

Maintaining the Ecological Flows of Estuaries: A Critical Reflection on the Application and Interpretation of the Relevant Legal Framework through the Lens of the Klein River Estuary

A Paterson*

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Alexander Paterson

Affiliation

University of Cape Town
South Africa

Email

Alexander.Paterson@uct.ac.za

Date of submission

23 June 2017

Date published

19 January 2018

Editor Dr A Gildenhuys

How to cite this article

Paterson A "Maintaining the Ecological Flows of Estuaries: A Critical Reflection on the Application and Interpretation of the Relevant Legal Framework through the Lens of the Klein River Estuary" *PER / PELJ* 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2781>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2781>

Abstract

South Africa has 291 functional estuaries of which 43 per cent are threatened. These estuaries provide numerous environmental goods and services to the species situated within and adjacent to them. In an effort to improve the protection of the country's estuaries and the environmental goods and services they provide, many laws of direct and indirect relevance to estuaries have been introduced over the past two decades. The provision of these environmental goods and services is contingent, however, upon maintaining the natural ecological flows inherent in estuaries. One significant threat to maintaining these natural ecological flows is the artificial opening of the mouth of an estuary, an action often triggered by the desire to protect private property against flooding when estuarine water levels rise. Decisions to artificially open the mouth of an estuary often therefore need to achieve a difficult balance between ecological (generally public) interests and proprietary (generally private) interests, a balance which should ideally be informed by the numerous laws, and their associated plans and policies, of direct relevance to protecting and managing estuaries. The courts have recently been called upon to resolve disputes regarding decisions about whether or not to artificially open the mouth of an estuary, and what one recent decision of the Supreme Court of Appeal in *Abbott v Overstrand Municipality* 2016 JOL 35969 (SCA) clearly illustrates is that there are not only significant challenges in the implementation of the legal framework of direct relevance to estuaries, but also in the judiciary's understanding and application thereof. It furthermore illustrates distinct anomalies in the interpretation of the original, assigned and incidental executive authority of local government in relation to environmental matters, and that notwithstanding a swathe of recent relevant jurisprudence in this regard, confusion still abounds in this environmental governance quagmire.

Keywords

Estuaries; ecological flows; coastal management; estuarine management; legal frameworks; constitutional executive authority; local environmental governance.

.....

1 Introduction

Estuaries provide essential environmental goods and services to species inhabiting the coast, an area facing increasing pressure from particular human migration to and the associated development of the often narrow and ecologically sensitive strip lying on the terrestrial and marine divide. These environmental goods and services include nesting and feeding habitats for aquatic plants and animals, stopovers for migratory birds, nursery areas for fish, storm surge management, flood water control, the provision of raw building materials and food, sediment and pollutant filtration, and recreational opportunities to those inhabiting the area. The provision of these environmental goods and services is dependent on maintaining the natural ecological flows in estuaries – "the amount of water required for the aquatic ecosystem to continue to thrive and provide the services humans and other species rely upon".¹

One key threat to maintaining these ecological flows is human manipulation of water levels through artificially opening the mouth of an estuary to the sea. This generally occurs through mechanically slicing a channel through the sand berm, a raised barrier of sand which is naturally seasonally deposited at the mouth of an estuary thereby temporarily cutting off its connection to the sea. Decisions relating to when, where and at what water level to allow for the artificial opening of the mouth of an estuary should be informed by the consideration of several factors relating to sedimentation,²

* Alexander Paterson. BSocSci LLB LLM PHD (UCT). Professor, Institute of Marine and Environmental Law, Faculty of Law, University of Cape Town. Email: Alexander.Paterson@uct.ac.za.

¹ European Commission *Ecological Flows* 9.

² Breaching the sand berm at higher water levels improves the scouring effect when the water rushes from the estuary into the sea. It improves the removal of sedimentation and deepens the natural channels of the estuary. Breaching the sand berm at lower water levels has the opposite effect. See Beck and Basson 2008 *Water SA* 33-38.

salinity,³ water quality⁴ and water levels.⁵ An integrated consideration of these factors improves the potential for the final decision to achieve a balance between ecological (generally public) interests and proprietary (generally private) interests. However, it would appear that it is often the last of the above factors, and particularly where rising water levels in an estuary threaten private proprietary interests, which has historically held sway in the decision-making process, with damaging consequences to several of South Africa's estuaries.

South Africa has 291 functional estuaries of which 43 per cent are threatened, 30 per cent critically so.⁶ Only 33 per cent of the country's estuaries are well protected and 59 per cent are apparently subject to no protection at all.⁷ The condition of the country's estuaries continues to deteriorate and according to the *National Estuarine Management Protocol* published in 2013, "(h)uman impact activities need to be regulated and managed for estuaries to be adequately conserved and sustainably utilised".⁸ These activities would include artificially opening the mouth of an estuary thereby manipulating its natural ecological flow.

The past two decades have seen the introduction of numerous laws of direct⁹ and indirect¹⁰ relevance to regulating and managing South Africa's estuaries. Those of direct relevance are principally the *National Water Act*¹¹ (hereafter the NWA) and the *National Environmental Management:*

³ Breaching the sand berm allows seawater into the estuary, thereby changing the salinity levels of its waters. Too high salinity levels can have negative impacts on fauna and flora in the estuary. See Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary* v-vi.

⁴ Breaching the sand berm can improve the water quality of the estuary by allowing polluted water to flow into the sea, with the flow simultaneously improving oxygen levels in the estuary's waters. This pollution can be caused by high ecoli levels (where untreated sewage drains into the estuary), inorganic nutrients (where residue nitrogen-based fertilisers used by farmers in the region drain into the estuary) and other toxic substances (where residue herbicides and pesticides similarly used by farmers in the area drain into the estuarine waters). See Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary* vi.

⁵ Breaching the sand berm will naturally result in a reduction of water levels in the estuary as the estuarine water flows into the sea. See Beck and Basson 2008 *Water SA* 33-38.

⁶ Driver *et al National Biodiversity Assessment* 8.

⁷ GN 341 in GG 36432 of 10 May 2013 1.

⁸ GN 341 in GG 36432 of 10 May 2013 1.

⁹ These laws contain provisions specifically directed at regulating estuaries or the water resources contained within them.

¹⁰ While not containing provisions specifically directed at regulating estuaries or the water resources contained within them, these laws do contain provisions of indirect relevance to both.

¹¹ *National Water Act* 36 of 1998 (the NWA).

*Integrated Coastal Management Act*¹² (hereafter NEMICMA). The NWA governs the country's "water resources", which are specifically defined to include estuaries.¹³ While the entire contents of the NWA are accordingly of direct relevance to estuaries, those of specific relevance to managing the natural ecological flows in estuaries include the following: prescription of resource quality objectives;¹⁴ reserve determinations;¹⁵ catchment management strategies;¹⁶ and the duty of care.¹⁷ NEMICMA in turn governs the "coastal zone", defined to include "coastal waters", which are in turn defined to include estuaries.¹⁸ Again, while the entire contents of the NEMICMA are accordingly of direct relevance to estuaries, those of key relevance to managing the natural ecological flows within them include the following: national estuarine management protocol;¹⁹ estuarine

¹² *National Environmental Management: Integrated Coastal Management Act 24 of 2008* (the NEMICMA).

¹³ Section 1 of the NWA.

¹⁴ Chapter 3 (parts 1 and 2) of the NWA. The Minister of Water and Sanitation must determine the class and resource quality objectives (hereafter RQOs) for all significant water resources, with resource quality referring to water quantity, water quality and the condition of the riparian habitat. Once determined, the class and RQOs are binding on all authorities exercising functions under the Act.

¹⁵ Chapter 3 (part 3) of the NWA. The Minister of Water and Sanitation must determine the reserve for all significant water resources. The reserve comprises of two components, a basic human needs component (which provides for the essential needs of individuals served by the water resource) and an ecological component (which relates to the water required to protect the aquatic ecosystems of the water resource). The reserve refers to both the quantity and quality of the water in the resource. The Minister must have determined the reserve before authorising the use of any water in a particular water resource (such as granting water use licences) with the reserve trumping all other forms of water use.

¹⁶ Chapter 2 (part 2) of the NWA. The country is divided into nine water management areas (hereafter WMAs). The Act provides for the establishment of a catchment management agency (hereafter CMA) for each of these WMAs. The CMA must develop a catchment management strategy (hereafter CMS) for the water resources within its WMA. The CMS must integrate the relevant RQO and reserve determinations for all significant water resources falling within the WMA and is binding on all decisions of the CMA.

¹⁷ Section 19 of the NWA. The NWA imposed a duty on any person who owns, controls, occupies or uses land to take measures to prevent the pollution of water resources situated on it. "Pollution" is very broadly defined in the Act and includes the "direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it: (a) less fit for any beneficial purpose for which it may reasonably be expected to be used; or (b) harmful or potentially harmful – (aa) to the welfare, health or safety of human beings; (bb) to any aquatic or nonaquatic organisms; (cc) to the resource quality; or (dd) to property" (s 1). If these measures are not taken, the relevant CMA may itself do whatever is necessary to prevent the pollution or to remedy its effects, and to recover all reasonable costs from the persons responsible for the pollution. Artificially opening the mouth of an estuary could feasibly constitute "pollution".

¹⁸ Section 1 of NEMICMA.

