

Municipal Courts and Environmental Justice in South African Local Government

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Online ISSN
1727-3781

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Date Submission

8 October 2020

Date Revised

9 June 2021

Date Accepted

21 June 2021

Date published

8 July 2021

Series Editor Prof AA du Plessis

Section Editor Dr IL Owosuyi

How to cite this article

Molaiwa A "Municipal Courts and Environmental Justice in South African Local Government" *PER/PELJ* 2021(24) - DOI <http://dx.doi.org/10.17159/1727-3781/2021/v24i0a8990>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a8990>

Abstract

South African law establishes environmental justice (EJ) as among the environmental management principles to direct decision-making. EJ's inclusion as a guiding principle in the *National Environmental Management Act 107 of 1998 (NEMA)* is relevant because of its legacy of continuing environmental injustices and inequalities concerning natural-resource dependent services and benefits. Also, the municipal service delivery of water and sanitation, electricity, land matters and municipal health should supplement, not compromise local communities' environments, and access should be equitable. In the event of service delivery-related environmental injustices, it is to be expected that communities must have remedial options available, one of which may be access to the judicial system. Therefore, this article seeks to identify and explain the role municipal courts may play specifically in strengthening the relationship between municipal service delivery and improved grass-root level environmental justice in South Africa. The underlying question is whether such courts can be agents of (environmental) change where local communities are exposed to environmental harm due to the failure of municipal services or the environmentally harmful actions of other community members or local industries.

Keywords

Municipal courts; magistrates' courts; courts' role; access to justice; developmental local government; environmental justice.

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1 Introduction

Environmental justice (hereafter EJ) is an established notion that recognises and advocates the fair distribution of environmental hazards and benefits in communities. McDonald¹ and Newton² argue that EJ concerns itself with environmental injustices inherent in the relationship between people and the environment. It invokes special inclusivity and connection between the present and future generations by protecting their environmental interests and equalising the impact on them of resource depletion.

South African law recognises EJ as part of the constitutionally entrenched environmental right, which provides everyone with a right to an environment that is not detrimental to their health and well-being.³ Alongside recognising the people's right to a healthy environment, one may assume that section 24 of the Constitution advocates and is aimed at EJ for all. The evidence of this cannot be gainsaid. The courts' jurisprudence on section 24 explicitly emphasises that environmental protection is justifiable if the development would improve the people's lives and well-being, whether socially or economically.⁴ Construed in the light of the obligations under section 24 of the Constitution, the *National Environmental Management Act*, 107 of 1998 (hereafter NEMA) requires integrating the environment, social and economic factors.⁵ NEMA provides, for example, that "EJ must be pursued

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¹ McDonald *Environmental Justice* 4.

² Newton *Environmental Justice* 3-5.

³ Section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

⁴ See, for example, *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* 2019 1 SA 491 (GP) para 11.11. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 10 BCLR 1059 (CC) (hereafter the *Fuel Retailers* case) paras 4, 44 and 45.

⁵ Section 2(3) of the *National Environmental Management Act* 107 of 1998 (hereafter NEMA).

to avoid the unfair distribution of adverse environmental impacts to any person or vulnerable or disadvantaged people" in particular.⁶

Arguably, the principle of EJ as contemplated in NEMA imposes duties on the state commensurate with the government's constitutional environmental duties. This stems from the fact that NEMA explicitly states that "environmental management must place people and their needs at the forefront of its concern and serve their cultural and social interests equitably."⁷ What this means is that when protecting the environment, environmental management must balance the three pillars of sustainable development while at the same time promoting EJ.

EJ also speaks to local government.⁸ Municipalities are jointly responsible with the other spheres of government for realising environmental rights and for realising the environmentally relevant legal entitlements of communities.⁹ The Constitution stipulates that municipalities must promote a safe and healthy environment for residents, of which a key element is law enforcement through courts and agencies.¹⁰ Given the constitutional and legislative mandate of municipalities to promote a healthy and safe environment, it is expected that municipalities will help enhance EJ by granting access to good municipal services, among other methods.

Despite the above legal framework concerning EJ, social injustice(s)¹¹ have resulted in environmental despoliation and degradation, increased poverty and the unequal distribution of necessary natural resources.¹² Recent statistics suggest that most poor people in South Africa's rural and urban areas are still without the proper delivery of services such as water

⁶ Section 2(4)(c) of NEMA. Also see Murcott 2015 *SALJ* 890-893. See other NEMA principles relevant to this, for example, ss 2(3) and 2(4)(i).

⁷ Section 2 of NEMA.

⁸ The term "local government" will be used interchangeably with the term "municipalities" throughout this paper. It includes metropolitan, district and local municipalities. See ss 155(1)(c) of the Constitution and s 1 of *the Local Government: Municipal Systems Act* 32 of 2000 (hereafter the *Municipal Systems Act*). Also, see the total number of municipalities in South Africa (Municipal Demarcation Board 2020 <http://www.demarcation.org.za/index.php/faq/>).

⁹ Du Plessis 2017 *LDD* 244. Several scholars have analysed the general environmental duties of municipalities in the country; see for example, De Visser 2009 *CJLG* 20-21; De Visser and Christmas 2009 *CJLG* 111-118; Du Plessis 2010 *Stell LR* 267-268; and Fuo 2015 *CJLG* 20-26.

¹⁰ Section 152(1)(d) of the Constitution.

¹¹ These injustices include poverty, unemployment and pollution.

¹² Llewellyn 2018 *J Contemp Afr Stud* 23-24; Beall, Crankshaw and Parnell 2010 *JSAS* 833-834.

services.¹³ Many communities are directly and indirectly exposed to indoor or outdoor pollution, poor urban planning and the impact of climate change, among other things, on an ongoing basis.¹⁴ Given the relationship between human health and well-being and the environmental dependency of valuable services, it is possible to argue that where municipal service delivery fails and threatens human health and well-being, EJ is threatened.

All injustice arising from non-compliance with EJ should, in principle, be judicially challengeable. The Constitution provides that everyone can approach the courts or any impartial courts when their rights enshrined in the Bill of Rights are infringed or when communities are faced with injustices.¹⁵ In this article the focus is on whether the South Africa judiciary is designed to adequately facilitate access to courts for local communities when EJ and environmental rights are threatened due to poor municipal performance. Put differently, this article engages with whether the judiciary is a suitable agent for environmental change.

In particular, a reciprocal nexus is drawn between environmental injustice and low (poor) essential municipal services. The specific question posed is how Municipal Courts can contribute to EJ in South Africa. The objective is to explore how a judicial institution situated in the local sphere of government (i.e. Municipal Courts)¹⁶ could help address specific manifestations of environmental injustice in the local government sphere. Attention is also paid to the common threats to EJ and factors which hamper access to justice in environmentally relevant cases involving local community actors.

Municipal Courts refer to a division of the courts that focus only on local matters.¹⁷ Municipal Courts have exclusive jurisdiction in terms of by-law

¹³ Stats SA 2017 <http://www.statssa.gov.za/publications/P0318/P03182017.pdf> 2-6; Stats SA 2015 <http://www.statssa.gov.za/publications/P0310/P03102014.pdf>.

¹⁴ *Khanyisa Community Development Organisation v Director: Development Management: Region 2, Western Cape Department of Local Government, Environmental Affairs and Development* 2020 2 All SA 485 (WCC).

¹⁵ Reading ss 34 and 38 of the Constitution together.

¹⁶ While exploring the functioning and powers of Municipal Courts it is noted at the outset that this paper does not intend to explore the functioning of a specific Municipal Court or Courts. Instead, it sets out to conceptually consider how a local court (as a type of judicial institution) devoted to municipal matters could potentially assist in resolving and addressing matters of environmental injustice as they occur in local communities across South Africa.

