

Municipal Sewage Pollution in South Africa: Evaluating Criminal Prosecution, Legal Defences and Regulatory Reform

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Abstract

South Africa faces a severe water crisis, worsened by municipal sewage pollution contaminating its already scarce freshwater resources. Despite their constitutional mandate to manage wastewater and sewage disposal, many municipalities operate ageing, poorly maintained and often dysfunctional wastewater treatment works (WWTWs). These facilities often discharge untreated or partially treated sewage into water systems, causing widespread pollution of rivers, dams and groundwater, leading to serious environmental degradation, increased public health risks and reduced access to safe drinking water. By failing to maintain essential infrastructure and prevent sewage overflows into natural water sources, municipalities – as organs of state – have become major contributors to water pollution in South Africa. In response hereto, the state has increasingly turned to criminal sanctions as a means of enforcing accountability.

This article critically examines this emerging trend in holding municipalities accountable, despite constitutional principles favouring cooperative governance. The article further explores the typical legal defences raised by municipalities and their officials in response to prosecution, drawing on recent court decisions to assess how the judiciary has addressed these arguments. Furthermore, it reviews recent legislative and policy reforms aiming to strengthen enforcement and improve accountability in the water and sanitation sector. Ultimately the article assesses the effectiveness of current legal mechanisms and suggests reforms to enhance municipal responsibility and protect South Africa's water resources.

Keywords

Criminal sanctions; defences; municipalities; pollution; prosecution; sewage; water crisis; wastewater; wastewater treatment works.

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1 Introduction

South Africa's status as a water-scarce country¹ stems from a combination of physical and economic factors that intensify the nation's water shortages.² Physical scarcity arises when available water cannot meet the demands of all users.³ Irregular rainfall patterns, frequent droughts and increasing population pressure further deplete the already limited water resources.⁴ At the same time, economic factors such as inadequate investment in water infrastructure and poor maintenance of existing systems hinder the effective delivery and governance of water services. Widespread pollution from various sources exacerbates the crisis. Together, these challenges contribute to a deepening water crisis⁵ that requires strict pollution control and urgent investment in infrastructure maintenance.

A key component of addressing South Africa's water challenges is effective wastewater treatment, which is vital in reducing water pollution. By removing harmful contaminants before they are discharged into natural water systems, wastewater treatment protects both the environment and public health.⁶ However, the country's sanitation and wastewater treatment infrastructure is currently under severe and increasing strain. During a 2021 National Green Drop Baseline summary, five out of the nine provinces had a Green Drop score of less than 50%.⁷ In 2022 39% of municipal Wastewater Treatment Works (WWTWs) were reported to be in a critical state and placed under regulatory surveillance.⁸ In 2023 29% of all municipal WWTWs' risk profiles were classified as "high", and 24% of all municipal WWTWs' risk profiles were classified as "critical".⁹ Alarming reports have

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¹ Muller *et al* 2009 <https://www.dbsa.org/sites/default/files/media/documents/2021-03/DPD%20No12.%20Water%20security%20in%20South%20Africa.pdf> 9, 18.

² Mnisi date unknown <https://hsf.org.za/publications/hsf-briefs/water-scarcity-in-south-africa-a-result-of-physical-or-economic-factors>.

³ Mnisi date unknown <https://hsf.org.za/publications/hsf-briefs/water-scarcity-in-south-africa-a-result-of-physical-or-economic-factors>.

⁴ Du Plessis *Water as an Inescapable Risk* 13-25.

⁵ Du Plessis *Water as an Inescapable Risk* 13-25.

⁶ Without proper treatment, pollutants can disrupt aquatic life, damage ecosystems, and contaminate drinking water sources.

⁷ DWS 2023 <https://ws.dws.gov.za/iris/releases/GDWR.pdf> 4.

⁸ DWS 2023 <https://ws.dws.gov.za/iris/releases/GDWR.pdf> 3.

⁹ DWS 2023 <https://ws.dws.gov.za/iris/releases/GDWR.pdf> 4.

also revealed excessive unlawful disposal or discharge of raw sewage into vital water sources.¹⁰

Section 156 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) grants municipalities executive authority over local government matters explicitly listed in Part B of Schedule 4, which includes "domestic wastewater and sewage disposal systems". This constitutional provision establishes a clear and legally binding responsibility for local governments to provide essential services in this domain. Consequently, when municipalities engage in the unlawful disposal or discharge of wastewater and sewage, they are not only contravening statutory provisions, but they are also failing to fulfil their constitutionally mandated duties.

This breach of constitutional obligation manifests in various legal violations. For example, as organs of state municipalities are legally bound by the general duty of care under section 28 of the *National Environmental Management Act 107 of 1998* (*NEMA*), which requires proactive, reasonable measures to prevent significant environmental pollution and degradation. The repeated discharge of untreated or partially treated sewage directly contravenes this duty.¹¹ Furthermore, under section 21 of the *National Water Act 36 of 1998* (*NWA*), the discharge or disposal of wastewater into a water resource is classified as a regulated water use, which requires prior authorisation through a Water Use Licence (WUL). In many cases, municipalities either fail to obtain the necessary WUL or disregard the conditions thereof, leading to the pollution of water resources and constituting offences under section 151 of the *NWA*.¹² As will be argued in more detail below, the failure extends to other national environmental legislation, including the *National Environmental Management: Waste Act 59 of 2008* (*NEM:WA*) and the *National Environmental Management: Integrated Coastal Management Act 24 of 2008* (*NEM:ICMA*), which govern waste management and coastal resource protection respectively, as well as the *Water Services Act 108 of 1997* (*WSA*). In addition to environmental contraventions, the unlawful disposal or discharge of sewage is often linked

¹⁰ See, for example, Afriforum 2024 <https://www.polity.org.za/article/sewage-pollution-in-the-vaal-river-catchment-threatens-gautengs-water-security-2024-11-15>; Mnguni 2022 *WIT Transactions on Ecology and the Environment* 17-26.