¹⁹ Chapter 4 of NEMICMA. The Minister of Environmental Affairs with the concurrence of the Minister of Water and Sanitation must publish a national estuarine

management plans;²⁰ coastal committees;²¹ coastal management programmes;²² coastal management lines;²³ and the concept of state trusteeship.²⁴ The above specific provisions contained in the NWA and NEMICMA are complemented by a diverse array of provisions contained in laws of indirect relevance to estuaries including the following: the *National Environmental Management Act*²⁵ (hereafter NEMA); the *Environment Conservation Act*²⁶ (hereafter ECA); the *National Environmental*

-
- management protocol which provides the national strategic vision and objectives, management standards, procedures and guidelines on how to manage estuaries and who is responsible for doing so. It must also contain details regarding estuarine management plans to be adopted for each of South Africa's estuaries, specifically who must adopt them and what they should contain. The *National Estuarine Management Protocol* was published in 2013 (GN 341 in GG 36432 of 10 May 2013).
- ²⁰ In terms of the *National Estuarine Management Protocol* (GN 341 in GG 36432 of 10 May 2013), a broad array of authorities, including coastal municipalities, must adopt estuarine management plans for each estuary falling within their jurisdiction. The estuarine management plan constitutes the primary plan for managing the estuary and should contain a local vision, management objectives, water quantity and quality objectives, an integrated monitoring plan, performance indicators, and an overview of institution tasked with implementing the plan.
- ²¹ Chapter 5 of the NEMICMA. Provision is made for the establishment of coastal committees in all three spheres of government to promote integrated coastal management, which would include the regulation and management of estuaries.
- ²² Chapter 6 of the NEMICMA. Provision is made for the national government, coastal provinces and municipalities to develop a coastal management programme which effectively constitutes the relevant coastal policy for their respective jurisdictional areas. They should accordingly guide decision-making in relation to the regulation and management of estuaries falling within their jurisdiction. Local authorities are empowered to make by-laws to give effect to their municipal coastal management programme.
- ²³ Section 25 of the NEMICMA. Relevant coastal provincial Ministers must establish coastal management lines *inter alia* to protect coastal public property, private property and public safety, to protect the coastal protection zone, and to preserve the aesthetic values of the coastal zone. Once delineated, the provincial Minister can prohibit or restrict the construction of structures that are wholly/partially seaward of the line; and municipalities must reflect the coastal management lines in the zoning schemes they administer.
- ²⁴ Section 3, read together with ss 1, 7 and 12 of the NEMICMA. The state, operating through its institutions and functionaries tasked with implementing the Act (which would include municipalities), must act as the trustees of the "coastal zone" (with estuaries falling within this concept). Cumulatively, they must ensure that it is used, managed and conserved "in the interests of the whole community", a term defined to include the interests of human and "other living organisms" that are dependent on the coastal environment.
- ²⁵ *National Environmental Management Act* 108 of 1998 (the NEMA). Given its framework nature, all the provisions in the NEMA are relevant to regulating and managing estuaries. Those of key interest include the national environmental management principles (s 2), integrated environmental management (ch 5) and compliance and enforcement (ch 7).
- ²⁶ *Environment Conservation Act* 73 of 1989 (the ECA). The provisions governing limited development areas (s 23) and directives (s 31A) may in certain circumstances be relevant to regulating and managing estuaries.

*Management: Biodiversity Act*²⁷ (hereafter NEMBA); the *National Environmental Management: Protected Areas Act*²⁸ (hereafter NEMPAA); the *Sea-Shore Act*²⁹ (hereafter SSA); the *Marine Living Resources Act*³⁰ (hereafter MLRA); the *Spatial Planning and Land Use Management Act*³¹ (hereafter SPLUMA); the *Western Cape Land Use Planning Act*³² (hereafter WCLUPA); and the *Nature Conservation Ordinance (Cape)*³³ (hereafter NCO (Cape)).

The objective here is not to provide a treatise on South African law of relevance to estuaries, but rather merely to highlight the fact that over the past two decades the country has introduced a broad array of laws of direct and indirect relevance to regulating and managing the natural ecological flows in estuaries. The rationale for doing so will be revealed towards the end of this note on *Abbott v Overstrand Municipality*.³⁴ The matter was initially heard by the Western Cape High Court in 2013, and was subsequently taken on appeal by the applicant to the Supreme Court of Appeal, which handed down its judgment in May 2016. The dispute centred

²⁷ *National Environmental Management: Biodiversity Act* 10 of 2004 (the NEMBA). The provisions dealing with biodiversity planning and monitoring (ch 3), threatened and protected ecosystems and species (ch 4), and alien and invasive species (ch 5) may in certain circumstances be relevant to regulating and managing estuaries.

²⁸ *National Environmental Management: Protected Areas Act* 57 of 2003 (the NEMPAA). Where an estuary falls within the borders of a protected area, the NEMPAA in its entirety is relevant to regulating and managing the estuary.

²⁹ *Sea-Shore Act* 21 of 1935 (the SSA). While the SSA was repealed by the NEMICMA with effect from 8 December 2015 (Proc 5 in GG 39657 of 5 February 2015), by-laws promulgated by municipalities under the SSA governing the sea and seashore (which area extends to include estuaries) are specifically saved (ss 98-99).

³⁰ *Marine Living Resources Act* 18 of 1998 (the MLRA). In so far as the MLRA extends to governing the fishing of marine living resources situated on/in the seashore and internal waters, it may in certain circumstances be relevant to regulating and managing estuaries.

³¹ *Spatial Planning and Land Use Management Act* 16 of 2013 (the SPLUMA). The provisions dealing with spatial development frameworks (ch 4), land use management (ch 5) and land development management (ch 6) may in certain circumstances be relevant to regulating and managing estuaries.

³² *Western Cape Land Use Planning Act* 3 of 2014 (WCLUPA). The provisions dealing with spatial planning (ch 3), municipal development management (ch 4), provincial development management (chapter 5), and land use planning principles (chapter 6) may in certain circumstances be relevant to regulating and managing estuaries. The same would be true for the other provincial planning ordinances and Acts.

³³ *Nature Conservation Ordinance (Cape)* 19 of 1974 (NCO (Cape)). In so far as the NCO (Cape) regulates the management of species of fauna and flora situated in internal waters (such as estuaries), it is relevant to regulating and managing estuaries themselves. The same would be true for the other provincial conservation ordinances and Acts.

³⁴ *Abbott v Overstrand Municipality* 2016 JOL 35969 (SCA) (hereafter *Abbott* (SCA)). The matter was initially heard in the Western Cape High Court (*Abbott v Overstrand Municipality* 2015 JOL 33188 (WCC) (hereafter *Abbott* (WCC))).

on a decision by the Overstrand Municipality not to artificially breach the mouth of an estuary despite Mr Abbott's allegation that a failure to do so would cause his house to be flooded and would thus interfere with his private property interests. The laws briefly canvassed above accordingly constituted the legal context within which the dispute should have been resolved. Before returning to consider this legal context and the manner in which the court grappled with it, it seems prudent to outline the factual scenario which gave rise to the dispute.

2 The facts and arguments

The Klein River Estuary (KRE) is situated on the Southern Cape Coast between the towns of Hermanus and Stanford. It is approximately 17 km long and can be divided into three main parts: the mouth (which stretches 3 kilometres inland from the sea and comprises of a series of shallows and tidal channels); the vlei (which stretches from 3 to 8.5 kilometres inland from the mouth and comprises of a large unconstrained lagoon); and the river (which extends from 8.5 to 17.5 kilometres inland from the vlei and comprises of the narrow Klein River which feeds the estuary). Administratively it falls within the jurisdictional boundaries of the Western Cape Province, the Overberg-Breede Water Management Area, the Overberg District Municipality and the Overstrand Local Municipality.

From a conservation perspective, the KRE is ranked fifth in importance of all temperate estuaries in South Africa³⁵ and is a priority estuary for biodiversity conservation and the provision of ecological services, specifically as a nursery area linked to the recovery of economically important fish species.³⁶ The quality and quantity of flows into the estuary are influenced by: water use for irrigation; agricultural and pastoral run-off containing fertilisers, pesticides and herbicides; effluent from Stanford; septic and conservancy tank seepage from developments on the banks of the estuary; and litter.³⁷ Considerable predominantly residential development along the banks of the estuary falls below the 1:50 year flood line. These residential developments are seasonally threatened by flooding when the mouth of the estuary is closed to the sea by sand deposited to form a natural berm.

³⁵ Turpie and Clark *Development of a Conservation Plan for Temperate South African Estuaries* 26.

³⁶ CapeNature & iRAP Consulting *Development of an Estuarine Management Plan for the Klein River* 19.

³⁷ Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary* iv.

Since approximately 1860, the mouth of the KRE has from time to time been artificially breached where it does not naturally breach the sand berm. Natural breaching historically occurs where the water level of the KRE exceeds 3-3.5 metres above mean sea-level (MSL). Artificial breaching, which is undertaken at lesser water levels, causes major changes in the mouth condition, water levels, salinity distribution and water quality in the KRE.³⁸ Where the KRE is artificially breached at lower than natural breaching water levels, it decreases the volume and duration of water flow out to sea, reduces sediment scouring, disrupts the long-term erosion/depositional cycles in the estuary, results in increased sedimentation in the lower estuary, and changes the estuary's abiotic state from a predominantly open marine system to a predominantly closed marine system.³⁹

Mr Abbott, the applicant in the matter, purchased a property on the Klein River (in the river component of the KRE) in 1982. In 1989 he constructed a house on the property and, following the completion of his building project, took up residence in the house. According to Mr Abbott, at the time he built his house, a municipal policy existed in terms of which the municipality agreed to artificially breach the sand berm when water levels in the KRE reached 2.1 metres above MSL, and to protect low-lying properties *inter alia* by erecting floodwalls when water levels in the vlei and river section of the KRE threatened to flood property.⁴⁰ In 2009 the Klein River Estuary Forum was established as a non-statutory body comprising of representatives from relevant national, provincial and local government departments and local stakeholders. Following various studies and workshops, it adopted the *Mouth Management Plan for the Klein River* (the *Management Plan*) spanning the period 2010-2015. The statutory status of this *Management Plan* is unclear, as despite the court's indicating that it had been formally approved by the Western Cape's Department of Environmental Affairs and Development Planning,⁴¹ it is unclear under what legal framework it was so "approved". Notwithstanding, Mr Abbott alleged that two components of the *Management Plan* affected him negatively.⁴² Firstly, it indicated that artificial breaching of the sand berm of the KRE would not be contemplated at water levels less than 2.6 metres above MSL and that breaching at higher levels

³⁸ Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary v.*

³⁹ Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary v.*

⁴⁰ *Abbott* (WCC) para 13.

⁴¹ *Abbott* (SCA) para 30.

⁴² *Abbott* (WCC) para 17.

would be preferred. Secondly, it indicated that artificial breaching would not be undertaken in order to prevent the flooding of low-lying private or public properties.