¹⁷ City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate%20and%20Shared%20Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. Municipal Courts are functions of the Department of Justice and Constitutional Development

violations dealing with nuisance matters such as street-trading, municipal planning, outdoor advertising, public open spaces, water services, and waste dumping.¹⁸ These Courts have delegated authority from the Department of Justice and Constitutional Development (hereafter the DoJ & CD) and the National Prosecuting Authority (hereafter the NPA). The delegation was prompted in order to conduct prosecutions concerning a failure to comply with a provision of other legislation that is administered by the municipality and traffic violations.¹⁹

The discussion is divided into four sections. Section 1 explores the meaning and relevance of EJ in the South African municipal context. It sketches the historical background and theoretical account of the emergence of EJ's notion in jurisdictions not confined to South Africa. Section 2 discusses the meaning and relevance of the right to access justice in the South African municipal context from judicial recourse for environmental injustices. Section 3 critically looks at the role and place of Municipal Courts in the South African judicial system with a specific focus on what these courts could contribute to EJ in the country's cities. The last section concludes the discussion and charts a future research and action agenda for Municipal Courts and the role they could potentially play in EJ at the local level.

(DoJ & CD). In the United States of America for example, the use of the term "municipal" in combination with courts refers to a lower court of record which has both civil and criminal jurisdiction over misdemeanour offences such as domestic violence, speeding tickets, evictions, parking violations and damages on default judgements.

¹⁸ City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate%20and%20Shared%20Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. The word "municipal" in the local government context is most frequently understood to refer to a municipality as an entity having the right of self-government. See s 1 of the *Municipal Systems Act*. Municipal Courts function in terms of the *Magistrates' Courts Act* 32 of 1944 (hereafter *Magistrates' Courts Act*).

¹⁹ Section 112(b) and (c) of the *Municipal Systems Act* read with s 22(8)(b) of the *National Prosecuting Authority Act* 32 of 1998. City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate%20and%20Shared%20Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>. By agreement between each municipality, the DoJ & CD and National Prosecuting Authority (NPA), a Municipal Court may conduct and institute criminal proceedings in respect of a contravention of, for example, the *National Building Regulations and Standards Act* 103 of 1977 and the *Spatial Planning and Land Use Management Act* 16 of 2013.

2 Environmental justice in the South African municipal context

2.1 A contemporary definition of environmental justice

While the initial discourse on EJ primarily focussed on the diversity and place-specificity of the United States of America (USA),²⁰ this article adopts a broader definition of the notion to expand its influence and application. The notion of EJ evolved from a social movement by the late 1980s and 1990s to a notion of environmental law, which now concerns environmental equity²¹ and the distribution of environmental harms.²²

In an unequal society such as South Africa's, environmental benefits and resources such as water and clean air are (still) not distributed equally to everyone.²³ Dugard, Alcaro and others argue that the ideology of domination and hegemony continues to shape and influence these resources' distribution paradigm, especially in poor and marginalised communities.²⁴ This suggests that a more inclusive definition would translate into an understanding of EJ that focusses on the total living environment of both the present and future generations, free from racial discrimination and excessive, unfairly distributed externalities.²⁵

A more inclusive understanding of EJ recognises the synergies between the living environment and environmental policy, legislation and government action as they manifest in the provision of public services and public

²⁰ The notion of environmental justice (EJ) was initially employed as a socio-environmental movement to explore and demonstrate the reasons why communities and individuals experience issues of unevenly distributed environmental harm, racism, and natural resource-related injustice in the USA. Since its inception in the USA, EJ has undergone significant conceptual development beyond the unfair and unequal distribution of environmental hazards and benefits. See Schlosberg 2013 *Journal of Environmental Politics* 39 and Griffin *et al* "Environmental Justice and Resilience" 7.

²¹ Newton *Environmental Justice* 3-5. Environmental equity is understood to refer to the circumstances in which environmental harms and benefits are equal and comparable for all in a society, as opposed to environmental inequity, which denotes that environmental harms or threats are disproportionately distributed to or located in poor communities.

²² Agyeman and Evans 2004 *Geogr J* 155-156.

²³ World Bank 2021 <https://www.worldbank.org/en/country/southafrica/overview>. The World Bank states that South Africa remains one of the countries in the world that is unequal in the distribution of opportunities such as employment and economic opportunities. Also see Dugard and Alcaro 2013 *SAJHR* 14-16.

²⁴ World Bank 2021 <https://www.worldbank.org/en/country/southafrica/overview>. Also see Feris 2008 *SAJHR* 29-49.

²⁵ Chemhuru 2019 *SAJP* 34-36. Also see Scott and Oelofse 2004 *JEPM* 449.

decision-making.²⁶ A broader understanding of EJ draws on the understanding of "justice" as being premised on three theoretical dimensions, namely justice as distribution, justice as a procedure, and justice as recognition. Together, these three dimensions help frame the conditions and circumstances under which it would be possible to identify environmental injustice and argue for judicial action in a context such as that of South Africa.

2.1.1 *Distributive environmental justice*

Distributive justice refers to the fair distribution of resources, goods, duties and responsibilities throughout society.²⁷ Munalula notes that distributive justice is a principle that guides the just distribution of benefits, services and burdens.²⁸ According to Schlosberg, an individual cannot access distributive justice without duly having justice in the procedures of distribution for producing equitable distribution.²⁹ It follows that in the environmental context, distributive EJ refers to the fair distribution of environmental burdens or the adverse effects of environmentally harmful facilities.³⁰

The relevance of the above to a broader understanding of EJ is that distributive EJ focusses on the process of distributing environmental goods and resources fairly (green spaces, clean water, air and green transport infrastructure). In the local context, this would mean that everyone in society gets a fair share of services that the municipality must provide in terms of the Constitution or legislation.³¹

2.2.2 *Procedural environmental justice*

Procedural justice is part of the discourse on EJ.³² It denotes the right to equal concern and respect in political and civil decision-making processes about environmental goods and opportunities (e.g. jobs and sustainable development).³³ The term denotes the idea of fairness in the procedures

²⁶ Chemhuru 2019 *SAJP* 36-39. Scott and Oelofse 2004 *JEPM* 449. Debbané and Keil 2004 *Space and Polity* 211.

²⁷ Legal Dictionary 2016 <https://legaldictionary.net/distributive-justice/>; Maiese 2013 <https://www.beyondintractability.org/essay/distributive-justice/>; Johnson, Pete and Du Plessis *Jurisprudence* 180. Also see Munalula 2014 *SADCLJ* 88; Schlosberg *Defining Environmental Justice* 11-13.

²⁸ Munalula 2014 *SADCLJ* 87. Also see White *Crimes against Nature* 170.

²⁹ Schlosberg *Defining Environmental Justice* 56.

³⁰ Clough 2018 *Curr Opin Environ Sci Health* 14.

³¹ Johnson, Pete and Du Plessis *Jurisprudence* 183, 194. Also see Maiese 2013 <https://www.beyondintractability.org/essay/distributive-justice/>.

³² Maiese 2013 <https://www.beyondintractability.org/essay/distributive-justice/>.

³³ Maiese 2013 <https://www.beyondintractability.org/essay/distributive-justice/>.

that resolve disputes and that pertain to the distribution of resources.³⁴ It is a core feature of EJ in conflicts and decisions relating to natural resources. The relationship between distributive justice and the judicial pursuit of EJ provides opportunities for society to access courts and exercise its rights to be heard and given information and reasons for any decision.³⁵

In the context of municipal service delivery, distributive EJ means that providing services to the community is procedurally fair. The provision of essential municipal services must duly consider the overall needs and values of the community openly and transparently.³⁶ One procedure provided for in South Africa to recognise the overall needs and values of a local community is related to the development and adoption of an Integrated Development Plan (IDP).³⁷ The IDP process requires consultation with and the participation of the local community in order to reflect the council's vision for the long term concerning critical development and the distribution of basic amenities such as water, sanitation and refuse collection, among other things.³⁸

2.2.3 *Environmental justice as "recognition"*

Justice as "recognition" emphasises who is given respect by whom, and who is and who is not valued in the decision-making process, for example, concerning the distribution of natural resources or access to environmentally dependent services.³⁹ This dimension of justice also concerns how non-recognition negatively affects the opportunities available to vulnerable and disadvantaged groups in society.⁴⁰ In the environmental context, justice as recognition involves all interested and affected parties and environmental management stakeholders.⁴¹

In the context of South African local government, this typically suggests that municipalities may not design laws, policies or strategies that unfairly discriminate against people directly or indirectly. Municipalities may not discriminate against people due to gender, age, culture, race, pregnancy, sexual orientation or colour regarding the provision of basic municipal services such as water and sanitation, health-care, food and waste

³⁴ Maiese 2013 <https://www.beyondintractability.org/essay/distributive-justice>.