¹¹ Note, however, that this duty of care may be fulfilled where the discharge is permitted or authorised and environmental harm is minimised or rectified. See the wording of s 28(1) of the *National Environmental Management Act 107 of 1998* (*NEMA*).

¹² Section 151 lists the acts and omissions that constitute offences under the *National Water Act 36 of 1998* (*NWA*). These include: using water otherwise than permitted under the *NWA*; failing to comply with a condition attached to a permitted water use; intentionally refusing to perform a duty, or obstruct any other person in the exercise of any power or performance; and unlawfully, intentionally or negligently committing any act or omission which pollutes, or is likely to pollute, a water resource.

to, or results from, breaches of various provisions within the broader framework of municipal legislation. This legislative framework includes the *Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act)*, the *Local Government: Municipal Finance Management Act 56 of 2003 (Municipal Finance Act)* and the *Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act)*.

To address the persistent problem of non-compliance by local government regarding environmental, waste and water management laws, the South African national government has increasingly resorted to criminal sanctions against municipalities as a means to punish wrongdoers and to deter similar behaviour.¹³ This punitive approach signifies a shift towards stronger accountability measures. The trend is evident in recent cases such as *S v Rand West Local Municipality (RC 38/2020) – 2022 (the Rand West case)*, *S v Thaba Chweu Local Municipality (Lydenburg CAS 131/03/2020) – 2023 (the Thaba Chweu case)*, and *S v Govan Mbeki Local Municipality (RC26/2023) – 2024 (the Govan Mbeki case)*, where municipalities faced criminal charges related to sewage pollution.

This article addresses the critical issue of municipal sewage water pollution, a significant factor exacerbating South Africa's looming water crisis. First, it outlines the public service, wastewater management and environmental obligations of municipalities. Second, it examines the legal consequences of failing to fulfil these duties, with a focus on typical offences related to the unlawful discharge or disposal of sewage. Third, it analyses the common legal defences raised by accused municipalities and officials, drawing from recent case law as well as the extensive practical experience of the authors, and considers the counterarguments advanced, or available, to the National Prosecuting Authority (NPA). Fourth, it explores recent legislative and policy developments that signal a growing shift toward stricter enforcement and clearer regulatory standards. The article concludes by assessing the effectiveness of current legal mechanisms and identifying areas for reform to enhance accountability within South Africa's water governance framework.

¹³ While this move towards criminal sanctions aims to hold local authorities accountable, it presents a tension with the constitutional mandate for cooperative governance and intergovernmental relations, particularly s 41(1)(h)(vi) of the *Constitution of the Republic of South Africa, 1996 (the Constitution)*, which encourages avoiding legal proceedings between government entities. See s 41(1)(h)(vi) of the *Constitution*, which explicitly encourages cooperative governance and instructs government entities to avoid legal proceedings against one another.

2 Defining municipal responsibilities: public service, wastewater mandate and environmental duties

Given the focus of this article on municipal sewage pollution and its contribution to South Africa's water crisis, this section briefly delineates the key legal obligations incumbent upon municipalities. It will specifically outline their public service duties, their wastewater management mandate and key environmental duties as prescribed by the *Constitution* and relevant legislation. Understanding these core responsibilities is essential to comprehending the basis upon which municipalities are held accountable for failures in wastewater management, ultimately leading to the increasing use of criminal sanctions as discussed throughout this contribution.

2.1 Municipalities' public service duties

Section 40 of the *Constitution* provides the framework for the South African government, which is divided into three distinct yet interdependent spheres: national, provincial and local. As a distinct sphere, local government is bound by the *Constitution* and must fulfil all constitutional obligations. Any action by a municipality that is inconsistent with the *Constitution* is invalid.¹⁴ Moreover, all spheres of government must provide effective, accountable governance and uphold constitutional values.¹⁵

Municipalities are specifically mandated to strive, within their financial and administrative capacity, towards ensuring accountable governance and the sustainable delivery of services.¹⁶ Section 195 of the *Constitution* further outlines the basic values and principles of public administration. These include accountability, transparency, and the efficient, economic and effective use of resources, along with a strong responsiveness to people's needs. Beyond the *Constitution*, several legislative instruments regulate the duties of municipalities as part of the broader service. The *Public Service Act* 103 of 1994 (*PSA*)¹⁷ and particularly the Code of Conduct published in the Public Service Regulations¹⁸ require public service employees to abide by the *Constitution* and all applicable laws. They also compel them to act accountably and to prioritise the public interest in performing their official duties.

The suite of national local government legislation further clarifies and supports these responsibilities. The *Municipal Systems Act* requires that municipal administrations be structured to promote responsiveness, with

¹⁴ Section 2 of the *Constitution*.

¹⁵ Section 41(1) of the *Constitution*.

¹⁶ Section 152 of the *Constitution*.

¹⁷ Provides the framework for the administration, organisation and conditions of service for the public service in South Africa.