As a consequence, Mr Abbott alleged that since the adoption of the *Management Plan* in 2010 he had suffered repeated flooding of and structural damage to his property caused by the high water levels in the KRE. Mr Abbott sought over the next few years to lobby the Overstrand Municipality, the first respondent, to artificially breach the KRE at lower water levels than those reflected in the *Management Plan*, and to take steps to prevent his house from being flooded. Following the receipt of a letter from the Overstrand Municipality in August 2013 indicating that it had no intention of heeding his requests, Mr Abbott approached the Western Cape Division of the High Court for relief in July 2013. The main relief sought by Mr Abbot was the review and setting aside of the decision of the Overstrand Municipality to refuse to take steps to prevent damage being caused to his house by the flooding of the Klein River.⁴³ He further requested the court to remit the matter to the Overstrand Municipality for reconsideration, which he requested should include a consideration of steps to prevent his house from being flooded, the flooding possibly being caused by their failure to artificially breach the KRE when water levels reached 2.1 metres above MSL.⁴⁴ He did not accordingly seek an order directing the Overstrand Municipality to breach the berm, but only to take steps to protect his property from flooding, which could naturally include artificially breaching the berm. In the alternative, he sought an order: declaring that an established practice existed to artificially breach the berm of the KRE when low-lying properties were threatened with damage by high water levels in the KRE; declaring that the practice could be lawfully departed from only if the Overstrand Municipality took reasonable alternate steps to protect his house from being flooded; and directing the Overstrand Municipality to take such steps.⁴⁵

The Overstrand Municipality disputed most of Mr Abbott's allegations including: that Mr Abbott's property had not been flooded prior to 2010; that measures had previously been taken by it to protect properties in the river component of the KRE when water-levels reached a certain height due to the berm remaining closed; that Mr Abbott's house had been damaged by high water levels between 2010 and 2012; and that any damage caused to Mr Abbott's house by high water levels in 2013 in particular had something

⁴³ *Abbott (WCC)* para 6.

⁴⁴ *Abbott (WCC)* para 6.

⁴⁵ *Abbott (WCC)* para 7.

to do with its failure to artificially breach the berm.⁴⁶ In addition, the Overstrand Municipality raised several additional defences.⁴⁷ Firstly, it argued that that Mr Abbott had proceeded against the wrong respondent, bearing in mind that the Overstrand Municipality was only one of the members of the Klein River Estuary Forum, which was tasked with overseeing the management of the KRE, including making decisions about when, where and at what level to artificially breach the berm. Secondly, that Mr Abbott was the author of his own misfortune, having built his house within the one-in-50 year flood line of the Klein River. Thirdly, that Mr Abbott had changed the contour of the Klein River, effectively contributing to any flooding and damage he allegedly suffered.

These latter defences largely fell by the wayside as the court *a quo* was faced at the outset with an apparent dispute of fact between Mr Abbott's version and that of the Overstrand Municipality, crucially relating to whether or not Mr Abbott had suffered damage to his property and whether this damage could be linked to the Municipality's decision to artificially breach the berm only at a higher water level. In the words of Blommaert AJ in the decision of the court *a quo*, "(i)t would seem to me that before the Applicant, as it were, gets out of the starting blocks, he has to prove that First Respondent's conduct, of which he complains, is the cause of his damage". The principal focus of the court *a quo*'s decision accordingly related to the alleged damage suffered by Mr Abbott, the possible causal connection between this damage and the decision of the Overstrand Municipality not to artificially breach the mouth of the estuary, and how to deal with the apparent dispute of fact between Mr Abbott's version of events and that of the Overstrand Municipality in motion proceedings.

3 The High Court decision – damage and the dispute of fact

The court *a quo* proceeded by outlining the legal position relating to the dispute of fact in motion proceedings, restating the rule emanating from *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,⁴⁸ as refined in *Wightman t/a JW Construction v Headfour (Pty) Ltd*.⁴⁹ In summary, where an applicant seeks relief through motion proceedings and a dispute of fact arises, the court must accept the respondent's version unless the latter's allegations are, in the opinion of the court, either not such as to raise a real,

⁴⁶ These disputes of fact are scattered throughout the *Abbott* (WCC) judgment and have been consolidated here in the interests of clarity.

⁴⁷ *Abbott* (WCC) para 21.

⁴⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (AD).

⁴⁹ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 3 SA 371 (SCA).

genuine or *bona fide* dispute of fact, or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers.⁵⁰

The court proceeded to trawl through the affidavits and supporting documentation submitted by Mr Abbott and the Overstrand Municipality to determine whether a dispute of fact had arisen. The key period in question was that running from 2010 (the year in which the Overstrand Municipality had adopted the *Management Plan* allegedly changing the policy regarding the water levels at which the estuary would be artificially breached) and 2013 (the year when Mr Abbott approached the court for relief).⁵¹ The initial enquiry of the court was to determine whether Mr Abbott's property had in fact been flooded during this period, with the court considering each year in turn.

According to documents presented to the court by the Overstrand Municipality, the estuary had been artificially breached on several occasions prior to 2010 when the water level in the estuary had exceeded that specified in the *Management Plan*, namely 2.6 metres above MSL.⁵² Notwithstanding, and to some consternation of the court, Mr Abbott alleged that the flooding of his property had commenced only in 2010.⁵³ In 2010 the area had suffered from a severe drought with water levels in the estuary remaining below 2.6 metres above MSL. While the mouth of the estuary had remained closed in 2010, the court concluded that it was very unlikely that Mr Abbott's property had been flooded in this year, given the historic water levels in the estuary prior to 2010, coupled with Mr Abbott's claim that the flooding of his property had occurred only since 2010.⁵⁴

As for 2011 and 2012, the Overstrand Municipality submitted documentation indicating that in both these years the estuary mouth had been artificially breached when water levels reached 2.78 metres above MSL. In his founding paper Mr Abbott had submitted photographs in support of his claim that his house had been flooded in 2011. He had furthermore submitted email correspondence with the Overstrand Municipality in support of his claim that his house had been flooded in 2012. The photographs, however, showed water close to the house and not in the house in 2011. The email correspondence referred to a threat of flooding were water levels to rise further in 2012, and not actual flooding. Furthermore, Mr Abbott had made

⁵⁰ *Abbott* (WCC) paras 26-27.

⁵¹ *Abbott* (WCC) para 51.

⁵² *Abbott* (WCC) para 45.

⁵³ *Abbott* (WCC) para 25.

⁵⁴ *Abbott* (WCC) para 54.2.

no mention of flooding when attending a meeting of the Klein River Estuary Forum in 2012 convened specifically to discuss the issue of artificially breaching the berm. On this basis the court expressed doubt that Mr Abbott's property had in fact been flooded in 2011 and 2012, notwithstanding water levels in the estuary rising to 2.78 metres above MSL.

2013 saw significant rainfall in the Overstrand Municipality, which led to extensive flooding of the area. It was common cause that Mr Abbott's property had been flooded in this year, but at the time the flooding occurred the mouth of the estuary had been open to the sea. According to the court, this year could therefore be removed from the enquiry as even according to Mr Abbott's version of events, the Overstrand Municipality could not be held accountable for this flooding.⁵⁵

The court accordingly concluded that Mr Abbott had not conclusively shown that his property had indeed been flooded between 2010 and 2012.⁵⁶ Although not appearing necessary, the court did move to briefly consider the alleged link between the flooding of Mr Abbott's property and the shift in policy reflected in the *Management Plan* regarding the water level (being above 2.6 metres above MSL) at which the estuary would be artificially breached. Given that in several years prior to 2010 the estuary had been artificially breached at water levels exceeding 2.6 metres above MSL, years in which Mr Abbott had strangely not claimed to suffer any flooding, the court called into question the validity of Mr Abbott's allegations that the flooding between 2010 and 2012 could be linked to the shift in policy.⁵⁷ The court was satisfied that the Overstrand Municipality had provided several reasons, accompanied by supporting documentation and expert reports, in response to Mr Abbott's allegations relating to the flooding and consequent damage to his property. In the court's mind, the reasons were neither "farfetched" nor "clearly untenable", and accompanied by the failure on the part of Mr Abbott to convincingly dispute the Overstrand Municipality's version, there was serious doubt as to what had in fact caused his alleged damage.⁵⁸

The court accordingly concluded that it was unable to decide the issue on the papers before it and moved to consider whether even in the absence of an application from Mr Abbott to refer the matter to oral evidence, it should

⁵⁵ *Abbott* (WCC) para 31 read with para 52.

⁵⁶ *Abbott* (WCC) para 55.

⁵⁷ *Abbott* (WCC) para 56.

⁵⁸ *Abbott* (WCC) paras 57-59.

mero motu do so.⁵⁹ Taking heed of the guidance provided by Myburgh J in *Joh-Air (Pty) Ltd v Rudman*,⁶⁰ the court decided not to do so.⁶¹ It accordingly held that Mr Abbott had not succeeded in getting out of the proverbial "starting blocks" and dismissed the application with costs,⁶² without one word of wisdom being passed on the application of the comprehensive contemporary legal framework of relevance to managing the ecological flows of estuaries. Mr Abbott, however, was granted leave to appeal.

4 The Supreme Court decision – The issue of local government mandates over estuaries

Mr Abbott's appeal was heard before the Supreme Court of Appeal (SCA) in May 2016. The relief sought by Mr Abbott and the Overstrand Municipality's response to his application were identical to that in the court *a quo*, and need not be repeated here. Notwithstanding this similarity and in agreement with the decision of the court *a quo* to dismiss the application, the SCA chose to follow a very different route in reaching its conclusion. Rather than focussing on the dispute of fact, the SCA deemed the starting point of the enquiry to be whether or not the municipality "had the legal obligation (and the necessary power) to take steps to protect the appellant's house from flooding".⁶³ In doing so, and in the rather bizarre absence of Mr Abbott's having clearly distilled in his papers the specific review ground in terms of the *Promotion of Administrative Justice Act*⁶⁴ on which he sought to found his review, the court inferred the review to be one in terms of section 6(2)(g). It accordingly held that to succeed in the application, Mr Abbott had to show that the Overstrand Municipality was under a legal obligation to take steps to prevent damage being caused to Mr Abbott's house by the flooding of the Klein River.⁶⁵ As correctly identified by the SCA, the logical starting point for an enquiry of this nature was the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*),⁶⁶ and specifically the manner in which it allocates competence to the three spheres of government to make and administer laws over different issues.

In a fleeting consideration of some relevant provisions contained in the

⁵⁹ *Abbott* (WCC) para 61.

⁶⁰ *Joh-Air (Pty) Ltd v Rudman* 1980 2 SA 420 (T).

⁶¹ *Abbott* (WCC) paras 62-67.

⁶² *Abbott* (WCC) paras 68-69.

⁶³ *Abbott* (SCA) paras 13-14.

⁶⁴ *Promotion of Administrative Justice Act* 3 of 2000.

⁶⁵ *Abbott* (SCA) para 13.

⁶⁶ *Abbott* (SCA) para 14.