³⁵ Preston "Effectiveness of the Law in Providing Access to Environmental Justice" 34.

³⁶ Reading s 73(2) of the *Municipal Systems Act* with s 195 of the Constitution.

³⁷ Chapter 5 of the *Municipal Systems Act*.

³⁸ Section 26 of the *Municipal Systems Act*.

³⁹ Preston "Effectiveness of the Law in Providing Access to Environmental Justice" 39.

⁴⁰ Gellers and Cheatham 2019 *Wis Int'l LJ* 282.

⁴¹ Schlosberg *Defining Environmental Justice* 25.

removal.⁴² This means that for laws, policies and strategies to contribute to EJ, vulnerable and marginalised people in poor and low-income communities must be able to get access to services that the municipality must provide in terms of the Constitution and legislation.

2.2.4 *Environmental justice as a concept of South Africa law*

EJ is expressly provided in NEMA as follows:

Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.⁴³

EJ is also implied in the following principle:

Equal access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access to it by categories of persons disadvantaged by unfair discrimination.⁴⁴

In the absence of a clear definition of what EJ entails from a South African environmental management perspective, the above principles give some sense of what EJ is supposed to mean. Significant emphasis is placed on the meaningful involvement of all people in environmental governance and complementary civil-based instruments, particularly public participation. Similarly, public participation constitutes a crucial civil-based instrument for ensuring that state decisions do not negatively impact on the environment and people.⁴⁵ In a similar vein, mechanisms such as public participation and notice-and-comment procedures serve as environmental governance tools to consider local communities' environmental concerns whenever an environmental injustice is triggered.⁴⁶

Sector-specific environmental laws are also devoted to the principle of EJ as envisaged by NEMA. For example, the *National Environmental Management: Air Quality Act 39 of 2004* (NEM: AQA) determines that "the burden of health impacts associated with polluted ambient air falls most heavily on the poor" and acknowledges that the "minimisation of pollution is the key to ensuring that air quality is improved" for everyone.⁴⁷ The fact that

⁴² Reading ss 9(3), 152(1) and 153(a) of the Constitution.

⁴³ Section 2(4)(c) of NEMA.

⁴⁴ Section 2(4)(d) of NEMA.

⁴⁵ Draai and Taylor 2009 *J Public Adm* 113; Du Plessis 2008 *PELJ* 22. Also see King and Redell 2015 *PELJ* 948.

⁴⁶ See ss 3 and 4 of the *Promotion of Access to Administrative Justice Act 3 of 2000*.

⁴⁷ The Preamble to the *National Environmental Management: Air Quality Act 39 of 2004*.

NEM: AQA recognises the rights of the poor concerning the environment feeds directly into the aims of EJ. In a similar vein, the *National Environmental Management: Waste Act* 59 of 2008 (NEM: WA) acknowledges the fact that while failures in waste management may have significant negative impacts on the environment, the minimisation of pollution and waste (recycling, reusing and reducing) may be conducive to the environment.⁴⁸ The minimisation of waste may be one of the keys to realising and ensuring that the environment is protected equally for everyone.

Against the background of the above, the following section links EJ and municipal services in South Africa. The point of departure is that a right to essential municipal services⁴⁹ and the scope of section 24 of the Constitution could be meaningfully linked to the EJ discourse.

2.3 The relevance of environmental justice in the municipal context

This section is premised on the view that the absence of basic municipal services such as water and sanitation and waste removal can impact on communities' experience of EJ. Municipalities are mandated to provide services in local communities – several of which are dependent on the availability or protection of natural resources and ecosystems.⁵⁰ Municipal services contribute to the quality of people's lives and well-being.⁵¹ This section explains how municipalities in South Africa are expected to provide services and fulfil their developmental mandate as entrenched in the notion of "developmental local government".⁵² The rationale is that municipal services are inextricably tied to developmental local government.⁵³

2.3.1 The nexus between developmental local government, environmental justice and municipal service delivery

The Constitution obliges municipalities to provide services sustainably, promote socio-economic development and a safe and healthy environment for local communities.⁵⁴ According to the *Municipal Systems Act*, each municipality exercises its executive and legislative authority towards promoting and undertaking "development" in communities.⁵⁵ "Development"

⁴⁸ The Preamble to the *National Environmental Management: Waste Act* 59 of 2008.

⁴⁹ Sections 1 and 5(1)(g) of the *Municipal Systems Act* read together.

⁵⁰ Section 73 of the *Municipal Systems Act*.

⁵¹ The *Municipal Systems Act*. Also see Van der Waldt "Municipal Service Delivery and the Environment" 310.

⁵² De Visser 2009 *CJLG* 9-10; Du Plessis and Fuo 2017 *CJLG* 2.

⁵³ See ss 152(1)(b) and (d) read with s 153(1) of the Constitution.

⁵⁴ Reading ss 152 and 153(a) of the Constitution together.

⁵⁵ Reading ss 11(3)(b) and 4(2)(g) of the *Municipal Systems Act*.

in this instance refers to the improvement of the quality of life of everyone, but especially the poor and disadvantaged, and safeguarding the living standards of future generations.⁵⁶ The *Municipal Systems Act* inadvertently emphasises that development must benefit everyone in society concerning their social, economic, environmental, institutional and infrastructural interests.⁵⁷

Although "developmental local government" (hereafter DLG) has a particular meaning which does not refer directly to EJ, it is of relevance to EJ if one considers its emphasis on fairness, inclusivity and equality. The notion of DLG, as contained in the White Paper on Local Government (hereafter WPLG), has a significant impact on the daily lives of South Africans.⁵⁸ It defines the notion as the commitment of municipalities "to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives."⁵⁹ Arguably DLG also unintentionally emphasises the relationship between the pursuit of EJ and the realisation of several socio-economic rights such as access to health-care, food, water and housing.

Steytler and De Visser argue that DLG should not occur at the expense of the environment and people.⁶⁰ DLG is about more than municipal service delivery, but the latter is a crucial part thereof. The WPLG provides that municipal service delivery must be accessible to all without discrimination and be affordable in the sense that those who cannot afford to pay for the services must get at least a minimum level of provision.⁶¹ Furthermore, the WPLG provides that for services to reflect the purpose of improving the daily lives of people in society, the services must be of good quality, safe and sustainable.⁶²

The idea of universal affordability addresses issues of social inequality broadly by reason that EJ protects the rights of poor and low-income communities. For this reason, a legitimate aim and function of municipalities to promote development in the lives of the people in the communities they

⁵⁶ Section 1 of the *Municipal Systems Act*; Steytler and De Visser *Local Government Law* ch 1.

⁵⁷ Reading ss 1 (definitions of the terms "development" and "local community") and 5(1)(g) of the *Municipal Systems Act* together.

⁵⁸ Section B of the Department of Constitutional Development *White Paper on Local Government* (hereafter WPLG).

⁵⁹ Section B of the WPLG; Steytler and De Visser *Local Government Law* ch 2.

⁶⁰ Steytler and De Visser *Local Government Law* ch 1.

⁶¹ Section F of the WPLG. Also see s 73(2) of the *Municipal Systems Act*; Van der Waldt "Municipal Service Delivery and the Environment" 322.

⁶² Section F of the WPLG.

serve directly translates into the affirmation of EJ. The nexus between DLG (the provision of services) and EJ could be established in that people should have equitable access to environmental resources, benefits and services, several of which are natural resource-dependent.⁶³ This means that municipal service delivery pertaining to water and sanitation, electricity, land matters and municipal health should supplement, not compromise, the state of local communities' environment, and that access should be equitable.⁶⁴ The failure to adequately (reasonably) provide such services to all affects DLG (service delivery) and amounts to a breach of the law. The breach also threatens EJ, if one considers its three dimensions (distribution, procedural and EJ as recognition).