¹⁸ Published in GN R877 in GG 40167 of 29 July 2016.

clearly assigned responsibilities.¹⁹ It also underscores the importance of respecting the constitutional rights of all people.²⁰ Additionally, the *Municipal Finance Act* regulates financial management within municipalities,²¹ including the duty to prevent unauthorised, irregular or fruitless and wasteful expenditure.²²

2.2 Municipalities' wastewater mandate

As previously noted, municipalities hold executive authority over local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the *Constitution*. These include essential services such as water and sanitation, specifically the provision of potable water supply systems and the management of domestic wastewater and sewage disposal systems, as set out in Schedule 4B.

The *Municipal Structures Act* further clarifies the distribution of functions within local government. In terms of section 84(1)(d) thereof, district municipalities are primarily responsible for domestic wastewater and sewage disposal systems. However, section 84(3) empowers the Minister responsible for local government to assign these functions to local municipalities via a notice in the Government Gazette. Once these functions are assigned, the local municipality becomes a Water Services Authority. At the time of writing this article, 144 out of 256 municipalities have been authorised as Water Services Authorities.

According to section 1 of the *WSA*, a Water Services Authority is defined as any municipality responsible for ensuring access to water services.²³ Section 11 of the *WSA* places a duty on Water Services Authorities to provide efficient and sustainable access to water services, including sanitation services such as sewage removal, purification, and disposal.²⁴ In terms of section 11(5), Water Services Authorities are required to take reasonable steps to ensure the provision of basic water and sanitation services during emergencies, which may be at their own cost.

In addition, Water Services Authorities are obliged to prepare a Water Services Development Plan to guide service delivery. The Regulations Relating to Compulsory National Standards and Measures to Conserve

¹⁹ Section 51 of the *Local Government: Municipal Systems Act* 32 of 2000 (the *Municipal Systems Act*).

²⁰ Section 4(3) of the *Municipal Systems Act*.

²¹ Sections 10-11 of the *Local Government: Municipal Finance Management Act* 56 of 2003 (the *Municipal Finance Act*).

²² Sections 32 and 173(1)(a)(iii) of the *Municipal Finance Act*.

²³ In South Africa, of the 256 municipalities, 144 are designated as Water Services Authorities under the *Water Services Act* 108 of 1997 (*WSA*).

²⁴ Section 11(5) of the *WSA*.

Water, published under the *WSA*,²⁵ further require Water Services Authorities to provide access to alternative water services, which include sanitation, if water services are interrupted for more than 24 hours, in order to protect health.²⁶

2.3 Municipalities' environmental duties

Municipalities are subject to several legal obligations that require the consideration of environmental impact and sustainability in their operations. Foremost among these is the *Constitution*, which guarantees everyone the right to an environment that is not harmful to their health or well-being and that is protected for present and future generations through reasonable legislative and other measures, including those aimed at preventing pollution and ecological degradation.²⁷

The *Constitution* further mandates all spheres of government and all organs of state – municipalities included – to secure the well-being of the people of the Republic.²⁸ Specifically, municipalities must, within their financial and administrative capacity, promote a safe and healthy environment.²⁹

In the context of sewage-related offences, the environmental responsibilities of municipalities take on critical importance. Unlawful sewage disposal or mismanagement may directly infringe on various constitutional rights, including the right to an environment not harmful to health and wellbeing;³⁰ the right to human dignity;³¹ the right to sufficient food and water;³² and the right to education,³³ particularly where poor sanitation or sewage spills at schools prevent children from accessing quality learning environments.

The *Municipal Systems Act* also imposes environmental duties on municipalities. Municipal councils must, within their financial and administrative capacity and considering practical realities, exercise their legislative and executive authority in the best interests of the local community. This includes ensuring that services are provided in a financially and environmentally sustainable manner; promoting a safe and healthy environment; and contributing to the progressive realisation of constitutional rights.³⁴ Section 73 of this Act further requires municipalities to prioritise the

²⁵ GN R509 in GG 22355 of 8 June 2001.

²⁶ Regulation 4 of GN R509 in GG 22355 of 8 June 2001.

²⁷ Section 24 of the *Constitution*.

²⁸ Section 41(1)(b) of the *Constitution*.

²⁹ Section 152 of the *Constitution*.

³⁰ Section 24(a) of the *Constitution*.

³¹ Section 10 of the *Constitution*.

³² Section 27(1)(b) of the *Constitution*.

³³ Section 29 of the *Constitution*.

³⁴ Section 4 of the *Municipal Systems Act*.

basic needs of the local community and ensure access to at least minimum levels of municipal services; while maintaining financial and environmental sustainability.

In addition, the Department of Water and Sanitation (DWS) is required to develop a National Water Resources Strategy, which governs the protection, use, development, conservation and management of South Africa's water resources.³⁵ This Strategy must be implemented not only by DWS, but also by all organs of state – including municipalities – and Water Management Institutions. Finally, municipalities are obliged to comply with all environmental legislation applicable to their operations.

3 Typical offences: holding municipalities and officials accountable for unlawful sewage disposal

Having outlined the governance framework that establishes the public service, wastewater management and environmental duties of municipalities, this part of the article turns to the specific legal ramifications of failing to uphold these obligations in the context of unlawful disposal or discharge of sewage. It will detail the typical offences associated with non-compliance. These offences can be broadly categorised into three distinct categories, each stemming from different pieces of environmental legislation: breaches of the general duty of care as outlined in *NEMA*; offences related to water pollution under the *NWA*; and contraventions pertaining to waste management, as defined by *NEM:WA*. By examining these categories of offences this section aims to clarify the potential legal liability not only for municipalities as entities but also for the individual officials responsible for ensuring compliance with environmental regulations.³⁶

3.1 Offences related to the breach of the general duty of care

Section 28 of *NEMA* establishes a general environmental duty of care. It requires any person who causes, has caused, or may cause significant pollution or environmental degradation to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring. Where such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, the person must take steps to minimise and rectify the damage.

