

UNIVERSITY OF LIMPOPO

SCHOOL OF LAW

**“THE LEGAL DUTY OF MUNICIPALITIES TO ENFORCE ENVIRONMENTAL
LAW”**

SUBMITTED BY,

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This dissertation is submitted in compliance with the requirements prescribed
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To all my friends and learned colleagues, thanks very much.

DEDICATION

This work is dedicated to my Mother Ms Christinah Mathebula who stood by be the whole of my life as a student and an academic.

More dedication should be given to the Attorneys Fidelity Fund who supported me financially as an undergraduate up until the post graduate level.

My family who also stood with me throughout the whole primary, secondary and tertiary lives

DECLARATION

I declare that “**The Legal Duty of the Municipalities to Enforce Environmental Law**” is my own work and that all the South African and international sources I have used have been acknowledged by means of complete reference. That this work has not been previously submitted by me to any other University except University of Limpopo, Turfloop Campus, School of Law, Faculty of Management and Law

Signature: _____ Date: _____

CHAPTER 1: DUTIES OF THE MUNICIPALITIES

1. INTRODUCTION

BACKGROUND

The roles of municipalities in relation to the protection of the environment have increased significantly in the last ten years with the promulgation of the Constitution,¹ as well as general environmental legislation, such as the National Environment Management Act (NEMA),² the National Environmental Air Pollution Act³ and some provincial legislation such as the Limpopo Environmental Management Act.⁴ This is because environmental legislation is often best administered at a local level, as opposed to being administered by central and provincial government. Municipalities may not have had the training which will enable them to make sound environmental decisions. It is recognized that capacity-building within the municipal sphere is both desirable and necessary. Most municipalities in the country lack much of the internal resources and suffer from too little upgrading and development. This may be the matter of lack of planning in the formulation of their Intergrated Development Plans that they make rather than outstretched practices in terms of planning. These are some of the issues in this discussion.

The Department, Department of Environmental Affairs and Planning, responsible for the environment and planning thereof has embarked upon capacity-building programmes, which seek to inform and educate the citizens of the country. Generally, these are to build capacity within municipalities in relation to decision-making which impacts on the environment and the implementation of legislation which relates to the environment. In

¹ The Constitution of the Republic of South Africa Act 108 of 1996, hereafter referred to as the Constitution

² Section 17 of the National Environmental Management Act 107 of 1998, hereafter referred to as NEMA.

³ Act 39 of 2004

⁴ Act 7 of 2003

addition, the Department of Environmental Affairs and Planning wishes to clarify the relationship between planning legislation and environmental legislation.

It will be argued in this dissertation that capacity-building programmes for the municipalities relating to the environment are best to be administered at local level. There will be a need to consider the overview of the role of municipalities in our new constitutional dispensation which include the Constitutional provisions dealing with municipal executive power as well as municipal legislative power. Further this dissertation will consider the role of municipalities in respect of environmental decision-making specifically including how decisions affecting the environment are made generally, with specific regard to administrative aspects of public law implementation in relation to specific statutes. It also considers the common law and the role of policy documents, including articles from legal journals.

1.2. THE RESEARCH PROBLEM

The theme or title for this dissertation and the research, on which this dissertation is based, is about the legal duty of the municipalities to enforce environmental law. It is for that reason that there are many problems that need to be considered and discussed with relation to the environment and the law. This research indicate a number of the problems experienced by the communities with their municipalities' apparent lack of interest to apply of environmental law where a need arise for it to be applied or enforced. The municipalities have a greater role in enforcing environmental law where the environment has been subjected to misuse and where areas are in need of care.

The right to environment is enshrined in section 24 of the Constitution⁵ in terms of which everyone has the right and to an environment. This right extends even to the municipalities which are also bestowed with the legal duty to correct the environmental degradation so as to apply environmental law within their jurisdictional areas. This dissertation will indicate where the municipalities commit a breach of the legal duty to

⁵ The Constitution

act positively in terms of the application or enforcement of the environmental law provision of the Constitution and other laws pertaining to the environment. In the course of this dissertation the researcher will check the compliance with the relevant laws against the Municipal Structures Act,⁶ which provides for the types, functions and powers of the municipalities on what effect it has to duties of the municipalities in relation to the environment.

The main problem here is the lack of compliance with the legal duty of the municipalities to take care of the environment, which leads to a serious degradation and regression of the environment. This dissertation is not about how to solve this problem but to analyze and evaluate the legal duty of the municipalities to enforce environmental law and in this way make a contribution to finding solution to this problem

1.3. THE HYPOTHESIS OF THE RESEARCH

It is the thesis or hypothesis, or hypothesis of this dissertation that municipalities do not comply with their duties in respect of proper implementation and application of the laws placing a duty of care upon them to care for the environment and natural resources base within their areas of jurisdiction and that this is major factor in the degeneration and deterioration of the natural environment of the citizens of South Africa. The aim of this research to analyze what the municipalities must comply with and how they must comply so that they, the municipalities become to comply with and enforce the environmental law in the local sphere of government. The legislation⁷ is in place which grants the municipalities the opportunity to act positively in the enforcement of environmental law. This research will show what the municipalities should be doing in order to comply with enforcement of environmental law. The need to comply will not be the only solution to the problem but be presented as a possible formula which can adequately serve as a point of departure. For municipalities to comply with environmental law, such as contained in section 24, section 152(1) of the Constitution

⁶ Municipal Structures Act 117 of 1998, hereafter referred to as Municipal Structures Act

⁷⁷ The Constitution , NEMA: Municipal Structures Act, et al.

as well as section 16(1) of the National Environmental Management Act 107 of 1998⁸ must be given greater attention and compliance support.

1.4. THE RESEARCH METHOD

This researcher will use both the primary and the secondary sources to gather information on what the laws expects of the municipalities, and how to address the problem stated above. This information will be used as a basis for the analysis of the law to be complied with, with reference to the relevant case law. Legislation will be used more accurately to define the important role of the municipalities and their legal duty to enforce environmental law. Mostly case law will applied as a priority in this research as it directly addresses the practical issues of implementation. The research does not involve field work and is mainly a library “desk top” research.

1.5. ANTICIPATED OUTCOMES (WHAT IS TO BE DONE TO IMPROVE COMPLIANCE)

There are the so-called the *municipality cases* which form an integral part of our law. They expounded the doctrine that municipalities are not liable for mere omissions on their part to construct, maintain or repair public facilities, especially roads and streets but have a positive duty to take care of the mechanisms and designs required for a healthy and not a harmful environment. The municipalities’ omissions are failure to maintain the environment and infrastructure which is environmentally related if law amounts to them not enforcing environmental law on their part and not protecting the environment. But the question comes to the fore here is the municipality supposed to enforce the environmental law or do even the public⁹ have a role to play in enforcing environmental law ? This question will have to be answered in line with the case of

⁸⁸ It provides compliance with environmental implementation plans and environmental management plans: “(1) (a) Every organ of state must exercise every function it may have, or that has been assigned or delegated to it, by or under any law, and that may significantly affect the protection of the environment, substantially in accordance with the environmental implementation plan or the environmental management plan prepared, submitted and adopted by that organ of state in accordance with this Chapter: Provided that any substantial deviation from an environmental management plan or environmental implementation plan must be reported forthwith to the Director General and the Committee.”

⁹ **Ratepayers and Residents Action Association Inc. v. Auckland City Council 1986 1 NZLR 746, 750 (CA):** any court exercising a discretion in the interests of justice in a particular case must have regard to any public interest consideration which the litigation serves

*Debbie Investment CC v. City Council of Johannesburg.*¹⁰ According to the law laid down in this case, the approach now is that the same principles of common law of delict apply to municipalities as are applied to ordinary individuals. Thus to say that where there is any delict caused due to environmental management (or lack thereof), the municipalities have the same recourse under common law as in the situation when there is need to enforce environmental law, which need is not fulfilled.