Constitution,⁶⁷ and with no consideration of contemporary jurisprudence canvassing the "environmental" mandate of local government,⁶⁸ the SCA concluded that the *Constitution* did not "confer any authority on the municipality in relation to the breaching of the berm in the estuary and the protection of riparian property owners against flooding".⁶⁹ According to the SCA, any such authority vested in the national and provincial spheres of government, owing to their concurrent competence over the "environment" and "nature conservation".⁷⁰ The SCA therefore concluded that any powers which the Overstrand Municipality may have wished to exercise with regard to the KRE must have been assigned to it by national and provincial legislation.⁷¹

The SCA went on to undertake a brief survey of a few laws in order to justify its conclusion, namely the NEMA, the NEMICMA and the NCO (Cape). In respect of the NEMA, the SCA simply referred to the provisions dealing with integrated environmental management, concluding that the authority to issue environmental authorisations fell to national and provincial, and not local authorities.⁷² In respect of the NEMICMA, the SCA acknowledged the potential for it to authorise local authorities to "administer" estuaries particularly through the development and preparation of individual estuarine management plans, where they agree and have the capacity to do so, but indicated that this potential was yet to be realised.⁷³ Finally, in respect of the NCO (Cape), the SCA held that while it did contain provisions relevant to managing estuaries, these fell under the purview of CapeNature, the provincial conservation agency, and not local authorities.⁷⁴

Mr Abbott sought to found authority on the part of the Overstrand Municipality to manage the KRE on two additional sources, both of which were dismissed by the SCA. First, he sought to rely on a council resolution passed by the erstwhile Hermanus Municipality in 1991, following the receipt of a request from the provincial conservation agency to manage the KRE. According to Mr Abbott, the council resolution indicated that the Hermanus Municipality resolved to accept full control over the KRE. This

⁶⁷ The SCA limited its consideration to s 156(1) read together with schedules 4 & 5 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

⁶⁸ This jurisprudence is referred to in the commentary undertaken in part 5 of this note below.

⁶⁹ *Abbott* (SCA) para 15.

⁷⁰ *Abbott* (SCA) para 15.

⁷¹ *Abbott* (SCA) para 16.

⁷² *Abbott* (SCA) para 17.

⁷³ *Abbott* (SCA) para 19.

⁷⁴ *Abbott* (SCA) para 18.

was, however, conditional upon the provincial conservation authority defining these powers and responsibilities. According to the SCA, the latter condition was never met, and the erstwhile Hermanus Municipality never assumed sole responsibility for managing the KRE.⁷⁵ Furthermore, the SCA held that Mr Abbott's contention failed to acknowledge the significant reallocation of public power and responsibility following the adoption of the *Constitution* in 1996.⁷⁶ Secondly, Mr Abbott sought to found municipal authority over the KRE on regulations published by the erstwhile Overberg Regional Services Council in 1994 under the SSA. The SCA similarly dismissed this argument given that these fell under the purview of the Overberg District Municipality and not the Overstrand Local Municipality, and furthermore owing to the fact that the regulations contained an express prohibition on artificially opening the mouth of the KRE.⁷⁷

The SCA concluded that no "power or duty to manage or control the estuary and to take measures to protect riparian properties" had been assigned to the Overstrand Municipality by national or provincial legislation.⁷⁸ It therefore held that the Overstrand Municipality had no obligation to take steps to protect Mr Abbott's house from flooding by the Klein River.⁷⁹

Acknowledging that it was not necessary to do so, the SCA nevertheless did briefly highlight several of the factual anomalies present in Mr Abbott's application, namely: whether his property had in fact been flooded; whether this flooding had been continuous/repeated or rather an isolated incident; whether this flooding could be linked in any way to different water levels triggering decisions to artificially breach the berm; whether a historic practice had existed prior to 2010 to artificially breach the KRE when water levels reach 2.1 metres above MSL; whether any measures had in fact in the past been undertaken by the Overstrand Municipality to protect properties in the river section of the KRE due to rising water levels; and whether the Overstrand Municipality was the party solely responsible for managing the KRE, given that it was but one member of the Klein River Estuary Forum.⁸⁰ Having done so, it confirmed that there was clearly a material dispute of fact on the papers as to the cause of the damage to Mr Abbott's house. The SCA held that the version of Overstrand Municipality, which was backed by expert opinion, that the cause of the flooding in 2013

⁷⁵ *Abbott* (SCA) para 20.

⁷⁶ *Abbott* (SCA) para 21.

⁷⁷ *Abbott* (SCA) para 23.

⁷⁸ *Abbott* (SCA) para 16.

⁷⁹ *Abbott* (SCA) para 24.

⁸⁰ *Abbott* (SCA) paras 25-30.

was the major flooding of the river as opposed to high water levels in the estuary and that the flooding would have occurred irrespective of whether the mouth of the estuary was open or closed, was not "far-fetched", "untenable" or "demonstrably and clearly unworthy of credence".⁸¹ It accordingly concluded that on this basis too, the review application "was doomed to failure".⁸²

The SCA then proceeded to deal with Mr Abbott's alternate cause of action, in which he sought to invoke the doctrine of legitimate expectation to secure a court order compelling the Overstrand Municipality to take reasonable steps to protect his property from flooding if it chose to depart from the alleged historic policy of artificially breaching the berm of the estuary at 2.1 metres above MSL. Why the court felt the need to do so is rather puzzling, given that the material dispute of fact canvassed above included the issue of whether the alleged practice and policy on which Mr Abbott sought to base his legitimate expectation existed in fact. Nonetheless, the SCA was easily able to dispense with the applicant's alternate cause of action on the basis that he had sought to invoke the doctrine of substantive legitimate expectation,⁸³ which the court confirmed was yet to be recognised as part of South African law.⁸⁴ Perhaps in an effort to preclude Mr Abbott from bringing further litigation on this particular point of law, the SCA highlighted that even were the doctrine of substantive legitimate expectation to be recognised, Mr Abbott's application would not have succeeded due to the dispute of fact discussed above.⁸⁵ Mr Abbott's appeal was accordingly dismissed with costs, which included the costs consequent upon the employment of two counsel.

5 Commentary

While the outcome of the case appears to have constituted a triumph for public ecological interests (to preserve and not artificially manipulate the ecological flows of the estuary) over individual proprietary interests (to protect Mr Abbott's house from flooding), the decision of the SCA in particular raises some distinct questions.

⁸¹ *Abbott* (SCA) para 31.

⁸² *Abbott* (SCA) para 31.

⁸³ Mr Abbott was seeking substantive relief in the form of an order directing the Overstrand Municipality to take reasonable steps to protect his house, as opposed to merely procedural relief in the form of a right to a hearing prior to a legitimate expectation's being disappointed.

⁸⁴ *Abbott* (SCA) paras 32-33.

⁸⁵ *Abbott* (SCA) para 34.

As highlighted above, the starting point for the SCA in resolving the matter was an enquiry into whether or not the Overstrand Municipality had a legal obligation and the necessary power to take steps to protect Mr Abbott's house from being damaged due to flooding. The SCA turned to the *Constitution* to resolve this enquiry, indeed a logical place to start, but the cursory manner in which it dealt with the issue, the relevant legal framework, the complex jurisprudence and rich academic commentary thereon is somewhat disappointing. The enquiry appears to have warranted far more rigorous attention, attention which may have led the SCA to a different conclusion, ironically leading to private proprietary interests trumping public ecological interests.

At the centre of the issue canvassed by the SCA was the executive authority (the powers, functions and associated obligations) as opposed to the legislative authority of the Overstrand Municipality. The executive authority of local government is primarily prescribed in section 156 read together with Schedules 4 and 5 of the *Constitution*, which together provide for three main types of powers, namely original powers, assigned powers and incidental powers.

The precise scope and nature of these powers of local government have been canvassed in several vast texts focussing on local government law generally⁸⁶ and environmental law and local government specifically.⁸⁷ They have similarly formed the focus of several cases, dealing with a range of issues including municipal rates,⁸⁸ municipal planning,⁸⁹ the subdivision of

⁸⁶ For a comprehensive general overview of these powers, see: Steytler and De Visser *Local Government Law*, specifically: original powers (5-5, and 5-11 to 5-12), assigned powers (5-42 to 5-50), and incidental powers (5-6 to 5-9).

⁸⁷ For a comprehensive perspective of local authorities' powers and functions in the context of environmental governance, see Du Plessis *Environmental Law and Local Government* chs 2 and 11.

⁸⁸ *City of Cape Town v Robertson* 2005 2 SA 323 (CC).

⁸⁹ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* 2014 5 BCLR 591 (CC); *Minister for Local Government Environmental Affairs and Development Planning, Western Cape v Clairison's* CC 2013 6 SA 235 (SCA); *Habitat Council v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape* 2013 6 SA 113 (WCC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Lagoon Bay Lifestyle (Pty) Ltd* 2014 1 SA 521 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Minister of Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC); *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning, Western Cape* 2012 3 SA 441 (WCC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA).

land,⁹⁰ liquor licences,⁹¹ water service provision,⁹² the management and use of rivers,⁹³ sewage and solid waste,⁹⁴ general environmental governance⁹⁵ and the certification of the *Constitution* itself.⁹⁶ One particular recent case, namely *Le Sueur v Ethekwini Municipality*⁹⁷ (hereafter the *Le Sueur* case) handed down by the Kwazulu-Natal High Court: Pietermaritzburg in 2013, triggered a flurry of journal articles focussing specifically on the powers of local government over environmental issues.⁹⁸ Cumulatively, these academic tomes, cases and the academic commentary thereon provide valuable guidance on a broad range of issues relating to the powers harnessed by local government, relevant components of which will be drawn into the commentary below.

An understanding of the form, nature and ambit of each of these different powers of local government, their associated responsibilities or duties, and their potential application to the scenario placed before the SCA in the Abbott matter, is key to understanding the potential shortcomings of the SCA's judgment. This commentary focusses on three such shortcomings. Firstly, the rather flippant manner in which the court dealt with the original power of local authorities over environmental matters, specifically relevant to managing estuaries. Secondly, the extent to which the court appears to have misconstrued the potential assigned powers of local authorities relevant to managing estuaries. Thirdly, the failure on the part of the court to consider the possible incidental power of local authorities to manage estuaries, predominantly the result of the very limited array of relevant environmental legislation canvassed by the court in its judgment.

5.1 Flippant consideration of the original power of municipalities

Municipalities have original executive authority in respect of and the right to administer the local government matters listed in Part B of Schedules 4 and

⁹⁰ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

⁹¹ *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC).

⁹² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

⁹³ *Nel v Hessequa Local Municipality* (WCC) (unreported) case number 12576/2013 of 14 December 2015.

⁹⁴ *Kenton on Sea Ratepayers Association vs Ndlambe Local Municipality* (ECD) (unreported) case number 4341/2014 of 15 June 2016.

⁹⁵ *Le Sueur v Ethekwini Municipality* 2013 ZAKZPHC 6 (30 January 2013).