NEMA further provides that it is an offence, whether committed intentionally or negligently, to unlawfully perform or omit to perform an act that results in

³⁵ Section 5(3) of the *NWA*.

³⁶ These insights will be used to evaluate the effectiveness of criminal sanctions as an accountability mechanism, which will be further explored in the analysis of recent case studies.

significant pollution, environmental degradation³⁷ or other detrimental effects on the environment.³⁸ This applies to both natural and juristic persons.³⁹ Offenders may be held liable to a fine not exceeding R10 million or imprisonment not exceeding 10 years.⁴⁰ Accordingly, if the discharge or disposal of sewage causes significant pollution or degradation of the environment, this may constitute an offence under this provision.

3.2 Offences arising from water pollution

The discharge or disposal of sewage into water resources constitutes a water use under section 21(f) or (g) of the *NWA*, which requires a WUL or another form of authorisation. Where such authorisation was required and not obtained, the discharge or disposal constitutes an offence.⁴¹

Even where a WUL has been lawfully obtained, it remains an offence for the holder to contravene the terms of the licence, such as failing to comply with prescribed water quality limits, monitoring requirements or operational requirements. This is particularly relevant to the problem at hand: if a municipality exceeds the limits set in the WUL, harmful pollutants such as *E coli*, nitrogen, phosphorus and heavy metals will be released into water resources. Such non-compliance may trigger offences under sections 151(1)(a), (c), (d), (i) or (j) of the *NWA*.

In addition to the general duty of care offence set out in section 28 of *NEMA*, municipalities are also subject to the duty of care provisions in section 19 of the *NWA* where water resources are involved. Any unlawful and intentional or negligent act or omission that pollutes or is likely to pollute a water resource constitutes an offence.⁴² Offences under the *NWA* carry significant penalties: a first conviction may result in a fine of up to R5 million or imprisonment for up to 5 years, or both. For a second or subsequent conviction, the penalty increases to a fine of up to R10 million or imprisonment for up to ten years, or both.⁴³

Where sewage discharge affects the coastal environment, the *NEM:ICMA* also applies. Section 69 prohibits the discharge of land-based effluent into coastal waters unless authorised by a general discharge authorisation or a coastal waters discharge permit issued by the Minister of Environmental Affairs, in consultation with the Minister of Water and Sanitation in cases involving estuaries. Discharging without such a permit constitutes an offence punishable by a fine of up to R5 million or imprisonment of up to 10

³⁷ Section 49A(1)(e) read with s 28 of *NEMA*.

³⁸ Section 49A(1)(f) of *NEMA*.

³⁹ See the definition of "person" in s 1 of *NEMA*.

⁴⁰ Section 49B(1) of *NEMA*.

⁴¹ In terms of s 151(1)(a) read with either s 21(f) or s 21(g) of the *NWA*.

⁴² Section 151(1)(i) and (j) of the *NWA*.

⁴³ Section 151(2) of the *NWA*.

years, or both.⁴⁴ In addition, the general duty of care contained in section 28 of *NEMA* is made applicable to the coastal environment as well. A breach of this duty in the coastal context is a criminal offence under section 49A(1)(e) of *NEMA*.

3.3 Waste-related offences

The *NEM:WA* creates a comprehensive framework of offences that may apply to the unlawful discharge or disposal of sewage, which is included in the broad definition of "waste".⁴⁵

Firstly any person, including an organ of state,⁴⁶ commits an offence if they fail to ensure that waste is treated and disposed of in an environmentally sound manner.⁴⁷ It is also an offence to manage waste in a way that endangers public health or the environment, or that causes a nuisance through noise, odour or unsightly visual impacts.⁴⁸ Additionally, failing to prevent employees or persons under one's supervision from contravening the provisions of *NEM:WA* constitutes a further offence.⁴⁹

Where sewage is discharged or disposed of onto land, additional provisions are triggered. The disposal of any hazardous waste to land is classified as a listed waste management activity⁵⁰ which requires a waste management licence.⁵¹ Sewage falls within the definition of hazardous waste, due to its potential health and environmental risks.⁵² Where no waste management licence was obtained and sewage is disposed of onto land, an offence is committed.⁵³ Also, the unauthorised disposal of sewage onto land, whether through burial, dumping, deposit, discharge, abandonment or other form of release, constitutes an offence under *NEM:WA*.⁵⁴ These waste-related offences are punishable by a fine of up to R10 million, up to 10 years imprisonment, or both, in addition to any other penalties or civil remedies that may be imposed under *NEMA*.⁵⁵

In addition to the above, several institutional or administrative offences may also be relevant where a municipality's failure to properly operate or manage

⁴⁴ Section 69(1) read with ss 79 and 80(1) of the *National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEM:ICMA)*.

⁴⁵ See the definition of "waste" in s 1 of the *National Environmental Management: Waste Act 59 of 2008 (NEM:WA)*.

⁴⁶ See the definition of "person" in s 1 of *NEM:WA*.

⁴⁷ Section 16(1)(c) read with s 67(1)(a) of *NEM:WA*.

⁴⁸ Section 16(1)(d) read with s 67(1)(a) of *NEM:WA*.

⁴⁹ Section 16(1)(e) read with s 67(1)(a) of *NEM:WA*.