There will be necessary for this dissertation to deal in some depth with the powers granted to municipalities when need arises to enforce the environmental law. This discussion will include some aspects relating to the enforcement of environmental law or for the protection of the principles of applicable environmental law. Some attention will be paid to the question of what the municipalities' responsibilities are, as mentioned above.

A municipality will be liable to anyone who institutes a claim against it for its omissions where there was a legal duty is still existing upon the municipality to take action to enforce the relevant and applicable environmental law provisions. However as is always the point of departure, when dealing with compliance issues, each case will have to be determined on its own merits. In this analysis, it is in the context of the e.g. legal the environmental incident which involves the legal principles as in the case when the *Debbie Investment company* instituted action against the *City of Johannesburg*. It is in view of these imperatives that the outcome will be firstly to determine what the law expects of a compliant municipality and secondly what the municipality should do in order to achieve an acceptable level of compliance with environment law

In considering the Plaintiff's action against the Defendant, the court found that although municipalities are no longer accorded blanket immunity from liability for omissions, there is also "*no blanket legal duty on the Defendant to maintain all roads and supporting walls in its jurisdictional area in a perfect condition.*"

¹⁰ ZASCA 25; [2006] SCA 29 (RSA)

In *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust as Amicus Curiae)*¹¹ and *Cape Town Municipality v Bakkerud*,¹² found that in order to decide whether the Defendant was under a *legal duty* to maintain this road and retaining wall, it had to determine whether the legal convictions of the community demanded that the Defendant was subject to a legal duty to act¹³ and that the Defendant's failure to do so was negligent. The duty to act was the duty to provide for adequate storm water drainage on the road and to take adequate steps to prevent flooding after the Defendant became aware of the danger of the municipal wall. The problem hereby displayed in this project will however be given a solution. The general role of municipalities is however well defined in both the Constitution and the legislations. According to the Constitution all spheres of government are obliged to provide effective, transparent, accountable and coherent government in the Republic.¹⁴ The municipalities in failing to comply will however in most cases involve a breach¹⁵ of access to information¹⁶ contained in the Bill of rights. This point should however be discussed with the legal duty of the municipalities to comply or rather to enforce the environmental law.

The municipalities are required to govern the local affairs of its community in accordance with the Constitution and subject to the national and provincial legislations.¹⁷ To enforce compliance, the Municipal Structures Act¹⁸, was enacted to force compliance to municipalities in terms of the enforcement of environmental law. On the other hand the Municipal Systems Act¹⁹, establishes the enabling framework in order for the municipalities to adequately discharge its constitutional and other obligations. Failure on the part of the municipalities to comply in their legal duty to enforce environmental law will however result in them breaching the requirements and frameworks set out in the Constitution and the stated legislations above.

¹¹ 2003 (1) SA 389 (SCA)

¹² 2000 (3) SA 1049 (SCA)

¹³ Section 152(1)(a)

¹⁴ Section 41(1) of the Constitution

¹⁵ Section 33 of the Constitution

¹⁶ Section 32 of the Constitution

¹⁷ Section 151(3) of the Constitution

¹⁸ Municipal Structures Act

¹⁹ Municipal Systems Act 32 of 2000 hereafter referred to as the Municipal System Act.

What is to be indicated below is the legal duty (omission) of the municipality to enforce environmental law: *“Parents of two children who were badly burnt, allegedly by exposed municipal electrical cables, are suing the King Sabata Dalindyebo (KSD) Municipality for R9 million. The two children, seven-year-old Mbalentle Mgozozana and his cousin, 10-year-old Philela Tshuta, were apparently burnt at a funfair last year. Lindile Qina, an attorney acting on behalf of the parents of the two minors, said summons had been served on the municipality on July 14. Mbalentle’s parents, Zolile Mgozozana and Liziwe Mafestile, have filed the biggest lawsuit, for R7.4 million. The pair said yesterday they were “fed up” with the municipality’s apparent “lack of caring”. Their lawsuit included: Mbalentle was the most severely burnt of the two children and spent more than five months at the Nelson Mandela Academic Hospital. According to the summons, the boy suffered 100 percent burns on both legs, his stomach, arms, right humerus and both hands. As a result, he “cannot remain standing for an inordinate period, cannot run, walk fast, squat, kneel or bend his right leg”, read the summons in part. The summons also denounced the conduct of KSD employees for failing to cover the cables. “The conduct of the defendant’s employees was wrongful because they **breached the legal duty to ensure the safety of the minor**”.*²⁰

This then indicates that the failure by the municipality in enforcing environmental law where necessary may result in that municipality held accountable under the national legislations to have breached the legal duty it has on the enforcement of environmental law.

Section 4 in of the Municipal Systems Act imposes a (legal) duty on municipalities to contribute towards building the capacity of local communities, to enable them to participate in the affairs in the municipality. According to this section, councillor and staff have the active duty to foster community participation through developing a culture of municipal governance that complements formal representative government with a system of participatory governance. Such constitutional and legislative provisions leave

²⁰ Parents sue KSD Municipality for R9m: an article: 2010/08/03

no doubt as to the existence of extraordinary political commitment to notions of participatory governance.²¹ The courts had decided on how the municipalities can further be held accountable or rather hold individuals accountable for breach of the legal duty to enforce the environmental law. Other indication was mentioned in another court decision.

1.6 ORGANIZATION OF CHAPTERS

In dealing with the legal duties of the municipalities, this mini-dissertation is will be organized according to the following chapters:

Chapter 1: The introduction to the legal duties of the municipality, giving a brief overview, sketching the background, the research problem, some anticipated outcome, as well as, the methodology and the hypothesis of the research recorded in this dissertation.

Chapter 2: The powers of the municipalities to enforce environmental law, administrative justice and the environment, the decision-taking and resolution of management conflict as provided for under the National Environmental Management Act,²² the integrated developmental management under national environmental act, who bears the duty of care and what the remedies are for environmental damage as anticipated in NEMA, assignment and delegation of municipal powers to other organs to enforce environmental law.

Chapter 3: compliance and non-compliance with provisions of, and the enforcement of environmental law.

Chapter 4: Justified expectation and deliverables that can result from adequate compliance.

Chapter 5: Conclusion and recommendations

²¹ "Assessing the effectiveness of community based involvement"- **Janine Hicks**, Director, Centre for Public Participation

²² NEMA as amended.

CHAPTER 2: THE EXECUTIVE POWERS OF THE MUNICIPALITIES

2. THE ENFORCEMENT OF ENVIRONMENTAL LAW BY MUNICIPALITIES

The Constitution has three sources for municipal executive authority. Firstly, a municipality has executive authority in relation to the matters set out in Parts B of Schedules 4 and 5 of the Constitution, and any other law assigned to it.¹ Secondly, a municipality has the right to exercise any power concerning **a matter** reasonably necessary for, or incidental to, the effective performance of its functions.² The functions of a municipality are set out in the Constitution which must be read with the Municipal Systems Act and the Municipal Structures Act. In view of devolution of power being a fundamental feature of the Constitution, this right should be widely interpreted. Such an interpretation should be consistent with the obligation on the national and provincial spheres of government not to compromise a municipality's ability or right to exercise its powers or perform its functions.³ Local authorities now have more independence in decision-making and greater freedom to devise and carry out policy.