⁹⁶ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC).

⁹⁷ *Le Sueur v Ethekwini Municipality* 2013 ZAKZPHC 6 (30 January 2013) (the *Le Sueur* case).

⁹⁸ Bronstein 2015 *SALJ* 639-663; Muir 2015 *SAPL* 556-579; Humby 2014 *PELJ* 1660-1689; and Freedman 2014 *PELJ* 567-594.

5 of the *Constitution*.⁹⁹ From an environmental perspective, these matters include: air pollution; building regulations; municipal planning; pontoons and jetties; storm-water management; water and sanitation services; beaches; cleansing; the control of public nuisances; local amenities; municipal parks and recreation; noise pollution; public places; and refuse removal, refuse dumps and solid waste disposal. Municipalities are empowered to make and administer by-laws for the effective administration of the above matters that they have a right to administer.¹⁰⁰

Several key lessons can be drawn from recent relevant jurisprudence and academic commentary thereon regarding the original powers of local government.¹⁰¹ Firstly, they confirm the new model of governance under the *Constitution*,¹⁰² one comprising of three distinctive, interdependent and interrelated spheres of government (national, provincial and local government), with the *Constitution* distributing authority amongst the three spheres, granting each autonomy to exercise their respective authority while placing an obligation on them not to generally usurp the authority of another sphere.¹⁰³ Secondly, the geographic scope of local government's original power relates mainly to matters that can be "appropriately regulated intra-municipally, as opposed to intra-provincially"; in other words those matters which fall within the jurisdictional area of a municipality.¹⁰⁴ Thirdly, the interpretation of the functional areas over which the three spheres exercise original executive authority must be guided by a "functional view of what [is] appropriate" to each sphere of government.¹⁰⁵ Fourthly, given that the functional areas over which the three spheres of government exercise original authority (as reflected in Schedules 4 and 5 of the *Constitution*) are

⁹⁹ Section 156(1)(a) of the *Constitution*.

¹⁰⁰ Section 156(2) of the *Constitution*.

¹⁰¹ See generally on the original powers of local government Steytler and De Visser *Local Government Law*; specifically, original powers (5-5, 5-11 to 5-12). See specifically on the original powers of local government in respect of environmental matters, Freedman 2014 *PELJ* 569-578.

¹⁰² As expressly reflected in s 40 of the *Constitution*.

¹⁰³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA* 1996 1996 4 SA 744 (CC) para 364; *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 42; and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 43. See further: Freedman 2014 *PELJ* 572.

¹⁰⁴ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 53. See further Steytler and De Visser *Local Government Law* 5-19 to 5-21; and Freedman 2014 *PELJ* 572-575.

¹⁰⁵ *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 51. See further Steytler and De Visser *Local Government Law* 5-19 to 5-21.

not contained in "hermetically sealed compartments",¹⁰⁶ overlaps may occur with the different spheres operating from their respective national, provincial and municipal perspective and applying their own constitutional and policy considerations when doing so.¹⁰⁷ Where overlaps do arise, a bottom-up approach should be adopted to resolve them, with the court first determining what powers are vested in local government before proceeding to ascertain what powers are vested in provincial and national government respectively.¹⁰⁸ Here I would add that any such determination would need to recognise that the structure of government "consists of a partnership"¹⁰⁹ among the three spheres of government, a partnership "oiled by the principles of co-operative government"¹¹⁰ that requires these spheres to "exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another".¹¹¹

Furthermore, and as recent jurisprudence illustrates, environmental matters have been held to fall within the substantive scope of the functional areas over which local government authorities exercise original power, notwithstanding the fact that the functional area of the "environment" falls within Schedule 4A of the *Constitution*, functional areas of concurrent national and provincial competence. In the *Le Sueur* case¹¹² the court concluded that local government has authority to pass by-laws that deal with the conservation and protection of the environment, in so far as these fall within their mandate over "municipal planning" reflected in Schedule 4B of the *Constitution*.¹¹³ In *Nel v Hessequa Local Authority*¹¹⁴ (hereafter the *Nel* case) the court upheld the validity of local government by-laws governing the management and use of rivers, given that rivers were public amenities,

¹⁰⁶ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; and *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47.

¹⁰⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 80.

¹⁰⁸ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 60-63; and *Habitat Council v Provincial Minister of Local Government Environmental Affairs and Development Planning, Western Cape* 2013 6 SA 113 (WCC) para 120H-I. See further Steytler and De Visser *Local Government Law* 5-21 to 5-22; and Freedman 2014 *PELJ* 575.

¹⁰⁹ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 82.

¹¹⁰ *Maccsand (Pty) Ltd v City of Cape Town* 2011 4 All SA 601 (SCA) para 11.

¹¹¹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC) para 289.

¹¹² The *Le Sueur* case.

¹¹³ *Le Sueur* case para 22.

¹¹⁴ *Nel v Hessequa Local Municipality* (WCC) (unreported) case number 12576/2013 of 14 December 2015 (the *Nel* case).

public places and places of recreation – all functional areas falling within Schedule 5B of the *Constitution*.¹¹⁵

As support for their conclusions, the judges in the above two matters referred to a range of relevant provisions contained in the *Constitution*, the *Local Government: Municipal Systems Act*¹¹⁶ (hereafter the *Municipal Systems Act*) and the NEMA.¹¹⁷ Firstly, they highlighted the obligation imposed on the state (inclusive of local government) in terms of section 7(2) of the *Constitution*, "to respect, protect, promote and fulfil the rights in the Bill of Rights".¹¹⁸ These rights naturally included the environmental right, specifically section 24(2), which creates an obligation on all spheres of government to take reasonable legislative and other measures to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development. Secondly, they specifically referred to section 152(1)(d) of the *Constitution*, which includes among the objects of local government, "promoting a safe and healthy environment".¹¹⁹ Finally, in the *Nel* case the judge made mention of the national environmental management principles reflected in section 2 of the NEMA, principles which apply to the actions of all organs of state, including municipalities.¹²⁰ These principles must *inter alia* "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment" and must "guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment".¹²¹ Substantively, the principles include avoiding and/or minimising the disturbance of ecosystems and the loss of biological diversity, avoiding the degradation of the environment, and adopting a risk-averse and cautious approach where uncertainty is present. Were they so inclined, the courts could also have referred to the *Municipal Systems Act* to support their conclusion, which includes "promoting a safe and healthy environment", as one of the means through which local government exercises its legislative and executive authority.¹²²

¹¹⁵ *Nel* case para 11.

¹¹⁶ *Local Government: Municipal Systems Act* 32 of 2000 (the *Municipal Systems Act*).

¹¹⁷ In the judgments of both the *Le Sueur* case and the *Nel* case, the consideration of these laws appears to have been undertaken primarily in the context of interpreting local government's original powers, as opposed to their assigned or incidental powers.

¹¹⁸ *Le Sueur* case para 19; and the *Nel* case para 12.

¹¹⁹ *Le Sueur* case para 19; and the *Nel* case para 12.

¹²⁰ The *Nel* case para 12.

¹²¹ Section 2(c) and (e) of NEMA.

¹²² Section 11(3)(l) of the *Municipal Systems Act*.

It is acknowledged that these two cases clearly focussed on the legislative authority of local government. They do nonetheless appear to constitute precedent in the context of the executive authority of local government, given that the Constitutional provisions governing the legislative and executive authority of local government are to all intents and purposes identical. Furthermore, the critique by some commentators on the *Le Sueur* case particularly is acknowledged. This critique is varied and includes: concerns that perhaps the court went too far in its purported extension of the original powers of local government to include environmental matters at the local level;¹²³ apparent confusion about the basis or type of power on which the court sought to found such an extension;¹²⁴ the continued lack of clarity about the precise substantive scope of any such extension;¹²⁵ and the continued need for greater clarity in "delineating the boundaries of municipal, provincial and national powers under the *Constitution*".¹²⁶ These two judgments nonetheless constitute relevant precedent relating to the scope and nature of local government's original power over environmental matters.

Within this rich and complex context, it now seems prudent to reflect on how the SCA managed to dispense with the issue relating to the original power (and associated responsibility) of the Overstrand Municipality to manage the KRE and its impacts on riparian property in a mere paragraph of its judgment. According to the SCA, none of the functional areas listed in Part B of Schedules 4 and 5 confer any "authority" on local government to artificially breach the berm of the estuary and take measures to protect riparian property owners against flooding.¹²⁷ According to the SCA, this conclusion was supported by the fact that the "environment" and "nature conservation" fell within Part A of Schedule 4, accordingly constituting matters of concurrent national and provincial competence as opposed to municipal competence.¹²⁸

This would appear to be a very superficial treatment of the relevant legal framework and contemporary jurisprudence relating to it, however. Several questions come to mind. Firstly, local government would appear to exercise original authority over several issues which span the management of estuaries. Take for instance their original authority over the following

¹²³ See further: Freedman 2014 *PELJ* 567-594.

¹²⁴ See further: Bronstein 2015 *SALJ* 663; and Humby 2014 *PELJ* 1680-1681.

¹²⁵ Freedman 2014 *PELJ* 592.

¹²⁶ Bronstein 2015 *SALJ* 663.

¹²⁷ *Abbott* (SCA) para 15.

¹²⁸ *Abbott* (SCA) para 15.

matters, all of which are reflected in Schedules 4B and 5B: beaches (through which the mouths of estuaries pass); pontoons and jetties (which are frequently erected on estuaries); storm-water and sewage (of which estuaries are frequently the recipients, given the absence of water-borne sewage systems in many rural areas); and municipal parks (which are often established adjacent to estuaries, given their ecological importance and the recreational opportunities they provide). Secondly, and following the same line of reasoning, does the *Nel* case not provide precedent for the argument that local government does have original power to manage estuaries, stemming from the fact that the estuary in question clearly constituted a public amenity, a public place and a place of recreation - all functional areas falling within Schedule 5B of the *Constitution*? Does the *Le Sueur* case similarly not provide precedent for the argument that local government does have original power to manage estuaries, to the extent that the conservation and protection of the environment fall within their mandate over "municipal planning", reflected in Schedule 4B of the *Constitution*? Thirdly, why did the SCA not deem it prudent to consider the relevant legal framework canvassed by the court in the *Nel* case and the *Le Sueur* case in reaching its conclusion regarding the original power of local government over environmental matters, specifically: section 7(2) read together with section 24(2) of the *Constitution*; section 152(1)(d) of the *Constitution*; and section 2 of the NEMA? To these I would add, as discussed above, section 11(3)(l) of the *Municipal Systems Act*. Fourthly, why did the SCA not deem it necessary to grapple with the characteristics of the model of government adopted by the *Constitution*, given the apparent overlapping original powers of the three spheres of government to manage estuaries? This model and the jurisprudence and academic commentary thereon recognises and tolerates potential overlap, promotes a functional and bottom-up approach to resolving overlaps, and recognises co-operative governance as a key to mitigating overlaps. The SCA did not address any of the above issues, seemingly regarding the original powers of national and provincial government over "environment" and "conservation" as "hermetically sealed compartments" secure from encroachment from local authorities. Had the SCA touched on the possibility of overlapping executive authority and drawn from the wealth of judicial and academic guidance on how to deal with such an overlap, it may well have come to the conclusion that the Overstrand Municipality did possess a significant degree of original authority (and associate responsibility) to manage the estuary and its impact on riparian properties. It may further have potentially come to the conclusion that this overlap did not pose a problem as the authority of the Overstrand Municipality would substantively and geographically focus on such

management from a purely local as opposed to a national and/or provincial perspective, a conclusion strengthened by the fact that the entire KRE falls within the jurisdictional boundary of the Overstrand Municipality.