⁵⁰ Activity 7 of Category B of GN 921 in GG 37083 of 21 November 2013.

⁵¹ Section 19 of *NEM:WA*.

⁵² Section 1 of *NEM:WA*.

⁵³ Section 21 read with s 67(1)(a) of *NEM:WA*.

⁵⁴ Section 26(1)(a) read with s 67(1)(a) of *NEM:WA*.

⁵⁵ Section 68(1) of *NEM:WA*.

its systems contributes to the unlawful discharge or disposal of sewage. Depending on the specific facts, these may include offences or breaches under the *Municipal Systems Act*, the *Municipal Structures Act*, the *WSA*, the *Municipal Finance Act*, and the *Public Service Act* and related Regulations. It is important to bear in mind that the applicability of each offence depends on the specific factual matrix of the case and the evidence available.

4 Criminal prosecution of sewage pollution offences: legal mechanisms, typical defences and prosecutorial responses

With the typical offences related to sewage pollution outlined, it is necessary to briefly consider the compliance and enforcement mechanisms available to address such violations. In the context of this article these mechanisms aim to ensure that municipalities meet their legal obligations in relation to the safe and sustainable management of sewage and wastewater. The compliance and enforcement tools currently available in relation to sewage-related offences include, firstly, compliance verification or monitoring and the issuance of administrative enforcement notices. Secondly, where significant harm is inflicted on the environment or risks are posed to public health, the law provides for more stringent enforcement – most notably, through criminal sanctions.⁵⁶ In fact, where there is sufficient evidence that municipalities or municipal officers have committed an offence, such as when dysfunctional water treatment works result in unlawful discharges, improper disposal and environmental harm, criminal prosecution may be initiated.

Once a person has been charged with committing environmental offences, the accused is entitled to raise one or more defences in response to the charges. An analysis of criminal cases relating to sewage pollution in recent years reveals a set of recurring defences typically raised by accused parties. The purpose of this section is to identify and discuss these typical defences with reference to recent case law, and to consider counterarguments that the NPA has used, or could potentially use, to rebut them. This inquiry is important because understanding the nature of these defences and how they are challenged in court will contribute to more effective prosecution strategies. It also provides insight into the legal reasoning applied by courts when determining liability for sewage-related offences, thereby strengthening future enforcement efforts.

⁵⁶ Criminal liability plays a critical role in deterring unlawful conduct, ensuring accountability, and reinforcing both constitutional and statutory duties related to environmental protection and water services delivery.

4.1 Defence one: criminal conduct of organs of state constitutes an "intergovernmental dispute"

One of the most frequently used and arguably most controversial defences in sewage-related criminal prosecutions is the argument that when an organ of state such as a municipality commits an offence, this conduct constitutes an "intergovernmental dispute".⁵⁷ According to this view, the relevant regulatory authority (per the legislation contravened) is precluded from initiating a criminal investigation or referring the matter to the NPA for prosecution until such time that the conflict resolution procedures as set out in the *Intergovernmental Relations Framework Act 13 of 2005 (IGRFA)*⁵⁸ and chapter 4 of *NEMA* have been exhausted.⁵⁹

Accused parties often rely on section 41 of the *Constitution*, which requires all spheres of government to avoid legal proceedings against one another⁶⁰ and to make every reasonable effort to resolve disputes through alternative means before resorting to litigation.⁶¹ They may also refer to the Public Service Act Regulations,⁶² which promote intergovernmental cooperation in the public interest.

The reality, however, is that this defence is fundamentally flawed, both legally and logically, for several reasons. The *IGRFA* provides a framework to ensure coordination and the execution of statutory powers and functions between organs of state, and regulates how intergovernmental disputes are to be resolved. An "intergovernmental dispute" is defined in the *IGRFA* as a dispute between different governments or organs of state concerning the implementation of statutory powers or functions, which is justiciable in a court of law.⁶³ This framework is primarily applicable to administrative and civil disputes, not to criminal conduct.

Criminal offences, by contrast, fall outside the ambit of the *IGRFA*'s definition of an "intergovernmental dispute". The unlawful discharge or disposal of sewage resulting in environmental harm is not merely a dispute over the exercise of a statutory function, but it constitutes criminal conduct for which the guilty parties must be held accountable under the law. This was confirmed in *MEC for Cooperative Governance and Traditional Affairs*

⁵⁷ Section 1 of the *Intergovernmental Relations Framework Act 13 of 2005 (IGRFA)* defines an "intergovernmental dispute" as a dispute between governments (national, provincial or local) or between organs of state from different governments.

⁵⁸ See ch 4 and specifically s 42 of the *IGRFA*.

⁵⁹ See ch 4 of *NEMA*.

⁶⁰ Section 41(1) of the *Constitution*.

⁶¹ Section 41(3) of the *Constitution*.

⁶² Regulation 11(e) of GN R877 in GG 40167 of 29 July 2016.

⁶³ Section 1 of the *IGRFA*.

v Imbabazane Municipality,⁶⁴ where the Court held that the *IGRFA* does not apply where illegality or criminal conduct is present.⁶⁵

Similarly, chapter 4 of *NEMA* applies only where there is a disagreement or difference regarding a) the exercise of functions which may significantly affect the environment,⁶⁶ or b) the protection of the environment.⁶⁷ As the commission of an offence is a criminal conduct and not a mere "difference or disagreement", it is clear that Chapter 4 of *NEMA* is not applicable where criminal offences are committed.