The national and provincial governments are obliged to assign to local authorities the administration of any matter listed in Part A of Schedules 4 and 5.⁴ These relate to local government's matters which would be most effectively administered there at local level and the municipality there under has the authority to administer such matters.⁵ This would imply that municipalities either at district or local level will have only that power granted to it by the empowering legislation to deal with matters that fall within the

¹ Section 156(1)- *Those matters which relate to the environment include, among others, municipal health services; municipal public works (but only where this is necessary for a municipality to administer the functions specifically assigned to it); stormwater management in built up areas; water and sanitation services (limited to potable water supply systems and domestic waste-water and sewage disposal systems); cleansing; solid waste disposal; air pollution; control of public nuisances; building regulations; jetties, piers and harbours (excluding the regulation of international and national shipping and related matters) and beaches.*

² Section 156(5) of the Constitution

³ Section 151(4) of the Constitution

⁴ Which include disaster management, environment, nature conservation (excluding marine resources and national parks), and pollution control and soil conservation.

⁵ Section 156(4) - The provisions of section 10 of the Municipal Systems Act would also have to be complied with.

jurisdiction of such municipalities. It is not clear which Organ of State ultimately decides whether a matter would be most effectively administered locally, particularly where there is a difference of opinion. This would assist in determining which municipal obligation rather duties of enforcing environmental law. The national or provincial government would actually assign the power and ultimate determination would probably lie there.

There is a potential for direct conflict between the definition of municipal power in relation to the functions outlined in Part B to Schedules 4 and 5 of the Constitution, and the broad powers granted to local government under the Structures Act, Systems Act and provincial legislation, such as the Municipal Ordinance.⁶ One such example, from an **environmental** point of view, would be the power of “supply, distribution, use and protection of water under the control or management of the council, whether within or outside its municipal area, with power to differentiate in regard to water used for different purposes”. In this regard, in terms of Schedule 4B of the Constitution, municipalities are competent only to administer water services insofar as they relate to potable water supply systems and domestic wastewater and sewage disposal systems.

Unusually, the legislative competence of a municipality depends on its executive powers. It seems that this is an indication that the Constitution envisages municipalities to be involved primarily in the delivery of services within the scheme of co-operative government and, accordingly, the legislative competence of municipalities must be restrictively interpreted.⁷ This means that unless the Constitution or other legislation clearly gives a municipality the power to make bylaws relating to a particular matter, they must be presumed not to have that power.

In other words, notwithstanding that at first glance local authorities appear to have broad powers to make laws, it is generally believed that these powers should be interpreted narrowly.

⁶ 20 of 1974

⁷ Currie and De Waal -The New Constitutional and Administrative Law (Volume One) (2001: 1st edition).

The principal duty of a municipality is to govern the affairs of that municipality in accordance with the Constitution and relevant legislation. The most common are the Structures Act and the Systems Act. The environmental right⁸ contained in the Bill of Rights imposes another important duty on municipalities.

If a municipality took a decision, or failed to take a decision, which resulted in degradation of the environment, anyone could approach a court alleging a violation by that municipality of the environmental right. A municipality, in turn, would be able to allege a violation of the environmental right where another State entity failed to perform a duty or function, which resulted in harm to the environment.

The right is also applicable between individuals, and thus may be enforced by State or non-State parties against private parties who are failing to act consistently with its provisions.⁹

It is important to recognize that the environmental right is **not absolute**, but may be restricted in accordance with the **limitations clause** in the Constitution.¹⁰ A right may be limited under the limitations clause, only by a law of general application, and only to the extent that the limitation is *“reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”*.¹¹ Courts considering whether a limitation of a right is reasonable and justifiable will apply a balancing test, in terms of which the right is weighed up against the limitation, to reach their conclusion.

Environmental decision-makers must take account of the provisions of the constitutional rights and associated legislation in the undertaking of their activities.

A municipality making a decision about the provision of water or environmental resource to a particular community must be aware the citizens. The attempt to rely upon their constitutional right to sufficient water or any resource may demand that measures be taken by the municipality to supply them with water or the resource. Under the *locus*

⁸ Section 24 of the Constitution

⁹ Section 8(2) of the Constitution

¹⁰ Section 36 of the Constitution

¹¹ Section 36(1) of the Constitution

standi clause, a wide range of people, including classes of people and people acting in the public interest may enforce constitutional rights, including the environmental right. The rights of access to information and to just administrative action are given effect to in legislations Promotion of Administrative Justice Act¹² and Promotion of Access to Information Act¹³ respectively. These will guide in checking the actions, powers and functions of the municipalities.

2.2. ADMINISTRATIVE JUSTICE AND THE ENVIRONMENT

Administrative law governs the relationships between public bodies and between public and private bodies. So many activities which affect the environment require authorization from a public body. Environmental conflicts usually arise from the exercise of administrative decision-making powers. Administrative law principles are of particular relevance to environmental law.

When making decisions in respect of the environment, the State must exercise their powers in accordance with the constitutional right to just administrative action and the Act promulgated under it.

The constitutional right to just administrative action guarantees everybody the right to administrative action that is “lawful, reasonable and procedurally fair”.¹⁴ It also guarantees the right to be provided with written reasons for administrative action that has adversely affected rights.¹⁵ Persons affected by administrative action, for instance, a decision of a municipality to rezone land, may therefore attempt to rely upon the right where they believe that the action was taken other than in accordance with fair procedure, or unreasonably or unlawfully. If they could also show that the decision adversely affected their rights, they would be entitled to obtain written reasons for the decision.

¹² 3 of 2000, hereafter referred to as to PAJA

¹³ 2 of 2000, hereafter referred to as to PAIA

¹⁴ Section 33(1) of the Constitution

¹⁵ Section 33(2) of the Constitution

Linked to the notion of administrative justice is the right of access to information. Without access to information, a person may be unable to determine whether or not his or her right to just administrative action has been infringed.

The Constitutional right of access to information, Promotion of Access to Information promulgated under it, and National Environmental Management Act, create rights of access for public and private bodies to certain public and private information, including environmental information. Authorities making decisions regarding the environment, including municipalities, must be aware that interested persons may rely upon these statutory provisions to request access to information in respect of the decisions. The authorities are obliged to comply with the statutory provisions.

Everyone has the right of access to all information held by the State, and any information held by non-State parties which is required for the exercise or protection of rights. This right prevails over statutory provisions that unreasonably limit disclosure of information.

Access to Information Act gives effect to the Constitutional right of access to information, and lays down detailed procedures in respect of the access to records of public and private bodies. Only in certain circumstances, laid down in PAIA,¹⁶ may access to information be refused. Decision-makers who take decisions in respect of the environment should take particular note of the following aspects of PAIA which are relevant to environmental law.

Municipalities, as “public bodies” under PAIA, must be aware particularly of the provisions of PAIA relevant to the right and manner of access to records of public bodies.¹⁷ Information officers of public bodies¹⁸ are charged with ensuring compliance with the provisions of PAIA, and are assisted by deputy information officers, to be designated for that purpose.¹⁹ Persons who make requests for information (“requesters”) are entitled to records of public bodies where they comply with the procedural

¹⁶ Part 2, Chapter 4 and Part 3, Chapter 4

¹⁷ Contained in Part 2 of PAIA

¹⁸ Section 17 of PAIA

¹⁹ *ibid*

requirements of PAIA and there is no ground under PAIA for refusing the request.²⁰ Public bodies are obliged to assist requesters to obtain information in accordance with the procedure laid down in PAIA.²¹

Various duties are imposed upon public bodies under PAIA, including publishing a manual containing detailed information about the body and the information held by it.²²

NEMA provides that every person is entitled to access to information held by the State and organs of state which relates to the implementation of NEMA and any other law affecting the environment, and to the state of the environment and actual or future threats to it, including emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous wastes and substances (“environmental information”).²³

Requests for environmental information may be refused only on the grounds stipulated in section 31(1)(c) of NEMA, which include that the request is manifestly unreasonable or formulated too generally; that commercially confidential information²⁴ must be protected; or that the granting of the request would endanger or further endanger the protection of the environment.