5.2 Misconstruing the assigned power of municipalities

Turning to the second type of authority, namely the assigned powers of local government. Municipalities are accorded executive authority in respect of and the right to administer any function assigned to them in terms of national and provincial legislation.¹²⁹ Executive powers and functions can be assigned to them by both the national and provincial spheres of government, subject to three conditions: the assignment must be in terms of an agreement concluded between the relevant Cabinet member (in the case of national government) or member of the Executive Council (in the case of provincial government) and the relevant Municipal Council; it must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and it takes effect upon proclamation by the President (in the case of national government) or relevant Premier (in the case of provincial government).¹³⁰ Giving effect to the subsidiary principle, the *Constitution* places an obligation on national and provincial government to assign the administration of such matters which necessarily relate to local government, if the matter would most effectively be administered locally and the municipality has the capacity to administer it.¹³¹ These assigned powers could accordingly relate to matters falling within the competence of national and provincial government, specifically those listed in Schedules 4A and 5A of the *Constitution*. Municipalities are empowered to make and administer by-laws for the effective administration of the above matters that have been assigned to them.¹³²

This overarching constitutional dispensation governing the assignment of executive powers and functions to local government needs to be read together with that prescribed in the *Municipal Systems Act*, specifically chapter 3 thereof.¹³³ The *Municipal Systems Act* draws a distinction

¹²⁹ Section 156(1)(b) of the *Constitution*. See generally on the assigned executive powers of local government: Steytler and De Visser *Local Government Law* 5-42 to 5-50; and DPLG *Guideline Document on Provincial and Local Government Relations* 6-8.

¹³⁰ See the *Constitution*: s 99 (in relation to the assignment of executive authority from national government to local government); and s 126 (in relation to the assignment of executive authority from provincial government to local government).

¹³¹ Section 156(4) of the *Constitution*.

¹³² Section 156(2) of the *Constitution*.

¹³³ See generally DPLG *Guideline Document on Provincial and Local Government Relations* 6-8.

between two forms of assignments: general assignments (to all municipalities) and individual assignments (to specific municipalities). General assignments take place through legislation passed by national or provincial government, with the *Municipal Systems Act* prescribing procedures for necessary consultation and assessing the potential financial obligations imposed by such assignments prior to their enactment.¹³⁴ Individual assignments take place through agreements concluded between national or provincial government and specific municipalities, with the *Municipal Systems Act* again prescribing procedures for necessary consultation and assessing the potential financial obligations imposed by such assignments prior to any such agreement's being concluded.¹³⁵

What appears clear in the context of the *Abbott* case is that no individual assignment of executive power to manage the KRE to the Overstrand Municipality had taken place, given the absence of any specific agreement providing for such assignment. Accordingly, the SCA correctly sought to consider whether any general assignment in terms of national and/or provincial legislation had taken place. The decision of the SCA not to consider the *Le Sueur* and *Nel* cases and relevant academic commentary thereon cannot be faulted in this specific context, as both cases primarily grappled with the general assignment of legislative as opposed to executive powers to local authorities.¹³⁶ What can be debated, however, is the very narrow array of legislation and policy canvassed by the SCA in coming to its conclusion that no such general assignment of executive power, as opposed to legislative power, had taken place of relevance to the KRE. In this regard, the SCA may well have benefitted from simply referring to the judgments in the *Le Sueur* and *Nel* cases, if only to distil a more comprehensive array of laws it should possibly have considered in undertaking this enquiry. In reaching its conclusion that the "authority of the municipalities at local government level to manage the environment at that level has always been and is still recognised",¹³⁷ the court in the *Le Sueur* case considered the following laws: the environmental right and associated

¹³³ Section 156(2) of the *Constitution*.

¹³⁴ Section 9 of the *Municipal Systems Act*.

¹³⁵ Section 10 of the *Municipal Systems Act*.

¹³⁶ As has been highlighted by several commentators, perhaps the court in the *Le Sueur* case misconstrued its consideration of this legislation in the context of the assigned legislative powers of the local authority (Bronstein 2015 *SALJ* 661-663; and Humby 2014 *PELJ* 1675). Notwithstanding this critique, a consideration of this legislation would appear to be of relevance in the context of determining the assigned executive powers and incidental powers of local government.

¹³⁷ *Le Sueur* case para 39.

relevant provisions in the *Constitution*;¹³⁸ the NEMA;¹³⁹ the NEMBA;¹⁴⁰ the *Local Government Transitions Act*;¹⁴¹ the *Development Facilitation Act*;¹⁴² the *Municipal Systems Act*;¹⁴³ and the *Land Use Planning Ordinance (Cape)*.¹⁴⁴ Whilst being far more rigorous in its reflection on the relevant legal framework than the SCA in the *Abbott* case, the court in the *Le Sueur* case similarly appears to have really only just scratched the surface of the legal framework governing the powers and functions of the local sphere of government in environmental governance. The omissions are simply too numerous to repeat here, but a simple page through the recent and most comprehensive text on local environmental governance in South Africa, *Environmental Law and Local Governance in South Africa*¹⁴⁵ published in 2015 prior to the SCA's judgment, attests to this fact as it rigorously unpacks and analyses the role of local government across almost all environmental sectors. Reading this tome of almost 1000 pages can really lead a person to only one conclusion, namely that a vast swath of authority over matters of general environmental relevance, and of specific relevance to estuaries,

¹³⁸ Section 24 read together with s 8(1) of the *Constitution*, which effectively compels local government to take reasonable legislative and other measures to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development.

¹³⁹ While the SCA did briefly consider the NEMA (specifically ch 5 dealing with integrated environmental management), it did not grapple with the national environmental management principles (s 2); the environmental implementation and management planning provisions (ss 11-16); private prosecution (s 33); and the *Environmental Management Framework Regulations* (GN R547 in GG 33306 of 18 June 2010).

¹⁴⁰ Chapter 3 (Biodiversity Planning and Monitoring), specifically the *National Biodiversity Framework* (published in terms of s 38 in GN 813 in GG 32474 of 3 August 2009); and s 48 (coordination and alignment of biodiversity plans).

¹⁴¹ Item 21 of Schedule 2 (Metropolitan Councils) and Item 14 of Schedule 2A (Metropolitan Councils) of the *Local Government Transitions Act* 209 of 1993 that included "the coordination of environmental affairs" and the "management and control of environmental affairs" within their respective mandates.

¹⁴² Section 31(c) and s 3(1)(h) of the *Development Facilitation Act* 67 of 1995 that required local authorities to encourage "environmentally sustainable land practices and processes" and promote the "sustainable protection of the environment" respectively.

¹⁴³ Section 23(c) of the *Municipal Systems Act* that places an obligation on municipalities in the context of integrated development planning to "contribute to the progressive realisation of the fundamental rights contained in Section 24 ... of the Constitution"; and the *Local Government, Municipal Planning and Performance Management Regulations* (GN R796 in GG 22605 of 24 August 2001) that specify that spatial development frameworks included in an integrated development plan should contain a "strategic assessment of the environmental impact of the spatial development framework".

¹⁴⁴ The court in the *Le Sueur* case canvassed the extent to which town planning schemes adopted under the Ordinance sought to regulate land use, including the protection of the natural environment.

¹⁴⁵ Du Plessis *Environmental Law and Local Government*.

has been generally assigned to the local sphere of government by way of legislation. Take for instance the following two examples, drawn from the ECA and the NEMICMA.

Firstly, section 31A of the ECA, which was strangely not considered by the judges in either the *Le Sueur* case or the *Nel* case, expressly enables a municipality to issue a directive to a person who "performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected", compelling them to cease such an activity or take steps to eliminate, reduce or prevent the damage, danger or detrimental effect.¹⁴⁶ It furthermore enables the municipality to "perform such activity or function as if he or it were that person and may authorise any person to take all steps required for that purpose" where the person to whom the directive is issued fails to comply with it.¹⁴⁷ Does this not constitute a generally assigned executive power granted to municipalities to take measures to manage the environment generally, a power which would appear to be of direct potential relevance to the management of an estuary and the activities of riparian property owners?

Secondly, while the SCA in the *Abbott* case did fleetingly acknowledge the executive authority generally assigned to local authorities under the NEMICMA in the broad context of coastal and estuarine management, it concluded that particularly the authority relating to estuaries constituted potential authority given that the implementation of the Act was still very much in its infancy.¹⁴⁸ The SCA, however, did not appear to recognise and grapple with a number of the NEMICMA's provisions of relevance to the assignment of executive authority (and associated responsibility) to municipalities, all of which were very much in force at the time the matter was considered by the court. These included the provisions governing: the state's duty to fulfil environmental rights in the coastal environment;¹⁴⁹ the state's public trusteeship of coastal public property;¹⁵⁰ measures affecting erosion and accretion relating to the seashore or coastal public property;¹⁵¹ the designation of coastal access land;¹⁵² the establishment of municipal

¹⁴⁶ Section 31A(1) and (2) of the ECA.

¹⁴⁷ Section 31A(3) of the ECA.

¹⁴⁸ *Abbott* (SCA) para 21.

¹⁴⁹ Section 3 of the NEMICMA.

¹⁵⁰ Section 12 of the NEMICMA.

¹⁵¹ Section 15 of the NEMICMA.