Moreover, the NPA is the only mandated body that is authorised to institute criminal proceedings. The *IGRFA* explicitly adopts the definition of "organs of state" in line with section 239 of the *Constitution*, which excludes courts and judicial officers, of which prosecutors are a part. Since an "intergovernmental dispute" arises only between organs of state, it cannot be extended to include criminal prosecution initiated by the NPA, which operates independently of government departments and accordingly, is not bound by the *IGRFA*'s dispute-resolution requirements.

The *IGRFA* itself reinforces this interpretation, stating that it is not applicable to courts, judicial officers, or any other constitutionally independent institution. Accordingly, it is clear that criminal prosecution is not subject to the exhaustion of conflict resolution proceedings.

It follows that attempts to shield municipalities and municipal officials from criminal accountability by characterising environmental offences as intergovernmental disputes are legally unsound and unsupported by statutory or constitutional frameworks.

4.2 Defence two: municipal duties are dependent on support from national and provincial government

A common defence raised by municipalities facing prosecution for sewage-related offences is that their constitutional and statutory duties, particularly the obligation to provide a safe and healthy environment, are qualified as they are required to achieve this objective only within their financial and administrative capacity.⁶⁸ This argument is further framed by section 41 of the *Constitution*, which calls for cooperative governance and obliges higher

⁶⁴ *MEC for Co-operative Governance and Traditional Affairs v Imbabazane Municipality* (5238/12) [2012] ZAKZPHC 77 (21 December 2012).

⁶⁵ *MEC for Co-operative Governance and Traditional Affairs v Imbabazane Municipality* (5238/12) [2012] ZAKZPHC 77 (21 December 2012) para 39.

⁶⁶ Section 17(1)(a) of *NEMA*.

⁶⁷ Section 19(1) of *NEMA*.

⁶⁸ Section 152(2) of the *Constitution*.

spheres of government to support and strengthen the capacity of municipalities to manage their affairs and to perform their functions.⁶⁹

The *Constitution*, along with the *WSA*, provides a framework for provincial and national intervention when a municipality is unable or unwilling to fulfil its executive functions. Specifically, section 139 of the *Constitution* permits provincial intervention where a municipality fails to fulfil an executive obligation, with national government stepping in under section 139(7) if the province fails to act adequately.⁷⁰

However, this defence is also legally flawed. While intergovernmental support is indeed mandated, it does not alleviate or absolve municipalities of their primary legal obligations, especially those related to water and sanitation delivery. Municipalities remain constitutionally and statutorily obliged to use resources effectively;⁷¹ ensure accountability;⁷² respond to people's needs;⁷³ place public interest at the forefront;⁷⁴ be responsive to the needs of the local community;⁷⁵ as well as to be compliant with applicable environmental legislation. Furthermore, the *Constitution* protects the institutional integrity and status of municipalities. Their ability or right to exercise powers or perform their functions may not be compromised or impeded by another sphere of government.⁷⁶ This means that national or provincial interventions must be carefully considered and must not undermine local autonomy. Although legislation allows for processes of intervention by other spheres of government, past evidence suggests that such interventions have had limited success. Since 1997 a total of 142 invocations of provincial intervention in terms of section 139 of the *Constitution* have occurred. Despite this relatively high number of interventions and the invocation of several repeat interventions, municipal performance in water and sanitation remains far from optimal. Nonetheless, courts have affirmed that provincial governments must intervene where municipalities fail to meet their legal obligations.⁷⁷

⁶⁹ Section 154(1) of the *Constitution*.

⁷⁰ Section 139 of the *Constitution* and s 63 of the *WSA*.

⁷¹ Section 195(1)(b) of the *Constitution*.

⁷² Section 195(1)(f) of the *Constitution*.

⁷³ Section 195(1)(e) of the *Constitution*.

⁷⁴ Regulation 11(b) of GN R877 in GG 40167 of 29 July 2016.

⁷⁵ Section 6(2)(a) of the *Municipal Systems Act*.

⁷⁶ Section 151(4) of the *Constitution*.

⁷⁷ *Komatipoort Despondent Residents Association v Nkomazi Local Municipality* (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024).

The 2022 Green Drop Report⁷⁸ and media reports⁷⁹ confirmed the declining state of municipal wastewater services. Of the systems assessed, 334 wastewater systems managed by 90 Water Services Authorities were classified as critical (scoring below 30%).⁸⁰ As a result, DWS initiated regulatory interventions. However, monitoring alone is insufficient. When municipalities consistently fail to remedy critical deficiencies, enforcement, ranging from directives to full-scale provincial or national takeovers, is essential to protect public health and the environment.

Despite this framework, a key question remains: When will the Minister (through the Department) act? The Minister of the DWS has the authority to act and intervene under section 139 of the *Constitution* where municipalities fail to comply with national water legislation, including the *NWA*. This includes failure to obtain or comply with water use authorisations (e.g., abstraction under section 21(a) and discharge under section 21(f)). If provincial governments fail to act, the national government is constitutionally required to intervene under section 139(7).

However, successful intervention of this nature is often hindered by practical constraints. The water and sanitation functions and budgets are not ring-fenced within municipal structures, meaning that these vital services are not necessarily financially separated from other municipal expenditures, making it difficult for other spheres of government to assume responsibility for these services without assuming broader financial and administrative burdens.⁸¹ Nonetheless, examples of national intervention include the Maluti-a-Phofung Municipality in the Free State,⁸² where the Minister intervened to restore water service delivery, and the Emfuleni Municipality in Gauteng, where the national government stepped in following significant sewage pollution of the Vaal River, eventually resulting in the deployment of the South African National Defence Force (SANDF) to assist in repairing infrastructure.⁸³

It may therefore be concluded that while intergovernmental support is essential, municipalities cannot escape accountability for their legal duties. Legal obligations under environmental and water law remain binding unless and until formal interventions are lawfully implemented, and even then, only

⁷⁸ DWS 2022 https://ws.dws.gov.za/iris/releases/Report_NATIONAL%20_FINAL_30March22_MNEdit_web.pdf.