Organs of state themselves are entitled to access environmental information where that information is necessary to enable the organ of state to carry out its duties under NEMA. It can also be any other law concerned with the protection of the environment or the use of natural resources.²⁵

²⁰ Section 11

²¹ *ibid*

²² Section 14 -The manual must be completed by 28 February 2003. (GN R1094 in *Government Gazette*

²³ *Section 31(1) (a) This section remains in force notwithstanding that section 31(1) states that it remains in force only until the promulgation of PAIA, by virtue of the provisions of section 6 of PAIA.*

²⁴ *Defined to mean “commercial information, the disclosure of which would prejudice to an unreasonable degree the commercial interests of the holder: Provided that details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provision of this Act or any other law”.*

²⁵ Section 31(1) (b)

From an environmental law perspective, the Constitution is significant in that it identifies which tier of government (national, provincial or local) is competent to make and enforce environmental laws on particular subjects. It elevates certain environmental considerations to the status of a fundamental human right by including an environmental right²⁶ in the Bill of Rights.²⁷ Further, it facilitates the bringing of legal actions to protect the environment by increasing access to information concerning the environment, and allowing greater access to courts, including by providing for the bringing of class actions. These entrench the right to lawful, reasonable and procedurally fair administrative action. The Constitution is the supreme law of South Africa, to which all law and conduct is subject.²⁸ Laws or conduct inconsistent with the values are invalid.²⁹

Environmental decision-making is therefore required to be consistent with its values and principles.³⁰ These must provide the backdrop to all laws passed and conduct undertaken in South Africa, by all public and private parties.

When conducting any activity, including decision-making, all spheres of government, at national, provincial and local level, and all organs of state, are required to observe and adhere to the constitutional principles of co-operative governance, discussed in more detail above.

The corollary of this second right is a duty on municipalities, among others, to protect the environment through such reasonable legislative and other measures. Legislative measures would include measures imposed in terms of national or provincial legislation, or by-laws. The term “other measures” would include policies, plans, and guideline and so on.

The right applies between State and citizen,³¹ and therefore any person can enforce the

²⁶ Section 24

²⁷ Chapter 2 of the Constitution

²⁸ Section 2 of the Constitution

²⁹ *ibid*

³⁰ Section 1 of the Constitution

right against an organ of state, such as a municipality, where it feels (and can show) that the State entity is violating the right, or is failing to protect it.

If a municipality took a decision, or failed to take a decision, which resulted in degradation of the environment, anyone could approach a court alleging a violation by that municipality of the environmental right. A municipality, in turn, would be able to allege a violation of the environmental right where another State entity failed to perform a duty or function, which resulted in harm to the environment.

The right is also applicable between individuals, and thus may be enforced by State or non-State parties against private parties who are failing to act consistently with its provisions.³²

The environmental right is not absolute, but may be restricted in accordance with the limitations clause in the Constitution.³³ A right may be limited under the limitations clause, only by a law of general application, and only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.³⁴ Courts considering whether a limitation of a right is reasonable and justifiable will apply a balancing test, in terms of which the right is weighed up against the limitation, to reach their conclusion.

2.3. THE DECISION-TAKING AND CONFLICT OF MANAGEMENT UNDER THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT

It becomes a fact that when obligation is placed on Municipal Councils to sort out any difference or disagreement that may arise concerning the exercise of any of their functions. This obligation that may significantly affect the environment may force the

³¹ Section 8(1)

³² Section 8(2)

³³ Section 36

³⁴ *ibid*

reconsideration of the desirability of conciliation before making a decision.³⁵

This is said to be if the decision taken above is considered appropriate, the matter must be referred to conciliation. The procedure laid in the National Environmental Management Act must also be attended to.³⁶ When there is a difference or dispute regarding the protection of environment, the other alternative is to refer such difference or dispute to Arbitration. It is always or rather an expected duty of the Minister to appoint or assign relevant officials to various types of conflict handling with regard to the protection of the environment. Thus to say: “ (1) *A difference or disagreement regarding the protection of the environment may be referred to arbitration in terms of the Arbitration Act, 1965*³⁷.”

2.4. THE INTEGRATED DEVELOPMENT AND MANAGEMENT UNDER NATIONAL ENVIRONMENTAL ACT

The Municipalities also play a role as authorizing agents. There are conditions whereby some of the agents require that the potential impact on the environment must be considered, investigated and reported to the relevant authority. This development and management plan need much of a quicker drafting and implementation. The Municipalities will be required to comply with Section 24 and the Integrated Environmental Management regulations, whether as authorizing agents or applicants.³⁸

³⁵ Section 17 (1): “Any Minister, MEC or Municipal Council-when a difference or a disagreement arises concerning the exercise of its functions which may significantly affect the environment may refer the matter to conciliation or arbitration.

³⁶ Section 18(1): (1) *Where a matter has been referred to conciliation in terms of this Act, the Director-General may, on the conditions, including time-limits, that he or she may determine, appoint a conciliator acceptable to the parties to assist in resolving a difference or disagreement: Provided that if the parties to the difference or disagreement do not reach agreement on the person to be appointed, the Director-General may appoint a person who has adequate experience in or knowledge of conciliation of environmental disputes.*

³⁷ Act 42 of 1965

³⁸ Section 24(1): “(1) *In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.*

2.5. THE DUTY OF CARE AND REMEDIES OF ENVIRONMENTAL DAMAGE UNDER THE NEMA.

The national environmental management act introduces a general duty to take reasonable measures to prevent environmental degradation.³⁹ People against whom the duty is imposed and who fail to adhere to relevant channels and procedures have to be directed to the Director-General or the Head of the provincial department who are/is responsible for the environment. In failing to do so, the relevant authorities may take the measures and recover the costs from the persons who failed to discharge their (legal) duties of care.

However Section 28 does not give the Municipalities power to enforce the (legal) duty of care. The Act provides for assigning or delegating of ministerial powers, functions and duties including the functions and duties of the municipalities.

The Municipalities are expected to be very much aware of the fact that certain powers under the Act currently not relevant to them must or may be assigned or delegated in the future. This is because some of the powers designated under Section 28 of the National environmental Management Act do not fall entirely within the Municipal parameters where they will need enforcement. Below is just how certain municipal powers may be assigned or delegated to other organs of state.

2.6. ASSIGNMENT AND DELEGATION OF MUNICIPAL POWERS TO OTHER ORGANS OF STATE.

The provisions (administrative) in National Environmental Management Act entitle the director-general to enter into consensus with organs of state in order to fulfill his or her responsibilities.⁴⁰ The Minister is also entitled to delegate his or her statutory powers to

³⁹ Section 28(1) of NEMA states that: “every person who causes, has caused or may cause significant pollution or degradation of the environmental must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far to such harm to the environment is authorised by law or can not reasonably be avoided or stopped, to minimise or rectify such pollution or degradation of the environment.”

⁴⁰ Section 41 provides that: “assignment must be made in terms of Section 99 of the Constitution, which provides that a Cabinet member may assign any power or function that is to be exercised or performed in

an officer responsible for protection of the environmental degradation. This may be so after consultation with the relevant Minister or MEC, or municipal administration. All these is necessary for taking care or making sure that any way best possible the environmental law is legally enforced fully so as to prevent environmental degradation. However when enforcing environmental law, Municipalities need to be aware of the need to enforce environmental law against those causing harm , threat, or degradation and to enforce environmental law when there is a need for the protection of the environment.