Any injustice arising from non-compliance with EJ should, in principle, be able to be judicially challenged. Therefore, it merits to highlight the importance of accessing justice in matters of environmental injustice as related to municipal service delivery.

3 Meaning and relevance of the right to access to justice in the South African municipal context

3.1 *The need for access to justice in local communities*

According to Dugard, having access to justice relates to the individual's or society's right to be heard when seeking legal redress.⁶⁵ She highlights difficulties that defeat the purpose of accessing justice, especially socio-economic hardships such as gross inequalities, legal costs and geographical disparities.⁶⁶ A lack of financial assistance, legal empowerment, or sometimes the necessary information on how the judicial system works contributes to its failures.⁶⁷ In these circumstances people need assistance, be it of a financial kind or concerning education, in order to be able to benefit from the judicial system, especially when instituting legal proceedings concerning a matter of service delivery or EJ in particular.

Access to justice allows communities that are environmentally, socially, economically, politically or otherwise marginalised to improve their livelihoods.⁶⁸ Access to justice promotes peoples' capabilities, security and

⁶³ Sections 2(4)(c) and (d) of NEMA.

⁶⁴ Linking ss 2(4)(c) and (d) of NEMA together.

⁶⁵ Dugard 2008 *SAJHR* 216. Also see Flynn *Disabled Justice?* 11-12.

⁶⁶ Dugard 2008 *SAJHR* 216.

⁶⁷ Dugard 2008 *SAJHR* 216.

⁶⁸ Staff Reporter *Mail and Guardian* 2015: <https://mg.co.za/article/2015-02-19-being-able-to-access-justice-is-a-human-right/>.

personal choices while at the same time, taking advantage of the law to prevent and address injustices.⁶⁹ For this reason, enabling access to justice grants local communities the power to address or seek remedies in instances where harm occurs or where service delivery is not sufficient.⁷⁰ Access to justice and legal empowerment also make it possible to realise one's rights, such as the right to water, food, sanitation, property, housing, education, and a healthy environment.⁷¹

3.2 The right to access to justice in South Africa

3.2.1 The Constitution

The Constitution enunciates a right to access justice (the courts) to enable anyone to enforce the rights in the Bill of Rights.⁷² Section 34 of the Constitution provides that:

Everyone has the right to have any dispute that the application of law can resolve decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The right to access to justice provides that everyone may approach the courts or other independent and impartial forums when their human rights (to life, dignity or privacy, among others) are violated, or where legal claims are concerned.⁷³ This means that courts and tribunals or forums have the power to make determinations and offer appropriate redress about such infringements or claims.⁷⁴ Frequently the right to access to courts operates in parallel with the right to legal representation for individuals or interested groups who cannot afford legal services.⁷⁵

According to Currie and De Waal, any individual involved in a dispute has three distinct rights, as guaranteed in section 34 of the Constitution, should such an individual resort to this provision.⁷⁶ They posit that the right to access to justice provided in the Constitution creates a right to access to

⁶⁹ Staff Reporter *Mail and Guardian* 2015: <https://mg.co.za/article/2015-02-19-being-able-to-access-justice-is-a-human-right/>.

⁷⁰ Kibugi "Enhanced access to environmental justice in Kenya" 158. UNDP *Programming for Justice* 5.

⁷¹ Mrema and Häntschel 2015 *ABDR* 19.

⁷² Section 34 of the Constitution.

⁷³ Currie and De Waal *Bill of Rights Handbook* 711-715.

⁷⁴ SAHRC Date Unknown <https://www.sahrc.org.za/home/21/files/Access%20to%20Justice%20Pamphlet.pdf>.

⁷⁵ Reading ss 34 and 35(2)(b) of the Constitution together. Notably, this chapter does not equate justice with the claim to a fair trial envisaged in s 35(5) of the Constitution. Dugard 2008 *SAJHR* 218.

⁷⁶ Currie and De Waal *Bill of Rights Handbook* 711.

courts.⁷⁷ They argue further that tribunals or forums involved in resolving disputes other than courts (judicial structures) should be independent and impartial when resolving disputes.⁷⁸ Thirdly, they require that those disputes be resolved in a fair and public hearing in order to embrace the guarantees of a fair trial or proceedings.⁷⁹ The primary purpose of this right is to protect individuals' interests should disputes arise as to which legal rules are applicable. Insisting on the use of section 34 of the Constitution gives effect to the principle of good order or the rule of law, which prohibits self-help in matters that would require judicial intervention.⁸⁰

Although the right to access to justice guarantees direct and indirect access to courts or administrative structures, courts have not interpreted this right as granting immediate legal standing.⁸¹ Prospective litigants still need to adhere to the rules of legal standing.⁸² The right to access to justice is entirely justified when a prospective litigant has sufficient interest in the subject matter concerned.⁸³ For this reason, section 38 of the Constitution broadly determines that to have access to justice (the courts) or tribunals and to be able to institute judicial proceedings, litigants must have a sufficient interest in these proceedings to enforce their rights successfully.⁸⁴

3.2.2 *National Environmental Management Act 107 of 1998*

Section 32(1) of NEMA expressly provides that any person or group of persons may help protect the environment or natural resources by seeking appropriate relief of any breach of a statutory provision in the Act. In this context, NEMA broadens access to justice by providing for appropriate relief and exempting indigent litigants who institute legal proceedings in the interest of protecting the environment from the payment of costs.⁸⁵ From an

⁷⁷ Section 34 of the Constitution. Currie and De Waal *Bill of Rights Handbook* 711.

⁷⁸ Currie and De Waal *Bill of Rights Handbook* 711.

⁷⁹ Currie and De Waal *Bill of Rights Handbook* 711.

⁸⁰ Currie and De Waal *Bill of Rights Handbook* 711.

⁸¹ *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecution* 2009 3 BCLR 309 (CC) para 62. Rautenbach "Introduction to the Bill of Rights" (LexisNexis Online Database).

⁸² Rautenbach "Introduction to the Bill of Rights" (LexisNexis Online Database). See *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions: Zuma v National Director of Public Prosecution* 2009 3 BCLR 309 (CC) para 47.

⁸³ Morrow "The courts and public participation in environmental decision-making" 148. Kibugi "Enhanced access to environmental justice in Kenya" 158.

⁸⁴ This section provides that any person has the requisite legal standing to enforce the rights in the Bill of Rights if that person (a) is acting in his or her own interest; (b) is acting on behalf of another person who cannot act in his or her own name; (c) is acting as a member of, or in the interest of, a group or class of persons; (d) is acting in the public interest; and (e) an association acting in the interest of its members.

⁸⁵ Sections 32(1) and (2) of NEMA.

EJ point of view, the provisions of NEMA give recognition of access to justice in the broader context of protecting the environment.

Access to justice is not confined to direct access to administrative structures or courts. Alternative dispute resolution (ADR) mechanisms could also prove beneficial to people involved in environmental or EJ-related disputes. This is because ADR mechanisms are often more cost-effective, flexible and confidential, and their use might encourage poor and vulnerable people to pursue EJ.⁸⁶ Section 34 of the Constitution directly grants everyone the right to dispute resolution using another independent and impartial tribunal or forum.

The use of ADR mechanisms obviates the barriers of financial constraints or delays in prosecution.⁸⁷ This is because ADR is understood to be mechanisms that resolve disputes outside courts. Its forms include mediation,⁸⁸ arbitration,⁸⁹ conciliation⁹⁰ and facilitation.⁹¹ Authors such as Pretorius⁹² and Bendeman⁹³ point out that the use of ADR methods brings justice to more people, especially the poor, at a lower cost and at a more acceptable speed. NEMA refers explicitly to two ADR methods, namely, conciliation⁹⁴ and arbitration.⁹⁵ The aim of referring disputes to conciliation and arbitration per NEMA is to have fair decision-making, conflict management and environmental protection while at the same time facilitating access to justice in environmental matters.

⁸⁶ Brand "Nature of the Arbitration Process" 100. The characteristics of litigation include formality (the procedure is determined by the Constitution or legislation), the outcome is enforceable, which sometimes destroys ongoing relationships between parties, and the law of precedent is strictly applied.