⁷⁹ Anon 2023 <https://businesstech.co.za/news/government/694289/municipalities-face-criminal-charges-over-water-quality-in-south-africa/>.

⁸⁰ DWS 2022 https://ws.dws.gov.za/iris/releases/Report_NATIONAL%20_FINAL_30March22_MNEdit_web.pdf xi and 10.

⁸¹ Also see Khaile 2023 *Journal of Local Government Research and Innovation* 1.

⁸² PMG 2020 <https://pmg.org.za/committee-meeting/29995/>.

⁸³ Simelane 2018 <https://www.dailymaverick.co.za/article/2018-11-26-army-experts-step-in-to-assist-emfuleni-municipality-with-sewage-problems/>.

under strictly defined conditions. The failure of other spheres of government to assist does not negate municipal liability for unlawful conduct or environmental harm.

4.3 Defence three: lack of financial and human resources

The shortage of financial and human resources within government, particularly at the municipal level, is an acknowledged dire reality and serious challenge. Municipalities often invoke this as a defence for not being able to maintain or upgrade wastewater treatment and disposal infrastructure. Again, they argue that their duty to provide a safe and healthy environment is qualified by the requirement to fulfil this obligation only within their available financial and administrative capacity.⁸⁴

This challenge is exacerbated by systemic issues, such as the high level of non-revenue water (currently estimated at 47% nationally),⁸⁵ largely due to illegal connections, infrastructure leaks, as well as the increasing impact of extreme weather events due to climate change.

While the difficulty of operating under resource constraints is acknowledged and valid, recent case law⁸⁶ confirms that this defence cannot justify ongoing infringement on citizens' constitutional rights. Courts have held that a lack of finances or capacity cannot be used to legitimise unlawful conduct. At most, such limitations may be used as a mitigating factor during sentencing proceedings, but they do not excuse non-compliance with statutory or constitutional duties. Municipalities are required to structure and manage their administration, budgeting and planning processes in a manner that prioritises the basic needs of the community.⁸⁷

Nevertheless, in evaluating the validity of this defence, a factual inquiry will be required to determine whether the municipality in question has indeed allocated funding appropriately to prioritise basic services or the basic needs of the community, including water and sanitation services, and spent those allocated funds in accordance with their intended purpose. Therefore, while financial and capacity challenges may explain some delays or shortcomings, they do not absolve municipalities of their legal responsibilities or shield them from liability for environmental harm or rights violations.

⁸⁴ Section 152(2) of the *Constitution*.

⁸⁵ DWS 2023 <https://ws.dws.gov.za/iris/releases/GDWR.pdf>.

⁸⁶ *South African Human Rights Commission v Msunduzi Local Municipality* 2021 6 SA 500 (KZP) (the *Msunduzi* case); *S v Rand West Local Municipality* (RC 38/2020).

⁸⁷ Section 153(a) of the *Constitution*.

4.4 Defence four: organs of state cannot be held criminally liable

In some cases defence attorneys have argued that organs of state, such as municipalities, cannot be held criminally liable for environmental offences. This argument is based on the claim that *NEMA* does not expressly state that it is binding on organs of state in respect of criminal liability. The fact that the *State Liability Act* 20 of 1957 pertains to civil liability only and not to criminal liability⁸⁸ is used as further proof that organs of the state cannot be held criminally liable. Some extend the argument by analogy to international criminal law, noting that bodies such as the International Criminal Court typically prosecute individuals and not state entities.⁸⁹

The argument also relies on the language of section 34 of *NEMA*, which refers to "directors", "employees", "employers", or "firms", suggesting an intention of this provision is to impose criminal liability on individuals or private legal persons, and not on organs of state.

However, this defence is also flawed and does not reflect the current legal position. There is clear evidence of legislative intent to allow for criminal prosecution of organs of state. Historical legislative context confirms that a previous provision of *NEMA*, which expressly excluded organs of state from criminal liability, was removed in 2013. This legislative amendment signals a deliberate shift by the Legislature to ensure that organs of state are not exempt from criminal accountability.

The word "person", as used in law and legislation such as *NEMA*, must be interpreted in accordance with the *Interpretation Act* 33 of 1957, which defines "person" to include entities such as divisional councils, municipal councils, village management boards or similar authorities.⁹⁰ Therefore, this means that municipalities fall squarely within the definition of "person", and may therefore be subject to criminal prosecutions where offences are linked to the term "person".

Furthermore, section 9 of the *Constitution* guarantees that everyone is equal before the law, including organs of state.⁹¹ The court has gone further to emphasise that organs of state should actually be held to a higher standard of legal compliance, given their public responsibilities.⁹²

Enforcement action against these non-compliant municipalities as organs of state is not only legally permissible but necessary to protect environmental

⁸⁸ Section 1 of the *State Liability Act* 20 of 1957 regulates claims against the state arising out of any contract lawfully entered into on behalf of the state or out of any wrong committed by any servant of the state.

⁸⁹ International Criminal Court date unknown <https://www.icc-cpi.int/>.

⁹⁰ Section 1 of the *Interpretation Act* 33 of 1957.

⁹¹ Section 9 of the *Constitution*.