One may argue to say without the environment there will be no development, but also, without development there will be no environment. This may be arguable on the basis that, one may say that, development can occur without the environment itself concerned. It is the formulation for the existence of the environment. Therefore the building-block of development will thus be environmental formulation, creation and development. This amongst other things will; lead to us having environmental justice. Clearly speaking, it will be ideal to talk about “the *legal duty to enforce environmental law*” if only we have formulated the environment and thus far, protect it. Eventually we will speak of environmental justice at some point. This will lead to us seeing our Municipalities having channels upon which to enforce environmental law and thus protecting the environment.

The above may be achieved by the demonstrations and procedures to be shown below to the municipalities in relying upon the enforcement of environmental law. To achieve this, below are the most powerful keys considered to be the best to assist the municipalities to enforce environmental law.

terms of the Act, to a member of the Provincial Executive Council or to a Municipal Council.”

CHAPTER 3: ENSURING COMPLIANCE

Ensuring Compliance with the enforcement of Environmental law

In order to see compliance with the enforcement of the environmental law, there are number of noteworthy aspects to be addressed. First we will start with default *by the local authority* in enforcing environmental law.

The administrator of a province, in terms of Environmental Conservation Act (the Act)¹, has the authority to direct a local authority which has failed to perform a function assigned to it in terms of the Act to perform.² This performance will be in line with the provisions of the Act. To direct a local authority is nothing else but to see compliance with the enforcement of environmental law. Failure to perform as directed, will result in the expenditure or costs been recovered form the official or the authority so directed to perform.³ It is common cause that the said Administrator may also perform the assigned function on behalf of the authority. At the same time, the administrator may recover the said expenses and costs as if the said authority failed to perform as directed.⁴

If the person performs and still perform an activity which is detrimental or damaging to the environment, such person may be ceased from continuing with such an activity.⁵ This will off course advance to the protection of the environment and have sustainable progress.

This is merely for the Municipalities to see compliance when environmental law is being enforced. These will also assist the municipalities in realizing their environmental report. With regard to such a report, the local government must work at the coalface of development. In order to have the effective state of the environment, the municipalities should first realize what goal they need to achieve and how.

¹ Environmental Conservation Act 73 of 1989 hereafter referred to as the Conservation Act.

² Section 33 (1) of the Conservation Act

³ Section 31(2) of the Conservation Act

⁴ Section 31(3) of the Conservation Act

⁵ Section 31 A (1) of the Conservation Act

Further, in order to see compliance, municipalities and the stake holders need to be persuaded of the importance of long-term vision and of integrating their planning and management across people, economy and the Environment.⁶ In that regard the level of governance closest to the people and local authorities must play a role in educating, mobilizing and responding to the public to promote sustainable development.

These will also assist in achieving what will be termed environmental sustainability. This will mean that the provision of a service that aims to ensure that risks of environmental harm and risks to human health and safety are minimized to the extent reasonably possible. Under the circumstances also, the potential benefits in these areas are maximized to a similar extent, while legislation intended to protect the environment and human health and safety is complied with. In that way our municipalities will also have a way when enforcing the environmental law.

Municipalities are in a unique position when it comes to ensuring compliance with state and federal environmental regulations. Most municipalities must have the financial resources to hire a full time environmental manager. Responsibility for environmental compliance must be typically given to the town manager and is delegated to individuals such as municipal wastewater treatment plant operators and road department managers. Despite good intentions, these individuals often lack the time or experience required to identify and keep current with changing regulatory requirements with which they must comply. However, this doesn't lessen a municipality's liability or obligation when it comes to environmental compliance. Municipalities are still subject to inspections by state and federal regulators and are subject to enforcement actions, including fines, if violations are found.

Municipalities must have authority to regulate environmental matters within their boundaries. Each province has enacted so-called “enabling laws” setting out the powers municipalities may exercise. If a municipality enacts a by-law that goes beyond the power enumerated in the enabling law, the by-law is invalid. The legal term for a by-law that goes too far is *ultra vires* (Latin for “beyond authority”). As a general rule, a by-law

⁶ Dr. Rudi Pretorius: State of Environmental Reporting: Guidelines for Municipalities

is ultra vires the enabling law when its effects go beyond the boundaries of the municipality's own territory and intrude on matters in other municipalities. Here are two cases showing these principles in action. So the municipalities have to make it a point that when enforcing the environmental law, all necessary precautions are taken care of. This will even be relevant in the exercise of environmental protection and sustainability.

3.1. COMPARISON WITH OTHER INTERNATIONAL COUNTRIES OR REGIONS: THE NETHERLANDS⁷

In the Netherlands there are approximately twelve provinces and 440 municipalities. Now, the main course here is to see how these municipalities comply with environmental enforcement as compared to our national municipalities when enforcing environmental law.

These municipalities are called executive because they have various boards wherein they are self regulatory. They are responsible for monitoring compliance and conduct of each municipal function. If, upon recognition, there is a misconduct in terms of which there is fault when exercising the enforcement of environmental law, certain penalties have to be imposed.⁸

There are also teams (26 of them) set out to investigate the environmental non-compliance. This will also be a common course in our country where same procedures will have to be followed to see compliance by the municipalities in the enforcement of environmental law where necessary and needed. The South African environmental law may be so efficient if the enforcers were responsible for their own conduct and the conduct of those they manage.

Like in the Netherlands, our municipalities must be responsible for interagency co-ordination environmental enforcement activities on their territory. It must also serve as a

⁷ Ensuring Environmental Compliance, Trends and Good Practices: by Organisation for Economic Development and Co-operation Page 780.

⁸ Alexander Paterson and Louis J. Kotze: Environmental Compliance and Enforcement in South Africa: Legal perspective by First Published in 2009.

legal duty on their part to adhere to the enforcement of environmental law. Most of the case law below will indicate such.

It will be of the greater importance when our municipalities operate within the legal framework to avoid unnecessary litigation and cost or liabilities. The legal duty of the municipalities thus far is to see the law (environmental law) enforced at a lower and higher level of interagency.

3.2. ENVIRONMENTAL CONTROL AND COMPLIANCE BY MUNICIPALITIES:

The municipalities have also the responsibility in protecting and control the enforcement, use and impact on the environment. The South African law concept appears to be confined to interference physical comfort of human exercise.⁹ The protection of the environment by the municipalities has to go to the greater extent in as far as reaching the comfort of human existence.

The legal duty to enforce environmental law must be something construed for the grater purpose of achieving the milestone of greater achievement in terms of which the environmental law is best administered at our municipalities. There are number of important aspects such as this for the enforcement and protection of the environment. In the case of *The Municipality of Cape Town v. Levin*¹⁰, there was a point which was indicated for the protection of the environment and thus enforcing the environmental law. The court stressed out that when there is a disturbance in the exercise or enforcing the environmental law, the municipality enforcing the environmental law will have to seek an interdict restraining the offender from either establishing an apprehended disturbance. In the case of *Beaufort West Municipality v. McIntyre*¹¹, the court stressed that where there is an environmental disturbance, the municipalities must make it a point that they direct the person to remedy the situation where possible. This in itself will also assist in the process of enforcing and balancing the environmental law by our

⁹ JRL Milton "Nuisance" in WA Joubert (ed) *The Law of South Africa* (1983) at para 184.

¹⁰ (1884) 3 SC 164 at 169: *the Durban Trolley Co. (Ltd) v. The Durban Corp* (1891) 12 NLR 104 at 105 and 111.