⁸⁷ Pretorius "Introduction and Overview" 1-2.

⁸⁸ Pretorius "Introduction and Overview" 4; Albertyn "Specialized Arbitration and Mediation" 114; Wiese *Alternative Dispute Resolution* 1-5. Mediation refers to a voluntary process which involves a third person (a mediator) who is impartial and neutral and assists the parties to resolve their dispute. Mediation is voluntary both in its initiation and in its continuation.

⁸⁹ Reading ss 1 and 3 of the *Arbitration Act* 42 of 1965 together. De Jong 2014 *PELJ* 2358. Arbitration is understood to be a "private" process whereby parties voluntarily opt to settle their dispute outside of court. Arbitration is also a form of adjudication. Pretorius "Introduction and Overview" 5. Wiese *Alternative Dispute Resolution* 7.

⁹⁰ Conciliation is more or less the same as mediation. The difference is that the conciliator makes a formal recommendation to the parties for settlement of the dispute in addition to being a mediator. See Pretorius "Introduction and Overview" 4.

⁹¹ Facilitation denotes the process where a facilitator assists two parties or more to resolve a dispute in some form of meeting. Pretorius "Introduction and Overview" 4.

⁹² Pretorius "Introduction and Overview" 2.

⁹³ Bendeman 2007 *African Journal of Conflict Resolution* 139.

⁹⁴ Section 17 of NEMA.

⁹⁵ Section 19 of NEMA.

3.2.3 *Jurisprudence on the right to access to justice*

The courts have interpreted the right to access to justice in such a way as to enhance access for the poor and low-income communities and to curb the recourse to self-help. According to the court in *Concorde Plastics (Pty) Ltd v NUMSA*,⁹⁶ access to justice is the initial requirement for the stability of an orderly community and to ensure that prospective litigants have legal mechanisms capable of resolving disputes among themselves.⁹⁷ The emphasis on access to justice is on the fact that access to the courts ensures that society is at peace and regulated in terms of law and that the institutionalised mechanisms used are fair and are seen to be fair.

The ruling in *Nedbank v Thobejane*⁹⁸ is an example of the courts recognising the right to access justice as enshrined in section 34 of the Constitution. The central question in this case was whether financial institutions must consider the cost implications and the principles concerning access to justice when instituting legal proceedings in the lower or superior courts.⁹⁹ The court held that financial institutions are obliged to consider the rights and the status of poor and low-income communities when choosing a court in which to resolve disputes.¹⁰⁰ According to the court's reasoning, the right to access justice aims to give members of society a meaningful opportunity to institute and efficiently defend any legal action in a court of law.¹⁰¹

The court further emphasised that section 34 of the Constitution places positive duties on the state to remove any restriction, regulation, social or economic hurdle that may prevent the possibility of access to justice.¹⁰² This judgement illustrates the fact that without cognisance of the development of the right to access to justice in the pursuit of effective redress when harm occurs, the ideal of equal access for all will not be attained in the current South African legal dispensation.¹⁰³ Where legal and valid opportunities to seek redress are lacking for whatever reason, this could amount to and exacerbate pre-existing injustices such as environmental injustices.

⁹⁶ *Concorde Plastics (Pty) Ltd v NUMSA* 1997 11 BCLR 1624 (LAC).

⁹⁷ *Concorde Plastics (Pty) Ltd v NUMSA* 1997 11 BCLR 1624 (LAC) paras 1644F-1645A. Also see *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) paras 16-17; *De Vos and Freedman South African Constitutional Law* 632.

⁹⁸ *Nedbank v Thobejane* 2018 4 SA 694 (GP).

⁹⁹ *Nedbank v Thobejane* 2018 4 SA 694 (GP) para 4.

¹⁰⁰ *Nedbank v Thobejane* 2018 4 SA 694 (GP) para 96.

¹⁰¹ *Nedbank v Thobejane* 2018 4 SA 694 (GP) para 79.

¹⁰² *Nedbank v Thobejane* 2018 4 SA 694 (GP) para 79.

¹⁰³ *Nedbank v Thobejane* 2018 4 SA 694 (GP) para 52.

Therefore, a right to enforce environmental law is essential in promoting access to EJ – in the local and other contexts. In this sense, it is possible to reason that in matters regarding access to justice concerning EJ, the state must take into consideration, commensurate with its duties stipulated in section 7(2) of the Constitution, that access to justice requires that people can claim and seek remedies in the judicial system when environmental harm occurs. This means that access to EJ through courts and other forums enables residents who are adversely affected by environmental injustices to participate in and have claims adjudicated relatively and openly, as envisaged by section 34 of the Constitution.

However, the question remains as to why it is still problematic for people (individuals and groups such as communities) to prosecute non-compliance with environmental law in South Africa. Why is access to the courts in cases of environmental injustice an ideal rather than a practicality? To answer this question, it is essential to consider the elevation of some judicial institutions (municipal courts) in terms of their potential to provide access to justice and EJ in local government.

4 "Municipal courts" as part of the South African judicial system

4.1 "Municipal courts" as specialist magistrates' courts

4.1.1 The nature of municipal courts

The potential role of municipal courts in the judicial system is significant, but the challenge is that the role has not yet been clearly defined. "Municipal court" is understood to refer to a division of a magistrate's court that has powers and functions in the handling of municipal matters only.¹⁰⁴ Municipal courts are described as specialist "district magistrates' courts dealing with municipal matters" and as separate lower courts.¹⁰⁵ This court, however, remains a district magistrate's court that operates in terms of the Constitution¹⁰⁶ and legislation.¹⁰⁷ This means that a municipal court is not

¹⁰⁴ City of Tshwane 2018 <http://www.tshwane.gov.za/sites/Business/Bylaws/Pages/Promulgated-By-Laws.aspx>.

¹⁰⁵ City of Tshwane 2018 <http://www.tshwane.gov.za/sites/Business/Bylaws/Pages/Promulgated-By-Laws.aspx>.

¹⁰⁶ Sections 170 and 171 of the Constitution read together.

¹⁰⁷ Municipal Courts functions in terms of the *Magistrates' Court Act 32 of 1944*, *Criminal Procedure Act 51 of 1977*, *National Prosecuting Authority Act 32 of 1998* and *Municipal Systems Act*.

autonomous or a separate lower court but has delegated authority under legislation from the DoJ & CD and the NPA to conduct prosecutions.¹⁰⁸

According to section 22(8)(b) of the *National Prosecuting Authority Act*,¹⁰⁹ the National Director of Public Prosecutions (NDPP) may authorise any local authority to conduct prosecutions in respect of statutory offences as well as municipal by-laws. However, municipalities derive their authority to conduct prosecutions from the Municipal Systems Act. Section 112 of the Act determines that an authorised municipal staff member has powers to institute criminal proceedings in matters relating to infringements of any municipal by-law, policy and regulation. These provisions empower municipalities to establish and introduce municipal courts to rationalise court jurisdictions, particularly the prosecution of municipal by-laws and traffic offences and service delivery.¹¹⁰ The aim of rationalising municipal courts was to enhance access to justice in local communities, streamline the prosecutorial process concerning municipal matters, and consolidate cooperative governance between the DoJ & CD and the NPA.¹¹¹

In recent years many municipalities have shown a great interest in establishing and introducing municipal courts in their jurisdictions. Municipalities like the City of Cape Town,¹¹² Ekurhuleni,¹¹³ eThekweni,¹¹⁴

¹⁰⁸ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹⁰⁹ *National Prosecuting Authority Act* 32 of 1998.

¹¹⁰ In a break with the past, local government went through an initial process of transformation in the post-constitutional era. Chapter 7 of the Constitution is dedicated to local government. Now municipalities have a wide range of powers and functions to effectively administer the executive functions outlined in s 156(1) of the Constitution. See *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 36.

¹¹¹ According to s 2(1) of the *Magistrate's Courts Act*, the Minister may establish a district magistrate's court to prosecute matters such as shoplifting, damage to property, and drinking and driving, the purpose being to enhance access to justice services at courts that are located closer to where people live. DoJ & CD 2014 <https://www.gov.za/minister-launch-rationalisation-courts-part-access-justice#>.