¹⁵² Sections 18-20 of the NEMICMA.

coastal committees;¹⁵³ municipal coastal management plans;¹⁵⁴ coastal planning schemes;¹⁵⁵ and the duty to avoid causing adverse effects on the coastal environment.¹⁵⁶ A more thorough consideration of these provisions may well have led the SCA to conclude that executive authority over certain aspects relevant to managing the coastal zone, inclusive of the KRE, had in fact been assigned generally to the Overstrand Municipality in terms of the NEMICMA.

5.3 Disregarding the incidental power of municipalities

Even were the SCA to have thoroughly considered the original and possible assigned executive power of the local sphere of government of relevance to managing the KRE, and having done so ruled that none such existed, the court could and I would argue should have considered the possible relevance of the third source of executive authority of municipalities, namely incidental power.

Section 156(5) of the *Constitution* accords a municipality a right to exercise any power "concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions". Commentators have argued that this power should be accorded a broad, purposive interpretation.¹⁵⁷ They further argue that two principles should guide the interpretation of the ambit of these incidental powers, namely that they "should be linked to local government's development mandate", and "should not be used to increase the functional ambit of local government's powers but rather to enhance the efficacy of administering an existing functional area".¹⁵⁸ These incidental powers should accordingly be viewed and interpreted against the background of section 7(2) of the *Constitution* read together with the Bill of Rights, with section 24 (the Environmental Right) and section 152 (Objects of Local Government) again being of specific relevance here. Section 7(2) compels the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". This would include promoting the environmental right, specifically section 24(2) thereof, which creates an obligation on all spheres of state, including local government, to take reasonable legislative and other

¹⁵³ Section 42 of the NEMICMA.

¹⁵⁴ Sections 48-50 of the NEMICMA.

¹⁵⁵ Sections 56-57 of the NEMICMA.

¹⁵⁶ Section 58 of the NEMICMA.

¹⁵⁷ Steytler and De Visser *Local Government Law* 5-6 to 5-8. The commentators cite *Ex Parte Western Cape Provincial Government: In re DVB Behuising (Pty) Limited v North West Provincial Government* 2000 4 BCLR 347 (CC) in support of this contention.

¹⁵⁸ Steytler and De Visser *Local Government Law* 5-8.

measures to prevent pollution and ecological degradation, promote conservation and secure ecological sustainable development. Furthermore, section 152(1)(d) includes among the objects of local government, "promoting a safe and healthy environment". Commentators argue that the latter component of the above object, namely promoting a "healthy environment", confirms that "development must take place in an environmentally sustainable manner", strengthening the argument for local government's incidental powers to extend over environmental matters.¹⁵⁹ Such an interpretation was clearly adopted in the *Nel* case and the *Le Sueur* case when interpreting the original and assigned power of local authorities, and there appears to be little reason why a similar interpretation could not be adopted in the context of local governments' incidental powers.

According to Gyanda J in the *Le Sueur* case, "the environment is an ideal example of an area of ... executive authority or power which had to reside in all three levels of government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4".¹⁶⁰ Furthermore, Gyanda J expressly recognised that "although matters relating to the environment may be said, in terms of the *Constitution*, to be the primary concern or sphere of National and Provincial responsibility, Local Governments in the form of Municipalities are in the best position to know, understand, and deal with issues involving the environment at the local level".¹⁶¹ Concerns about overlapping executive authority would similarly not appear to be an issue here in the context of incidental powers, with the same approach distilled from relevant jurisprudence and academic commentary above in the context of original and assigned executive power seemingly applicable here.

Why the court did not deem it appropriate and necessary to deal with the incidental executive authority of the Overstrand Municipality of relevance to the management of the KRE and its impacts on riparian properties is puzzling. Had it chosen to venture into such an enquiry and grappled with the relevant constitutional and legislative framework, jurisprudence and academic guidance previously canvassed in this commentary, it may well have come to a different conclusion. The management of the environment generally, and estuaries specifically, would appear clearly incidental to many of the functional areas delineated in the *Constitution* over which local authorities exercise original power and accordingly carry responsibility.

¹⁵⁹ Steytler and De Visser *Local Government Law* 5-9.

¹⁶⁰ *Le Sueur* case para 20.

¹⁶¹ *Le Sueur* case para 20.

These could include: building regulations; municipal planning; pontoons and jetties; storm-water management; water and sanitation services; beaches; the control of public nuisances; local amenities; municipal parks and recreation; and public places. Accordingly, if such power did vest in the Overstrand Municipality, did it not similarly labour under some form of obligation to manage water levels in the estuary? If so, would the SCA in the *Abbott* case not then have been compelled to rule, using its own words when distilling the starting point of its enquiry, that "the municipality had the legal obligation (and the necessary power) to take steps to protect the appellant's house from flooding"?¹⁶² Finally, if it had so ruled, would the result of the matter have seen Mr Abbott's private proprietary interests (namely to protect his house from flooding) trumping the public ecological interests (to protect the ecological flow of the estuary against artificial breaching)?

6 Conclusion

The SCA's interpretation of the original, assigned and/or incidental powers of local government over the environment generally, and estuaries in particular, clearly indicates that there is some way to go in understanding the key role of local government in environmental governance, particularly where its "environmental mandate" overlaps with that of the national and provincial spheres of government. The SCA's rather pithy examination of the relevant environmental legislation also illustrates that there remains significant scope for building a common, integrated and holistic understanding of the vast, complex and overlapping suite of laws introduced in the past two decades governing a wide variety of environmental issues, and the manner in which these laws distribute power and responsibility to the different spheres of government.

Had the SCA ruled differently on the relevant power (and associated responsibility) of the Overstrand Municipality to manage the KRE, as I believe it ought to have, it would have accorded itself an opportunity to grapple in detail with all the components of South Africa's environmental legal framework relevant to the fundamental issue which appears to have lain at the heart of the dispute between Mr Abbott and the Overstrand Municipality, namely how to balance private proprietary interests and public environmental interests in the context of managing and maintaining the ecological flows of the estuary. This legal framework, inclusive of the laws of direct and indirect relevance to this balancing enquiry, was briefly

¹⁶² *Abbott* (SCA) para 14.

canvassed in the introduction to this note and does not bear repeating here in its entirety.

What does bear repeating, however, are the specific legal innovations introduced in the NWA and the NEMICMA of central relevance to informing this balancing act. In the broader context of fresh water resources (specifically the NWA), these would crucially include resource quality objectives, reserve determinations and catchment management strategies. In the narrower context of estuaries (specifically the NEMICMA), these would crucially include the national estuarine management protocol, estuarine management plans, coastal management programmes, coastal management lines, and the concept of state trusteeship over the coastal zone.

It is here that the court may have faced a further challenge, having to determine which of these legal innovations reflected in the NWA and the NEMICMA were applicable and which not. One would forgive the court for assuming that the implementation of these relevant legal innovations would be at an advanced stage, if not complete, with the NWA and the NEMICMA having commenced some nineteen years and seven years ago respectively.¹⁶³ Unfortunately, this would be a dangerous and erroneous assumption.

There are innovations in the NWA of potential relevance to resolving the fundamental issue in the *Abbott* case. The Breede-Gouritz CMA, within whose WMA the KRE falls, was established only on 23 May 2014,¹⁶⁴ rather bizarrely prior to the formal rationalisation of the country's initial nineteen WMAs into nine, which took place on 16 September 2016.¹⁶⁵ No CMS has yet been adopted by the Breede-Gouritz CMA, although the Breede-Overberg CMA, which was amalgamated with another to form the current CMA, had formally published a proposed CMS for its original WMA in 2012.¹⁶⁶ It was never finalised in the light of the amalgamation of the CMAs, which was initially proposed in 2012.¹⁶⁷ No resource quality objectives or comprehensive reserve determinations have been adopted for the water resources situated within the Breede-Gouritz WMA. This state of affairs, unfortunately, is not unique to the KRE and in summary, the potential value

¹⁶³ The bulk of the NWA commenced on 1 October 1998. The bulk of the NEMICMA commenced on 1 December 2009.

¹⁶⁴ GN 412 in GG 37677 of 23 May 2014.

¹⁶⁵ GN 1056 in GG 40279 of 16 September 2016.

¹⁶⁶ GN 546 in GG 35517 of 20 July 2012.

¹⁶⁷ GN 547 in GG 35517 of 20 July 2012.

of these legal innovations of key relevance to managing the country's scarce water resources, inclusive of its estuaries, remains stagnant owing to the exceptionally tardy performance of the relevant water authorities in ensuring their timeous roll-out.

Now it is necessary to turn to the relevant legal innovations in the NEMICMA. The *National Estuarine Management Protocol* was published in 2013.¹⁶⁸ While providing a broad vision, set of objectives and management standards, its key value lies in the details it provides on the form, nature and roll-out of estuarine management plans to be developed by a range of authorities for each of the country's 291 functional estuaries. Notwithstanding the fact that this guidance was provided almost four years ago, only one final¹⁶⁹ and four draft¹⁷⁰ estuarine management plans have been formally released to date, with none yet being formally adopted for the KRE.¹⁷¹ This troublesome state of implementation to a large extent similarly characterises the roll-out of the provincial coastal management plans, municipal coastal management plans and municipal coastal management lines. The *National Coastal Management Programme* was published in late 2014. Only the Eastern Cape and Western Cape have formally released their provincial coastal management programmes - in 2014 and 2016 respectively.¹⁷² As was confirmed in the latest version of the Overstrand Municipality's *Integrated Development Plan*, released in 2016, neither it nor the Overberg District Municipality has formally completed or adopted its municipal coastal management programmes.¹⁷³ While several municipalities, inclusive of the Overberg District Municipality within whose boundaries the KRE falls, have released project reports relating to coastal management lines,¹⁷⁴ only one municipality, namely Nelson Mandela Bay Municipality, has formally adopted a set of coastal management lines in

¹⁶⁸ GN 341 in GG 36432 of 10 May 2013.

¹⁶⁹ This is for the Nahoon Estuary (PN 41 in PG 3777 of 19 December 2016).

¹⁷⁰ These are for the Durban Bay and Orange River Mouth Estuary (GN 1034 in GG 39347 of 30 October 2015); Breede River (PN 288 in PG 7653 of 20 July 2016); and Buffels and Swartlinterjies Estuary (PN 41 in PG 2094 of 15 May 2017).

¹⁷¹ While CapeNature published a *Draft Situation Assessment Report: Development of an Estuarine Management Plan for the Klein River* in 2007, a formal estuarine management plan is yet to be adopted for the estuary.

¹⁷² *Eastern Cape Coastal Management Programme* (PN 83 in PG 3150 of 26 March 2014); and *Western Cape Coastal Management Programme* (PN 212 in PG 7620 of 27 May 2016).