¹¹ (1899) 16 SC 541 at 543

municipalities. The municipalities are therefore ushered with the responsibility of enforcing environmental law where best possible. This will be achieved if there is a light content on the basis of compliance by the authorities and the stake holders when environmental law is being enforced. Enforcing environmental law does not require the exercise of human power on extraneous issues involving the expectation into the development of the environmental plan, but the stability to formulate the plan to overcome the instrumental ideal power of having the smooth run of the enforcement of the law in to the environment. In that way compliance in the enforcement of environment law by our municipality will be at ideal and sizzling express. Environmental law is the law of the nature and we are the product of nature. Everything we do or touch impacts on the environment. Environment can be spoken in the sense of any aspect considered natural to exist on the either by way of application of the law or natural existence.

If compliance is wanted within or by our municipalities, there is a need to explain what is termed *irreparable harm* where there is disturbance on the environment. In the case of *Joseph Ellis Brown v. James Bennett McCord*¹², the court expressed that: “*irreparable harm would include harm which cannot be adequately compensated in money or the threat of physical harm.*” By mere explanation of this is that, there is a need to educate the stakeholders of the possible directions that may be taken by the authorities to see compliance with the enforcement of environmental law by the municipality where also the environment is damaged.

As far as environment law and the municipalities are concerned, actions that may be taken by the Municipalities against non-compliers have to make with specific reference to the loss involved. In the case of *Bloemfontein town Council v. Richter*,¹³ the court stressed out that it was not necessary for the proof to be provided in order for one to be successful in environmental harm, only the loss or harm itself will suffice.

Environmental disturbance may occur in various ways and therefore causing non-compliance. Humans depend on the environment, and without the environment life will be difficult. When the environment has been badly affected, the general public at large

¹² (1906) 27 NLR 674 at 674 at 682.

¹³ 1938 AD 195 at 229-30; *Flax v Murphy* 1991 (4) SA 58 (W).

or at least a distinct class of person within the field of living may also suffer. That is why we impose legal duty on the municipalities to enforce environmental law. This is just the protection of current and future generation. This then speed up compliance amongst individuals or stakeholders. The Municipalities are the bearers or the custodian of our environmental by-laws, so enforcement will be something to top all the discussion. Although the public may suffer a little when their environmental enjoyment has been restricted, they may constitute harmonious development of the environment and therefore understand the meaning of environmental law.¹⁴

In order to reinforce compliance, civil proceedings may also be necessary where the degradation of the environment affect the general public or their health. All these actions are supposed to be undertaken by the relevant authority (municipalities), although, in appropriate circumstances, some individuals may also take initiatives. Our common law prescribe that an authority having jurisdiction over his area in which the general public is located, may institute proceedings on behalf of the public for the abatement of environmental damage.¹⁵

3.3. COMPARISON WITH THE LOCAL AUTHORITIES IN ENGLAND

The authorities in England had rather focused on restructuring of their municipalities rather than basing themselves on demarcation just like it is in South Africa. The restructuring of the Municipalities works much more than to demarcate. Demarcation of the Municipalities leads to lack of performance due to them not having solidarity in the service delivery. The English authority had separated into two various houses for the reorganisation of the local government.¹⁶ There are now three types of local authorities in the England Government. The first one is (a). Single-tier London brought and a metropolitan district, the second one is (b). Non-metropolitan areas and the third one is (c). Unitary authorities.

¹⁴ See East London West District Farmers' Association & others v. Minister of Education & Development Aid & others 1989 (2) SA 63 (A).

¹⁵ East London Municipality v. Ellis and the East London Harbour Board 1907 EDC 261; Municipality of Stellenbosch v. Levinson 1911 CPD 203 at 206-207; KingWilliamstown Municipality v. Horwitz 1946 EDL 128 at 138; Windhoek Municipality v. Lurie & CO (SWA) (Pty) Ltd 1957 (1) SA 164 (SWA) at 168-169.

¹⁶ Local Government Act 1992.

Now we have to check as to how these authorities operate when enforcing environmental law as compared to our national municipalities and thus enforcing compliance.

The first one is having the responsibility over all matters pertaining to the development and enforcement of environmental law. It is responsible for the actions involving the conduct of the humans. For an example when a person cause environmental degradation either in a form of noise pollution, nuisance or any other manner. All environmental initiatives are taken form this authority.

The second one is responsible for the protection of the environment and development. It is also responsible for human health in terms of the environment, whilst the third one is responsible for the monitoring of the two above. It ensures that there is compliance with what the three local authorities impose as a measure for the enforcement of environmental law.

Unlike our municipalities, there are just three local spheres in England who are responsible and having policies readily determined for the enforcement of environmental law and protection of the environment. Our local municipalities must review their policies if they want to see change and compliance when environmental law is enforced. People must be guided by the policies developed by the municipalities. They must be educated about them and also participate in environmental development and sustainable development. The legal duty of the municipalities is to enforce environmental law and mainly, to formulate solid legal policies to achieve these.

Like England municipalities, our municipalities must also be the planning authorities.¹⁷ This would mean that they will be responsible for making environmental development and environmental development control. This will also include the imposition of the policy making with regard to the duty to enforce environmental law.

¹⁷ Environmental law :by Stuart Bell& Donald McGillivray 7th edition 2008, Page 121.

3.4. STRENGTHENING COMPLIANCE:

Our country, South Africa, is having enough concepts about environmental, thus to say we are not short of environmental law. Some writers believe that what is short is the effectiveness of it. This effectiveness has thus far been categorised into two fundamental causes. The first, as the writer proceeds, is the inadequate enforcement of environmental law. The second as he points out, is the lack of effective administration of environmental quality control.

The above statements simply imply that if our municipalities what to see the effective enforcement and compliance, there is a need to put harsh penalties for environmental damages. Municipalities should also put adequate incentive to promote good relations with the communities and thus encourage sustainable industrial practices. There must be policies to regulate the promotion of industrial practices and to manage them. Unclear policy directions by the government make it impossible for the municipalities to enrol proper administration of environmental law. However for the municipalities to reinforce proper compliance when enforcing environmental law, there must be open forums whereby people or communities will be able to exercise or facilitate their concern processes when environmental law is being enforced.

In *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*,¹⁸ it was mentioned that the negative protection should not be probably considered superior because, in any event a retrogressive or harmful measure would violate the right in s 24(a) of the Constitution. Thus reducing the communities trust on complying when environmental law is enforced.

The municipalities need support form the stake holders, communities, in lieu for the smooth running of the development and facilitation of their services on environment. This will also assist the municipalities in the enforcement and upgrading of

¹⁸ 1996 (4) SA 744 (CC).

environmental law. Also in processes such as areal development and the capacity to engage in structural means when coming to the protection of the environment.

There is this Act which is so closer to the facilitation of the environmental scheme and planning within the jurisdictional areas designated in the municipalities. This Act supports the co-operative government system of our country but only limited to two spheres.¹⁹ This act, Development Facilitation Act,²⁰ supports the two governmental spheres which is provincial and local. This Act was quoted further by Acting Judge Nugent in the case of *Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal* when he said that: “the existence parallel authority in the hands of two different bodies , with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within the municipalities”.

In order for the municipalities to enforce their legal duties on the environment in terms of where the environment has been damaged or degraded, municipalities have to act independently without interference by another body. This is where matters fall solely in the jurisdictions of these municipalities.

The legal duty to enforce environmental law has thus far seen itself as the parameter of the constitutional obligation. Thus, the constitutional right to a healthy environment and the constitutional duty imposed on the state actively to protect the environment. Ever since the concentration is on the municipalities about the enforcement of environmental law, the constitutional right to environment will go some way to re-invigorating environmental law.