¹¹² City of Cape Town 2021 <https://www.capetown.gov.za/Family%20and%20home/See-all-city-facilities/Our-service-facilities/Municipal%20courts>. The City of Cape Town manages eleven municipal courts.

¹¹³ There are four rationalised magisterial districts in Ekurhuleni namely: Ekurhuleni Central (Palm Ridge and Germiston), Ekurhuleni East (Springs and Nigel), Ekurhuleni North (Kempton Park, Boksburg and Tembisa) and Ekurhuleni South East (Benoni, Brakpan, Daveyton and Tsakane).

¹¹⁴ eThekweni Municipality 2011 http://www.durban.gov.za/City_Government/Administration/city_manager/LegalServices/Pages/Municipal-Courts.aspx. There is only one municipal court in eThekweni Municipality.

Johannesburg¹¹⁵ and Tshwane¹¹⁶ have introduced municipal courts to provide services such as traffic fines, or general inquiries about the payment of outstanding traffic fines and municipal accounts.¹¹⁷ Emfuleni,¹¹⁸ George¹¹⁹ and Mossel Bay¹²⁰ local municipalities have introduced municipal courts to provide a modern, well-run court service and sustain public confidence in the criminal justice system.¹²¹

The role and function of the municipal courts are meaningful in the prosecution of by-law offences and the imposition of the sanctions provided for in these by-laws. Municipal courts have jurisdiction in matters of municipal by-law violations dealing with nuisance, waste dumping, public amenities, cemeteries, air quality management, events management, outdoor advertising and informal trading and traffic rules.¹²² However, section 112 of the *Municipal Systems Act* determines that a municipal court may have jurisdiction to prosecute violations and non-compliance with any legislation administered by a municipality, for example, the *National Building Regulations and Building Standards Act* 103 of 1977. Under section 112, a prosecutor in a municipal court or an authorised municipal staff member

¹¹⁵ There are four magisterial municipal courts in the City of Johannesburg namely: Johannesburg Central, North (Randburg, Midrand and Alexandra) West (Roodeport) and in Emfuleni (Vereening district). Johannesburg Innercity Partnership 2017: <https://www.jicp.org.za/news/joburg-municipal-courts-launching-in-johannesburg/>.

¹¹⁶ City of Tshwane 2015 <http://www.tshwane.gov.za/sites/residents/Services/MunicipalityCourts/Pages/Municipal-Court-Listing.aspx>. There are three main courts (Pretoria Central, Centurion and Wonderboom) and five satellite courts (Mamelodi, Garankuwa, Soshanguwe, Temba and Atteridgeville).

¹¹⁷ Buffalo City municipality is also set to establish a municipal court. Gowa 2017 <https://www.dispatchlive.co.za/news/2017-05-23-r4m-municipal-court-on-cards/>.

¹¹⁸ Emfuleni Local Municipality 2011 <http://www.emfuleni.gov.za/index.php/gallery/5-municipal-courts/municipal-courts4>.

¹¹⁹ George Local Municipality 2021: <https://www.george.gov.za/george-municipal-court-committed-to-service-despite-stringent-covid-regulations/>. Anon 2015 <https://www.georgeherald.com/News/Article/General/municipal-court-for-george-approved-20170711>.

¹²⁰ Anon 2021 <https://www.mosselbayadvertiser.com/news/News/General/20674/Green-light-for-municipal-court>.

¹²¹ Emfuleni Local Municipality 2011 <http://www.emfuleni.gov.za/index.php/gallery/5-municipal-courts/municipal-courts4>.

¹²² Emfuleni Local Municipality 2011 <http://www.emfuleni.gov.za/index.php/gallery/5-municipal-courts/municipal-courts4>; City of Tshwane 2015 <http://www.tshwane.gov.za/sites/residents/Services/MunicipalityCourts/Pages/Municipal-Court-Listing.aspx>. However, by virtue of the commencement of *Administrative Adjudication of Road Traffic Offences Act* 46 of 1998 (AARTO), many municipalities elect not to establish municipal courts for traffic law violations. This is because AARTO aims to facilitate the adjudication of road traffic infringements and to support the prosecution of offences in terms of the national and provincial laws relating to road traffic. See AARTO Date Unknown <https://online.aarto.gov.za/#/>.

may effectively and successfully prosecute any offender who fails to comply with any provision or regulation in the Act.

Municipal courts also have jurisdiction in matters connected with the particular provisions enshrined in the *Criminal Procedure Act* (hereafter CPA).¹²³ For example, where a municipal court intends to prosecute an accused for non-compliance with or the infringement of a by-law, it may issue a summons in order to secure the attendance of the accused successfully.¹²⁴ The issued summons must contain the complete charge and information specifying the place, date and time for appearance at the municipal court.¹²⁵ Subsequently, if the accused fails to appear, a municipal court may issue a warrant of arrest to secure his or her attendance. For this reason, a municipal court may impose a fine not exceeding R300 or sentence the accused to imprisonment for a period not exceeding three months if there are compelling and aggravating circumstances.¹²⁶

4.1.2 Establishment of municipal courts and appointment of judicial officers

Every municipality requires collaboration with the DoJ & CD and NDPP to establish a municipal court successfully.¹²⁷ This collaboration initially requires a municipality to provide a detailed motivation for establishing a municipal court as an additional and specialist magistrate's court in the judicial system.¹²⁸ When a municipality intends to establish a municipal court, the municipal manager¹²⁹ must firstly consult with the DoJ & CD, the NDPP and the area court manager regarding the need for a municipal court.¹³⁰ During this process, the municipal manager must submit a proposed comprehensive business plan together with a detailed prior establishment investigative report which outlines the mission and vision of

¹²³ *Criminal Procedure Act* 51 of 1977 (hereafter CPA). A municipal court is a district magistrate's court and is operational in terms of the CPA and the *Magistrates' Courts Act*.

¹²⁴ Section 54 of the CPA. However, an accused may elect to admit guilt and pay a fine in terms of s 57 of the CPA.

¹²⁵ Section 54(1) of the CPA. In a similar manner, a municipal court may issue a written notice to the accused in terms of s 56(1) of the CPA.

¹²⁶ Section 55(2) of the CPA. Compelling and aggravating circumstances include failure to appear without a proper reason.

¹²⁷ Linde 2003 *Local Government Bulletin*; DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹²⁸ Linde 2003 *Local Government Bulletin*; DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹²⁹ Section 82 of the *Local Government: Municipal Structures Act* 117 of 1998 defines a municipal manager as the head of municipal administration as well as the accounting officer for the municipality.

¹³⁰ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

the municipal court.¹³¹ Also, the costs associated with the establishment, functioning and challenges encountered, alternative plans, and the municipality's budget must be included in the report.¹³² The reason for requiring the presentation of a business plan in the initial phase is to scrutinise whether the proposed plan is linked to an approved municipal budget and the municipality's IDP.¹³³

The municipal manager and the relevant municipal legal department must describe to the DoJ & CD and the NPA the advantages of establishing a municipal court and the disadvantages of not doing so.¹³⁴ The aims of the establishment must reflect what a municipal court as an additional district magistrate's court would seek to achieve.¹³⁵ In most instances, the aims of establishing the municipal court should be to primarily ensure the implementation and enforcement of all municipal by-laws in conjunction with effective prosecution should infringements arise as a matter of non-compliance.¹³⁶ Also, a municipal court must seek to impose appropriate fines or penalties and sentences in imprisonment cases, provide access to fair and speedy justice services for all, and ease the roll of the existing magistrates' courts.¹³⁷

Thirdly, a municipality must consider the following factors in an attempt to establish a municipal court: the number of all municipal-related cases requiring prosecution, the number of court days allocated to these cases in an ordinary magistrate's court, and statistics and data showing the cases reported and the success rates.¹³⁸ By so doing, a municipality will

¹³¹ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹³² DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹³³ Section 1 of the *Local Government: Municipal Finance Management Act* 56 of 2003 (hereafter MFMA). The approved budget refers to an annual budget that is adopted and approved in terms of s 16 of the MFMA. The recent report issued by the Auditor-General seems to indicate that municipalities have run out of funds. This could hamper the establishment of municipal courts, which is a risk to realising EJ. AGSA 2019 <https://www.agsa.co.za/Reporting/MFMAReports/2017-2018MFMA.aspx>.