¹⁷³ Overstrand Municipality *Integrated Development Plan 85-87, 206*. A Final Situational Analysis Report informing the development of the Overberg District Municipality's Coastal Management Programme was released in 2015 (Overberg District Municipality T01/12-2013/13).

¹⁷⁴ Western Cape Department of Environmental Affairs and Development Planning *Coastal Management (Set-Back) Lines for the Overberg District*.

terms of the NEMICMA.¹⁷⁵ In the absence of most of the specific planning innovations introduced by the NEMICMA, the armoury of most coastal provinces and municipalities, inclusive of the Overstrand Municipality, enabling them to fulfil their responsibility to act as trustees of the coastal zone seems significantly depleted. This responsibility would surely include seeking to balance private proprietary interests and public environmental interests when it comes to managing the natural flows of estuaries passing through the coastal zone, such as the KRE in the *Abbott* case.

Without wanting to end on too negative a note, a depressing conclusion appears to emanate from the above very tardy track record of the relevant national, provincial and local spheres of government to implement most of the important legal innovations highlighted above. It is thus. Even were the SCA to have availed itself of the opportunity to grapple with the heart of the enquiry and dissected the vast, complex and overlapping relevant legislative framework, it would have been compelled to come to a decision in a virtual vacuum, owing to the continued absence of the bulk of the relevant legal innovations contained in the NWA and the NEMICMA of key relevance to managing South Africa's estuarine environment. Hopefully this tardiness will be remedied prior to a similar dispute canvassing local government's executive authority over estuaries coming before the judiciary again, although in the current era where legislative enactment as opposed to implementation appears to be the new vogue, or perhaps internal measure of government performance, this may be unlikely.

Bibliography

Literature

Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary*

Anchor Environmental *Determination of the Ecological Water Requirements for the Klein Estuary - Report Prepared for the Breede-Gouritz Catchment Management Agency* (Anchor Environmental Tokai 2015)

Beck and Basson 2008 *Water SA*

Beck JS and Basson GR "Klein River Estuary (South Africa): 2D Numerical Modelling of Estuary Breaching" 2008 *Water SA* 33-38

Bronstein 2015 *SALJ*

Bronstein V "Mapping Legislative and Executive Powers over 'Municipal

¹⁷⁵ PN 43 in PG 3777 of 19 December 2016.

Planning': Exploring the Boundaries of Local, Provincial and National Control" 2015 SALJ 639-663

CapeNature and iRAP Consulting *Development of an Estuarine Management Plan for the Klein River*

CapeNature and iRAP Consulting *Development of an Estuarine Management Plan for the Klein River, Overberg Region, Western Cape - Draft Situation Assessment Report* (CapeNature and iRAP Consulting Cape Town 2007)

DPLG *Guideline Document on Provincial and Local Government Relations* Department of Provincial and Local Government *Guideline Document on Provincial and Local Government Relations* (The Department Pretoria date unknown)

Driver *et al National Biodiversity Assessment*

Driver A *et al National Biodiversity Assessment 2011: An Assessment of South Africa's Biodiversity and Ecosystems - Synthesis Report* (South African National Biodiversity Institute & Department of Environmental Affairs Pretoria 2012)

Du Plessis *Environmental Law and Local Government*

Du Plessis A (ed) *Environmental Law and Local Government in South Africa* (Juta Cape Town 2015)

European Commission *Ecological Flows*

European Commission *Ecological Flows in the Implementation of the Water Framework Directive - Guidance Document No 31* (European Union Luxembourg 2015)

Freedman 2014 *PELJ*

Freedman W "The Legislative Authority of the Local Sphere of Government to Conserve and Protected the Environment: A Critical Analysis of *Le Sueur v eThekwiwni Municipality* [2013] ZAKZPHC (30 January 2013)" 2014 *PELJ* 567-594

Humby 2014 *PELJ*

Humby T "Localising Environmental Governance: The *Le Sueur* Case" 2014 *PELJ* 1660-1689

Muir 2015 *SAPL*

Muir A "The *Le Sueur* Case and a Local Government's Constitutional Right to Govern" 2015 *SAPL* 556-579

Overberg District Municipality T01/12-2013/13

Overberg District Municipality T01/12-2013/13: *Overberg Coastal Management Programme: Final Situation Analysis Report* (dated June 2015)) accessible at <http://www.overstrand.gov.za/en/documents/strategic-documents/environmental-management-services/coastal-management-programme/2749-t01-12-2013-13-overberg-coastal-management-programme-final-situation-analysis-report/file> on 28 December 2017

Overstrand Municipality *Integrated Development Plan*

Overstrand Municipality *Integrated Development Plan: 4th Review of 2012/2017 Cycle* (The Municipality Overstrand 25 May 2016)

Steytler and De Visser *Local Government Law*

Steytler N and De Visser J *Local Government Law of South Africa* Issue 9 (Lexis Nexis Durban 2016)

Turpie and Clark *Development of a Conservation Plan for Temperate South African Estuaries*

Turpie J and Clark B *Development of a Conservation Plan for Temperate South African Estuaries on the Basis of Biodiversity Importance, Ecosystem Health and Economic Costs and Benefits - Final Report - CAPE Regional Estuarine Management Programme* (Anchor Environmental Cape Town 2007)

Western Cape Department of Environmental Affairs and Development Planning *Coastal Management (Set-Back) Lines for the Overberg District*
Western Cape Department of Environmental Affairs and Development Planning *Coastal Management (Set-Back) Lines for the Overberg District: Project Report* (31 March 2015) accessible at <https://www.westerncape.gov.za/eadp/sites/default/files/news/files/2015-04-08/Overberg%20CML%20Final%20Report%20March%202015.pdf> on 28 December 2017

Case law

Abbott v Overstrand Municipality 2015 JOL 33188 (WCC)

Abbott v Overstrand Municipality 2016 JOL 35969 (SCA)

City of Cape Town v Robertson 2005 2 SA 323 (CC)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC)

Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC)

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 4 SA 744 (CC)

Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill 2000 1 SA 732 (CC)

Ex Parte Western Cape Provincial Government: In re DVB Behuising (Pty) Limited v North West Provincial Government 2000 4 BCLR 347 (CC)

Habitat Council v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape 2013 6 SA 113 (WCC)

Joh-Air (Pty) Ltd v Rudman 1980 2 SA 420 (T)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 2 SA 554 (SCA)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC)

Kenton on Sea Ratepayers Association vs Ndlambe Local Municipality (ECD) (unreported) case number 4341/2014 of 15 June 2016

Le Sueur v Ethekwini Municipality 2013 ZAKZPHC 6 (30 January 2013)

Maccsand (Pty) Ltd v City of Cape Town 2011 4 All SA 601 (SCA)

Maccsand (Pty) Ltd v City of Cape Town 2012 4 SA 181 (CC)

Mazibuko v City of Johannesburg 2010 4 SA 1 (CC)

Minister for Local Government Environmental Affairs and Development Planning, Western Cape v Clairison's CC 2013 6 SA 235 (SCA)

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council 2014 5 BCLR 591 (CC)

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Lagoon Bay Lifestyle (Pty) Ltd 2014 1 SA 521 (CC)

Minister of Mineral Resources v Swartland Municipality 2012 7 BCLR 712

(CC)

Nel v Hessequa Local Municipality (WCC) (unreported) case number 12576/2013 of 14 December 2015

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (AD)

Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning, Western Cape 2012 3 SA 441 (WCC)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 1 SA 337 (CC)

Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 3 SA 371 (SCA)

Legislation

Constitution of the Republic of South Africa, 1996

Environment Conservation Act 73 of 1989

Development Facilitation Act 67 of 1995

Local Government: Municipal Systems Act 32 of 2000

Local Government Transitions Act 209 of 1993

Marine Living Resources Act 18 of 1998

National Environmental Management Act 108 of 1998

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Protected Areas Act 57 of 2003

National Water Act 36 of 1998

Nature Conservation Ordinance (Cape) 19 of 1974

Promotion of Administrative Justice Act 3 of 2000

Sea-Shore Act 21 of 1935

Spatial Planning and Land Use Management Act 16 of 2013

Western Cape Land Use Planning Act 3 of 2014

Government publications

GN R796 in GG 22605 of 24 August 2001 (*Local Government, Municipal Planning and Performance Management Regulations*)

GN 813 in GG 32474 of 3 August 2009 (*National Biodiversity Framework*)

GN R547 in GG 33306 of 18 June 2010 (*Environmental Management Framework Regulations*)

GN 546 in GG 35517 of 20 July 2012 (*Draft Catchment Management Strategy of the Breede-Overberg Catchment Management Agency*)

GN 341 in GG 36432 of 10 May 2013 (*National Estuarine Management Protocol*)

PN 83 in PG 3150 of 26 March 2014 (*Eastern Cape Coastal Management Programme*)

GN 412 in GG 37677 of 23 May 2014 (*Establishment of Breede-Gouritz Catchment Management Agency*)

Proc 5 in GG 39657 of 5 February 2015

GN 1034 in GG 39347 of 30 October 2015 (*Draft Durban Bay and Orange River Mouth Estuarine Management Plans*)

PN 212 in PG 7620 of 27 May 2016 (*Western Cape Coastal Management Programme*)

PN 288 in PG 7653 of 20 July 2016 (*Draft Breede River Estuarine Management Plan*)

GN 1056 in GG 40279 of 16 September 2016 (*Rationalisation of South Africa's Water Management Areas*)

PN 41 in PG 3777 of 19 December 2016 (*Nahoon Estuarine Management Plan*)

PN 43 in PG 3777 of 19 December 2016 (*Nelson Mandela Bay Municipality Coastal Management Lines*)

PN 41 in PG 2094 of 15 May 2017 (*Draft Buffels and Swartlintjies Estuarine Management Plan*)

List of Abbreviations

CMA	Catchment management agency
CMS	Catchment management strategy
DPLG	Department of Provincial and Local Government
ECA	Environment Conservation Act
KRE	Klein River Estuary
MLRA	Marine Living Resources Act
MSL	Mean-Sea Level
NCO (Cape)	Nature Conservation Ordinance (Cape)
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
NEMPAA	National Environmental Management: Protected Areas Act
NEMICMA	National Environmental Management: Integrated Coastal Management Act
NWA	National Water Act
PELJ	Potchefstroom Electronic Law Journal
RQO	Resource quality objectives
SALJ	South African Law Journal
SAPL	South African Public Law
SPLUMA	Spatial Planning and Land Use Management Act
SCA	Supreme Court of Appeal
SSA	Sea-Shore Act
WCLUPA	Western Cape Land Use Planning Act
WMA	Water management areas