Only if the constitutional obligation to protect the environment by municipalities can be met, there will be nothing to hamper compliance when environmental law is enforced. The involvement of public, thus public participation in the policy making process of the Municipalities can assist in the development and protection of environmental law. There will be nothing to defeat compliance when environmental is enforced by the municipalities only in there is public participation in moist of the environmental policy decisions by the municipalities. There are many and various factors that can be

¹⁹ Parallel Planning Mechanisms as a “Recipe for Disaster” by Jeannie Van Wyk 2010 Vol. 13 No.1

²⁰ The Development Facilitation Act 67 of 1995.

considered much relevant when environmental law is enforced. These are the concerns and the needs that arise during the enforcement of environmental law. Whether one party is affected left to be considered during the policy making process which regulates the environment. To improve compliance this policies, in *Glazewski* language, must be collective not individual in nature.²¹

²¹ J Glazewski: “ The Environment, Human Rights And a New South African Constitution” SAJHR 167, 172

CHAPTER 4: AFTER COMPLIANCE

The (expected) outcomes after compliance

There will be a need for complete authorisation to be issued in terms of which the municipalities lack the powers to monitor and enforce environmental law. Once the authorisation, by provincial authority, has been issued, a municipality must monitor the activity to ensure compliance with the conditions of the authorisation.¹ The municipalities must also ascertain what their powers of enforcement are in terms of the law. These powers must apply to the decisions they take. The municipalities should also ensure that the appropriate enforcement measures are put into place. This is in the cases where persons are acting lawfully by, for instance, failing to comply with the conditions of an environmental authorisation.

It is common fact that rigid environmental laws are of no importance unless they are properly enforced. This enforcement is expected from the municipalities. The legal roles that the municipalities are supposed to play are from time to time important in the effective regulation of environmental control. The municipalities will have to enforce properly, the environmental laws in order to see good changes and increase in compliance.

Municipalities must assume far greater responsibility with regard to the implementation and enforcement of environmental laws in the country. This responsibility will be devolved or assigned as such in the municipalities where there is need for demonstration of capabilities and expertise in such responsibilities. The municipalities should take necessary steps to ensure that there are resources adequate to maintain compliance and as such monitoring of compliance.

The above simply entail that the resources that the municipalities must put in place is the human and financial resources. This is to implement by-laws and use them as a big tool to ensure compliance and healthy environment. Just like the Kyoto protocol, there

¹ Section 41 of the Constitution (co-operative governance).

should be serious commitment and measures taken against environmental degradation or damage. This in itself will have preserve and protect our environment that will be free and healthy for everyone living on it.² The municipalities should as a result, enforce harsh environmental penalties to most of the offenders. This in itself again, will help reduce environmental shame and destroy and lead to safe and healthy environment.

Effective enforcement by our municipalities will be a key to ensuring that the ambitious goals of our environmental statutes are realized. This enforcement will refer to the set of actions that the government can take to promote compliance with environmental law. If our municipalities cannot ensure that they reduce the current non-compliance with environmental laws, it will remain disturbingly high. Experts believe that as many as twenty to forty percent of firms regulated by federal environmental statutes regularly violate the law. Tens of millions of citizens live in areas out of compliance with the health based standards of the Clean Air Act,³ and close to half of the water bodies in the country fail to meet water quality standards set by the Clean Water Act.⁴ In communities where there is burdened multiple sources of pollution, non-compliance has particularly resulted in serious health consequences for affected residents.

As in virtually every other area of government regulation, Municipal environmental enforcement traditionally has been based on the theory of deterrence. This theory assumes that: *“persons and businesses act rationally to maximize profits, and will comply with the law where the costs of non-compliance outweigh the benefits of non-compliance.”* The job of Municipalities is to make both penalties and the probability of detection high enough that it becomes irrational and unprofitable for regulated firms to violate the law.

² Section 24(1) of the Constitution

³ Act of 1956 :The International name or law for the Reduction of air pollution

⁴ Act of 1977:The International name or law for Reduction of water or surface pollution

For further protection and compliance with the enforcement of environmental law, the case of *Director: Mineral Development, Gauteng Region v. Save the Vaal Environment*⁵ had indicated on how the environment can be protected and the environmental law enforcement guaranteed. This case indicated what will call public participation in terms of the protection of the environment. It indicated also high compliance on the enforcement of environmental law by the stake holders.

In the above case, the appellant is a voluntary association of more than twenty persons, with which has its object to assist its members to maintain the environment and protect the environmental law enforcement and integrity.

To see greater compliance, the case indicated that, the coming together of all the environmental rights as fundamental and justiciable human rights will help change ideological climate and our legal and administrative approach to the environmental concerns.

The municipalities' task is simple in their legal duties on environment. Their task is to implement policies that will circumvent the whole idea of environmental degradation and educate the societies about the importance and the protection of the environment. Not all societies are containing educated residents, but the little the municipalities can provide, as a platform of environmental awareness the greater the environment will sustain. Municipalities must encourage public participation. They must also promote the idea of environmental awareness campaigns in areas of public domains and enjoyment, like schools and shopping centres.

4.2. COMPARISON WITH CANADIAN PLAN ON ENVIRONMENTAL (LAW) COMPLIANCE:⁶

The protection of the environment is a responsibility shared between federal, provincial and to a certain degree municipal levels of government. In addition, environmental obligations and liabilities may be incurred pursuant to common law.

⁵ 1999(2) SA 709 (SCA)

⁶ Mark Madras, Gowling LaFleur Henderson, LLP, Jun 1, 2010

Like in our country, there is a need for Corporate conduct in the sphere of environmental control. This will be subject to substantial scrutiny, as in Canada, by government and the public. Non-compliant conduct must have significant financial consequences: both direct penalty or damages consequences, and long-term reputational and brand consequences. In this way the municipalities will have the powers freely to enforce environmental law and therefore engage compliance thereof. Corporate conduct will be the conduct directed specifically and not the less to the juristic entities which fail to adhere to the environmental laws and enforcement procedures.

4.2.1. MAINTAINANCE OF ENTERPRISE OPERATIONS COMPLIANCE BY MUNICIPALITIES:

In Canada, environmental law has various points of application to business operations. The municipalities reinforce policies on understanding the companies' compliance obligations and as result, ensure that the corporate management systems of such companies adequately meet those compliance requirements. These may range from meeting regulatory or permit air and water emission caps, complying with reporting requirements, responding to environmental emergencies in accordance with prescribed response requirements, and the transportation of dangerous goods.

The Canadian Environmental Protection Act (the CEPA)⁷ is intended to protect human health and the environment. The Act regulates the import, export, manufacturing and use of certain prescribed substances in Canada, as well as prescribing certain obligations in the event of the unlawful discharge into the environment of defined Toxic Substances. New substance notification provisions are to be found in the Canadian Act, as well as certain substance information obligation provisions. Substances in use in Canada must be on the Domestic Substances List, otherwise there is a prohibition against the manufacture, import or export of those substances. Our country also must be using the same method compared to the Canadian method. In this way municipalities won't lack the potential of enforcing the environmental at ease.

⁷ 1992 , c. 37

The Canadian Environmental Assessment Act ⁸ may apply to projects involving federal government financing, federal lands, or where certain specified federal approvals are required in order for the project to proceed. Regulations under CEAA define those instances where CEAA applies. If CEAA applies then an environmental assessment of the project will be required. The project will only be permitted to proceed where the Minister is satisfied, taking into account the implementation of any mitigation measures that are considered appropriate, that there will be no significant environmental impacts associated with the project.