¹³⁴ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹³⁵ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

¹³⁶ Linde 2003 *Local Government Bulletin*.

¹³⁷ This must be authorised in terms of s 92(1) of the *Magistrates' Courts Act*; DoJ & CD 2016:

https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html;
George Local Municipality 2021: <https://www.george.gov.za/george-municipal-court-committed-to-service-despite-stringent-covid-regulations/>

¹³⁸ DoJ & CD 2016: https://www.justice.gov.za/m_speeches/2016/20160513_StellenboschCourt.html.

successfully allocate sufficient time to prosecute specific offences and to trace all exceptional cases on the roll in order to avoid double jeopardy.¹³⁹ A municipality should also consider cases withdrawn and the reasons that precipitated the withdrawal, the warrants of arrest issued (including outstanding warrants, cases allowed after the execution of warrants per day).

4.2 *Municipal courts for improved access to the justice system in cases of environmental injustice*

South African local communities are legally entitled to EJ, and they also have legal standing and the right to access judicial recourse in the event of environmental harm. The question that remains to be answered is how municipal courts *per se* can enhance EJ at the local level, where municipalities fail to deliver services or address pollution in a fair and equal manner. In order to arrive at a finding on this matter, it is essential first to outline the requirements for a municipal court to be able to function in the local "environmental" space.

Firstly, in an endeavour to achieve EJ in local communities, municipalities (together with the national and provincial spheres) have a legal duty to protect the environment and the health and well-being of the community.¹⁴⁰ The Constitution also explicitly provides that municipalities must promote a safe and healthy environment for the community.¹⁴¹ A key to protecting and promoting a safe and healthy environment for the community is arguably applying and enforcing relevant municipal by-laws.¹⁴² This is because many municipal by-laws regulate activities that are concomitant with working and residing in an environment free from health risks, which is one of the critical pillars of EJ. For this reason, municipalities could fulfil their constitutional environmental duties and strengthen the EJ principle in South African local communities through establishing a visible judicial institution (a municipal court) that is dedicated to the handling and prosecution of non-compliance with (environmentally relevant and service delivery-related) by-laws.

Secondly, municipal courts are designed to adequately facilitate access to justice (being the courts closest to the community) in instances where

¹³⁹ Cox 2005 <https://www.iol.co.za/news/south-africa/joburg-municipal-court-fails-to-take-up-slack-251108>. Double jeopardy refers to a procedural defence that prevents an accused person from being prosecuted again on the same offence. Merriam Webster 2021 <https://www.merriam-webster.com/dictionary/double%20jeopardy>.

¹⁴⁰ Sections 7(2) and 40(1) of the Constitution read together.

¹⁴¹ Section 152(1)(d) of the Constitution.

¹⁴² Linde 2003 *Local Government Bulletin*.

(environmental) rights and (service delivery) entitlements are threatened or where harm has occurred as a result of the infringement. This means that where EJ and environmental rights, in particular, are at risk or infringed, a local community member or a group of such people may approach a municipal court to resolve the dispute as an indirect way of accessing and enforcing EJ.¹⁴³ It follows that municipal courts, with their specialist powers to prosecute non-compliance with by-laws or other relevant legislation¹⁴⁴ and traffic violations, may broaden access to justice and effectively provide relief to the rolls of the existing magistrates' courts.¹⁴⁵

Thirdly, municipal courts as courts of first instance in the prosecution of non-compliance with environmental by-laws¹⁴⁶ are well-placed to prioritise the principles of NEMA.¹⁴⁷ Prioritising the NEMA principles would require municipal courts to dedicate resources to achieving successful prosecutions of non-compliance with environmental by-laws. Municipal courts could achieve the successful prosecution of these by-laws by ensuring that qualified, experienced and dedicated judicial officers, court administrators and law enforcement personnel have the required knowledge of both the environmental and local government laws to contribute to EJ.¹⁴⁸ These courts could also ensure that all transgressors appear in court and could

¹⁴³ See s 34 of the Constitution. Access to justice is a critical pillar of EJ, especially when environmental injustice occurs. Kotzé and Du Plessis 2010 *J Ct Innovation* 162; Nealer 2005 *J Public Adm* 470; Friedman 2010 *Fordham Urb LJ* 3. Also see art 9 of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998).

¹⁴⁴ See s 112 of the *Municipal Systems Act*.

¹⁴⁵ Municipal matters are often unnecessarily withdrawn from the court rolls due to administrative deficiencies, poor law enforcement, or a lack of departmental integration and partnerships with other stakeholders such as the South African Police Service (SAPS), AARTO and traffic departments. Furthermore, there is a gap between adherence and enforcement which creates backlogs both in the judicial system and in municipalities, as well as delays in the prosecution of contraventions of by-laws.

¹⁴⁶ Environmental by-laws typically deal with air pollution and noise control, street-trading, waste management, water services, outdoor advertising and public health, among other matters.

¹⁴⁷ Section 2(1) of NEMA significantly provides that the Act applies throughout the country and binds all actions that have adverse effect on the environment.

¹⁴⁸ For appointment of judicial officers in magistrate's courts see sections 8 and 9 of the *Magistrate's Court Act* 44 of 1944. It is established that unqualified, unexperienced and undedicated judicial officers, court administrators and law enforcement undermine and impede on the successful prosecution of non-compliance with environmental by-laws since it is difficult to interpret the law, resolve disputes impartially and contribute to law-making by coming to sound and useful judgements that could strengthen EJ in local communities. On the critical roles of the courts in the pursuit of EJ as well as of environmental protection and sustainability, see Kotzé and Du Plessis 2010 *Journal of Court Innovation* 159-160 and Qumbu *Role of Courts in Promoting Water Security* 42.

expedite the turn-around time in EJ cases. In a similar vein, the decisions of these courts could also serve as a deterrent to those who might engage in acts that do not comply with the environmental by-laws.¹⁴⁹

The next step is to determine (in the event of municipal courts being established and having environmental authority) how such courts should go about providing remedial judicial. Firstly, a municipal court¹⁵⁰ has to protect the constitutional rights by upholding the law and resolving disputes impartially.¹⁵¹ This duty reflects the ruling in the *Fuel Retailers* case that courts have a potential role to play in protecting and promoting the rights in the Bill of Rights, particularly in section 24, in the purview of sustainable development.¹⁵² For this reason, the specialist powers and functioning of municipal courts are critical to the pursuit of EJ and environmental protection and sustainability.¹⁵³ This is because these courts must uphold the law in practice, interpret the law to resolve disputes impartially, and contribute to law-making by coming to sound and reasonable judgements that could strengthen EJ in local communities.¹⁵⁴

Secondly, in the municipal context and service delivery, municipal courts would exercise their adjudicative (specialist) powers and functions generally to protect and promote rights concerning the distribution of services and ensure that municipalities respect and fulfil these rights.¹⁵⁵ Through their specialist powers and functions in promoting a healthy environment, municipal courts can contribute to the broader advancement and protection of EJ in local South African communities. According to section 152(1)(d) of the Constitution, municipalities are constitutionally mandated to promote a safe and healthy environment for residents. A key element in promoting a

¹⁴⁹ Ngqakamba 2018 <https://www.news24.com/news24/SouthAfrica/News/tavern-owner-sentenced-to-2-years-in-jail-for-noise-pollution-in-neighbourhood-20180810>. Tshwane Municipal Court, sitting in the Soshanguwe Magistrate's Court, sentenced a tavern owner who contravened Gauteng noise control regulation after being served notices of contravention several times. See regs 2 and 9 of the *Gauteng Noise Control Regulations* in GN 75 in GG 5479 of 20 August 1999.

¹⁵⁰ McLeod-Kilmurray "Lowering Barriers to Judicial Enforcement" 289. Generally, courts are the most powerful institutions involved in the enforcement of laws; this in comparison with other institutions such as non-governmental organisations and environmental practitioners.