The South African Provincial environmental laws and their enforcement must be varied from province to province. Matters to be regulated by our municipalities must include air emissions, water and wastewater treatment and discharges, waste management and, generally, release of contaminants including issues relating to contaminated land redevelopments. Additional areas which are regulated include pesticide use, underground and above ground storage tanks and the transportation of dangerous goods.

These Provincial environmental laws must follow a general formula. Generally, there is a prohibition against the discharge of pollutants into the environment. The definition of what constitutes a pollutant and the environment varies from province to province. New emission sources or new facilities that may impact the environment must be regulated through the requirement for an environmental permit, licence or certificate of approval for the particular emissions. Strict conditions must accompany such an approval. Existing sources of emissions may also be subject to further controls through the issuance of administrative orders.

Municipalities must regulate activities through municipal by-laws. Applicable by-laws would include sewer use by-laws, noise by-laws and property standards by-laws. In addition, for example in Ontario and Quebec (both in Canada), municipalities are integrating environmental approvals with planning approvals. Like our own municipalities, municipalities will require comprehensive environmental site

⁸ 1992, c. 37

investigations and public notification prior to issuance of specific permits by the municipality.

4.2.2. COMPLIANCE WITH WASTE MANAGEMENT LAW

Compliance with Canadian environmental laws governing waste management is an essential aspect of corporate environmental compliance which must be construed to the level required of our own municipalities.

Provincial laws must assist to the municipalities to govern the classification of wastes for disposal and recycling purposes, and determine approval and documentation requirements for those engaged in waste transportation, waste disposal, and recycling operations. Certain classes of waste generators may have approval or registration requirements, as well as waste classification and reporting requirements. Waste generators may be subject to requirements to progressively reduce the waste they generate.

Our municipalities must make policies or by-laws⁹ which will regulate the use of unlicensed waste facilities or operators which may lead to penalties and waste removal requirements. As well, the disposal of waste on one's own site without an approval may result in penalties and waste removal orders.

4.2.3. PROTECTING OFFICERS AND DIRECTORS

The Municipal and provincial environmental laws must provide for officer and director with the liability in certain circumstances of corporate non-compliance. Generally speaking, officers and directors who permit non-compliance, actively or through acquiescence, must be prosecuted, and in some circumstances those who fail to take adequate measures to pro-actively prevent corporate non-compliance may be prosecuted. Penalty amounts may be significant. As well, officers and directors may be subject to environmental remediation orders if found to be in charge, management or control of a polluting activity or a contaminated site.

⁹In terms of section 156 of the Constitution

4.2.4. MAINTAINING A DEFENCE-READY CORPORATION THROUGH DUE NEGLIGENCE

Canadian environmental law is characterized as public interest regulatory legislation. Prosecutions of environmental offences are quasi-criminal in nature: generally the Crown as prosecutor has the onus to prove only the offending conduct beyond a reasonable doubt; the onus then shifts to the defence to prove due diligence on a balance of probabilities. If due diligence is proven then there is an acquittal. There is no doubt as the same may be done by our municipalities.

The regulatory offence system must be established in our municipalities that will aim to create the incentive for companies to be in a position to prove due diligence if prosecuted. This entails being able to prove that the company exercised all reasonable care with respect to the relevant aspects of the operation in issue. For instance, the courts in Canada have held that Canadian environmental law does not require perfection but it does require that companies operate with due care, having regard to the risks their operations present, available control technologies and established risk management systems. So can our local environment be.

4.2.5. PROTECTING THE ENTERPRISE FROM CIVIL LIABILITY EXPOSURE

Of course if our municipalities strive in meeting compliance with public law is but one aspect of ensuring corporate compliance with applicable law. An awareness of common law principles of environmental law is also required. Common law causes of action relating to environmental matters include nuisance, negligence, strict liability and trespass. These environmental law matters are very much familiar in our communities and at most must be located by our municipality. The public must also be provided with additional opportunities to commence litigation through class-action legislation in specific provinces, and through specific provisions within certain provincial legislations.

With regard of all of the above, the legal duty of the municipalities to enforce environmental law may be fulfilled.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

It has been summed up in all the four chapters above, that the municipalities' legal duties on the enforcement of environmental law lack much but policy directions. It is however a considerable fact that municipalities should also involve the public rather the societies in their plan to make environmental policies. These policies must meet the standards required of them to meet. Thus to say, they should be so strict that even the offender feels like offended by them. There should be more environmental campaigns in the country to help stimulate these development and management responsibilities on the municipalities.

It is however a loose question on the part of the municipalities with regards to their direct mandate in terms of the degradation and harm to the environment. South Africa has so many laws (environmental) which one can talk and enforce on or about. It is however, again, the common fact that our municipalities are ignorant of the environmental laws in existence within their surroundings or jurisdiction. It is then monitored at that level that there is high environment damages that there where before if these laws could have been enforced or recognized. Most of our societies are uneducated about the ways in which the land rather the environment can be protected, and that leaves much to be desired because they are the frontiers of the environmental benefit. What is meant here is that, these people may form as offenders and complainants on the part of environmental degradation or so.

Let it be a common view on all of us that, municipalities lack policy directives. For instance, we can look at the way in which dumping fines are controlled on most of municipal directions.

Municipalities must also make decision about the provision of environmental resources to communities and must be aware the citizens. The must be attempt to rely upon their constitutional right to sufficient water or any environmental resource. This may demande that measures be taken by the municipality to supply them with water or the resource. The *locus standi* principle must be evoked, under which the municipalities mat enforce

what is called Municipal cases. Under the *locus standi clause*, there will be wide range of people. These people include the classes of people and people acting in the public interest who may enforce constitutional rights, including the environmental right.

The constitutional obligation to protect the environment by municipalities must be met, which means there will be nothing to hamper compliance when environmental law is enforced. The involvement of public, thus public participation in the policy making process (of the Municipalities) can assist in the development and protection of environmental law. There will be nothing to defeat compliance when environmental is enforced by the municipalities. There must be public participation in most of the environmental policy decisions by the municipalities. There are many and various factors must be considered much relevant when environmental law is enforced. These must be the concerns and the needs that arise during the enforcement of environmental law.

The municipalities' task is simple in their legal duties on environment. Their task must be to implement policies that will circumvent the whole idea of environmental degradation and educate the societies about the importance and the protection of the environment. Not all societies are containing educated residents, but the little the municipalities can provide, as a platform of environmental awareness the greater the environment will sustain. Municipalities must encourage public participation.

In order to give effect to compliance with environmental law, the municipalities should further acknowledge the application of the above sections in order to give effect to the protection of the environment. This will be achieved by means of the general application of the stated legislations consistent with the local government capacity-building programmes that are in place for effective control and implementation towards the environment and the law. To further show compliance, the municipalities need largely to rely on the whole National Environmental Management Act 107 of 1998. Lack of compliance and enforcement to the environmental law at most cases lead to environmental degradation, harm to health and other related impacts such as road infrastructure, land as well as court disputes in relation to the impairment of the right to environment. The municipalities should follow their guidelines and the empowering

legislations and develop good working Intergraded Development Plans. In that way there will be compliance to the enforcement of environmental law by our municipalities

There must be the system of checks and balances in the provincial and local spheres to help regulate the enforcement of environmental laws. Provincial laws must assist to the municipalities to govern the classification of wastes for disposal and recycling purposes, and determine approval and documentation requirements for those engaged in waste transportation, waste disposal, and recycling operations. Our municipalities must make policies or by-laws which will regulate the use of unlicensed waste facilities or operators which may lead to penalties and waste removal requirements. As well, the disposal of waste on one's own site without an approval may result in penalties and waste removal orders. If that can be met we will have no doubt about the way in which our municipalities regulate and enforce environmental laws.

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