¹⁵¹ Sections 39 and 165 of the Constitution read together; Kotzé and Du Plessis 2010 *J Ct Innovation* 159-160; Qumbu *Role of Courts in Promoting Water Security* 42.

¹⁵² *Fuel Retailers* case paras 44-45.

¹⁵³ Soyapi *Role of the Judiciary in Advancing the Right to a Healthy Environment* 76-77.

¹⁵⁴ Kotzé and Du Plessis 2010 *J Ct Innovation* 159-160. Also see Qumbu *Role of Courts in Promoting Water Security* 42.

¹⁵⁵ See s 7(2) of the Constitution; Soyapi *Role of the Judiciary in Advancing the Right to a Healthy Environment* 102.

safe and healthy environment is law enforcement through courts and agencies.

The Court in *Le Sueur v eThekweni Municipality*,¹⁵⁶ for example, submitted that it would be implausible to exclude municipalities from legislating concerning environmental matters at the local level particularly for matters in Schedules 4 Part B and 5 Part B of the Constitution.¹⁵⁷ Therefore, municipal courts could have a role in the local pursuit of EJ by explicitly promoting a safe and healthy environment.¹⁵⁸ Ideally, these courts should be situated in one locality (one building). Also, most municipal courts offer more than just the prosecution of non-compliance with by-laws. For example, the accessibility of the courts also leads to the provision of information on by-laws and traffic fines, customer care, responses to inquiries relating to outstanding individual fines, the development of public trust and confidence, and the perception that the court is independent and accountable.¹⁵⁹

5 Conclusion

EJ and its pursuit are complicated and not easy to box in terms of who is responsible for exactly what and when. This article has aimed to argue that environmental injustices often surface in local areas where municipal services fail, concerning their sustainability and equal provision. The focus was, however, on the potential impact that municipal courts may have in the municipal areas of South Africa as far as pertains to service delivery-related environmental injustices. It is thus possible to reason that municipal courts could play a role in strengthening the relationship between municipal service delivery and improved grass-root level EJ in the country. These courts can also be agents of (environmental) change where local communities are exposed to environmental harm due to a lack of municipal services or the environmentally harmful actions of other community members or local industries.

This is warranted because municipal courts have specialist powers to challenge any injustice resulting from non-compliance with environmental

¹⁵⁶ *Le Sueur v EtheKwini Municipality* 2013 ZAKZPHC 6 (30 January 2013).

¹⁵⁷ *Le Sueur v EtheKwini Municipality* 2013 ZAKZPHC 6 (30 January 2013) paras 19-20, 40.

¹⁵⁸ Section 152(1)(d) of the Constitution.

¹⁵⁹ City of Tshwane 2015 <http://www.tshwane.gov.za/sites/Departments/Corporate%20and%20Shared%20Services/LegalServices/MunicipalCourts/Pages/Municipal-Courts.aspx>; City of Cape Town 2021 <https://www.capetown.gov.za/Family%20and%20home/See-all-city-facilities/Our-service-facilities/Municipal%20courts>.

by-laws or laws aimed at EJ. Municipal courts could also improve EJ by advancing the fair and reliable prosecution of non-compliance with environmental by-laws in communities. Achieving fair and reliable prosecutions would require municipal courts to have sufficient time and resources to function optimally. Therefore, dedicated magistrates and prosecutors (and other staff members) would need to be appointed. Also, the number of court days would have to be increased and the standard of law enforcement would have to be improved.

The above finding suggests that advancing the fair and reliable prosecution of non-compliance with environmental by-laws is feasible, firstly, by reason that the DoJ & CD have rationalised municipal courts to enhance access to justice in local communities and have withdrawn municipal matters from the jurisdiction of other courts. This finds support in that access to courts closest to where harm occurs is one of the critical pillars of EJ. Secondly, the nature and jurisdiction of municipal courts allow the prosecution of non-compliance with any by-law, including environmental by-laws. Arguably, prosecuting non-compliance with by-laws in general or environmental by-laws serves as a deterrent and suggests that municipal courts are institutions demonstrably able to advance the fair and reliable prosecution of by-laws in the pursuit of EJ in South Africa.

Bearing in mind the backlogs in the court rolls, the deficiencies that are associated with a lack of quality, the inadequate qualifications and experience of presiding officers and court officials in environmental and local government law in the justice system, municipal courts could thirdly contribute to EJ in South Africa by employing suitable candidates in advancing municipal matters to achieve successful prosecutions. Fourthly, municipal courts could remedy the inefficiencies of the current justice system concerning municipal matters by prioritising these matters and dedicating time and resources to them. Finally, municipal courts could improve the status of EJ and service delivery in local South African communities by prosecuting municipalities for their failure to deliver and to provide and distribute municipal services in a fair and equal manner, as required by the Constitution. This means that well-established and efficient municipal courts would help residents with service delivery and that residents could use these courts to report environmental harm.

Therefore, based on the findings above, some of the overarching recommendations are firstly that municipalities should consider establishing more municipal courts to broaden access to justice (and EJ) and advance the fair and reliable prosecution of by-law offences. In so doing, municipal

courts could help address environmental injustice in local communities. Secondly, in criminal and civil proceedings concerning the nexus between EJ and the provision of essential services, there is a need to train municipal prosecutors and magistrates to include references to EJ in charges and sentencing in existing municipal courts and processes by invoking section 2(1)(e) of NEMA.¹⁶⁰ The training and exposure to environmental law and EJ would instil knowledge of and skill in applying the principles of NEMA alongside other relevant considerations when protecting the environment. Thirdly, invoking the provisions of section 2(1)(e) of NEMA would also optimise the streamlining of the prosecutorial process and the enactment of the *Municipal Courts Act*. The enactment of the Act could improve the status, powers and functions of municipal courts concerning access to EJ since these courts depend on other specific laws concerned with the judicial processes.

Fourthly, the production of a prosecutorial manual on by-laws (including environmental by-laws) and traffic offences in municipal courts across the country could address enforcement issues between the DoJ & CD, the NPA and municipalities. Fifthly, municipalities need to take advantage of the modernisation and digitalisation of municipal courts to move away from inefficient methods, reduce costs, and improve the status of access to EJ in local communities. Finally, there should be an evaluation of municipal courts every year to track developments and statistics concerning the warrants of arrest issued and the cases outstanding concerning environmental by-laws. These findings and recommendations suggest that further research may be necessary. However, for now it is established that municipal courts can be valuable and that as a judicial institution, they must be embraced and their establishment, actively supported.

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¹⁶⁰ This provision guides the interpretation, administration and implementation of NEMA in the protection and management of the environment.

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List of Abbreviations

AARTO	Administrative Adjudication of Road Traffic Offences Act 46 of 1998
ABDR	Asian Biotechnology and Development Review
ADR	Alternative dispute resolution

AGSA	Auditor-General South Africa
CJLG	Commonwealth Journal of Local Governance
CPA	Criminal Procedure Act 51 of 1977
Curr Opin Environ Sci Health	Current Opinion in Environmental Science and Health
DLG	Developmental local government
DoJ & CD	Department of Justice and Constitutional Development
EJ	Environmental justice
Fordham Urb LJ	Fordham Urban Law Journal
Geogr J	Geographical Journal
IDP	Integrated Development Plan
J Contemp Afr Stud	Journal of Contemporary African Studies
J Ct Innovation	Journal of Court Innovation
J Public Adm	Journal of Public Administration
JEPM	Journal of Environmental Planning and Management
JSAS	Journal of Southern African Studies
LDD	Law, Democracy and Development
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
NDPP	National Director of Public Prosecutions
NEMA	National Environmental Management Act 107 of 1998
NEM: AQA	National Environmental Management: Air Quality Act 39 of 2004
NEM: WA	National Environment Management: Waste Act 59 of 2008
NPA	National Prosecuting Authority
NPC	National Planning Commission
PELJ	Potchefstroom Electronic Law Journal
SADCLJ	Southern African Development Community Law Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SAJP	South African Journal of Philosophy
SALJ	South African Law Journal
Stats SA	Statistics South Africa
UNDP	United Nations Development Programme

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