⁹² *Msunduzi* case para 95.

integrity and uphold constitutional rights. The significance of sewage-related pollution justifies stringent and swift criminal enforcement.⁹³

Recent prosecutions provide clear precedent that non-compliant municipalities can and must be held criminally liable. In the *Rand West* case the Rand West municipality was charged with committing offences related to the unlawful discharge of untreated sewage and non-compliance with its WUL. The municipality entered into a plea and sentence agreement,⁹⁴ which was made an order of court through which it was sentenced to pay a fine of R10 million, of which R7 million was suspended for 5 years on condition that no similar offences were committed. The remaining R3 million had to be used to effect identified repairs, with proof submitted to both the DWS and the Department of Forestry, Fisheries and the Environment (DFFE). The municipality was also ordered to appoint technical expertise and by-law enforcement officers and implement additional processes.⁹⁵

Similarly, in the *Thaba Chweu Municipality* case the municipality faced similar charges. It entered into a plea and sentence agreement through which it was sentenced to pay a fine of R10 million, of which R5 million was suspended for 5 years on condition that no similar offences were committed. Another additional fine of R5 million was wholly suspended. R4.8 million had to be used to effect identified repairs and proof of this had to be submitted to DWS and the DFFE; and R200 000 had to be paid to the authorities to cover the costs of the investigation and prosecution.

Lastly, in the *Govan Mbeki Municipality* case the municipality was faced with the most significant penalty to date. It was fined R200 million, of which R50 million was suspended for five years on condition that no similar offences were committed. The remaining R150 million had to be used to effect identified repairs, and proof that they had completed the repair had to be submitted to DWS and DFFE. Furthermore, an additional R350 000 had to be paid to authorities to be used for Environmental Management Inspectorate capacity-building initiatives; certain technical experts and supervisors had to be appointed and pre-treatment processes had to be installed. The municipality was also ordered to comply with ongoing monitoring and auditing conditions. It follows that attempts to avoid accountability by invoking the status of a municipality as an organ of state are without merit and inconsistent with both statutory interpretation and judicial precedent.

⁹³ *Msunduzi* case para 96.

⁹⁴ In terms of s 105A of the *Criminal Procedure Act* 51 of 1977.

⁹⁵ *S v Rand West Local Municipality* (RC 38/2020) "Agreement in terms of section 105A of the *Criminal Procedure Act* 51 of 1977" 18-21.

4.5 Defence five: the wrong municipality was charged

Some local municipalities charged with sewage-related offences have raised the defence that they are not the correct entity to be prosecuted. They argue that, under the *Municipal Structures Act*, the mandate for domestic wastewater and sewage disposal systems is allocated to district municipalities – not local municipalities.⁹⁶

From a practical perspective, local municipalities argue that they are being treated unreasonably, especially in situations where district municipalities approve new developments that require expanded wastewater treatment infrastructure without properly consulting the local municipality tasked with implementation.

However, this defence often fails when examined in light of the municipality's designation as Water Services Authorities. In terms of the *WSA*, Water Services Authorities are responsible for ensuring access to water services, which include the operation and maintenance of WWTW facilities.⁹⁷ While the general allocation of powers under the *Municipal Structures Act* does assign certain sanitation responsibilities to district municipalities, this Act also provides a mechanism for the Minister of Cooperative Governance and Traditional Affairs to authorise a local municipality to perform a specific function, such as water and sanitation services, by issuing a notice in the Government Gazette. Once this occurs, the designated local municipality assumes the legal obligations of a Water Services Authority.⁹⁸ As such, a local municipality that has been authorised as a Water Services Authority is legally responsible for the infrastructure and management of the WWTWs within its jurisdiction. The fact that it may not have been consulted by the district municipality regarding new developments does not negate its legal obligations to ensure compliance with water services and environmental legislation.

This argument has already been tested in practice. In the *Rand West* case, *Thaba Chweu* and *Govan Mbeki* cases, as discussed earlier, all three municipalities are local municipalities and were prosecuted and convicted. Ultimately, whether the correct municipality has been charged is a factual question. It requires an inquiry into where the operational responsibility for the wastewater infrastructure lies, and whether that municipality has been designated as a Water Services Authority. If the local municipality holds that designation, it is the correct party to be held criminally accountable.

⁹⁶ Section 84(1)(d) of the *Local Government: Municipal Structures Act* 117 of 1998 (the *Municipal Structures Act*).

⁹⁷ Section 1 of the *WSA*.

⁹⁸ Section 84(3) of the *Municipal Structures Act*.

4.6 Defence six: it is irrational to impose the statutory penalties on a municipality

A further argument advanced by defence teams is that the imposition of statutory penalties such as fines under *NEMA* and the Specific Environmental Management Acts (SEMA) is irrational when applied to municipalities. They argue that a reading of these penalty provisions suggests that the Legislature intended them to apply primarily to natural persons and not organs of state.

This view is grounded in practical concerns. There is no manner in which the penalties can have the desired punitive impact on the municipality in the same way as on natural persons. Practically, any fines imposed on a municipality will ultimately be financed from the public's rates and taxes. It will be absurd to order the closing down of a municipality as it renders a broad range of public services to the community, who will suffer the consequences. Moreover, unlike natural persons or private entities, municipalities cannot be imprisoned. While these concerns are not without merit, they do not invalidate the application of statutory penalties to municipalities. Courts have developed structured sentencing mechanisms to address these concerns by directing fines toward remedial and preventative measures. For example, in the *Rand West*, *Thaba Chweu* and *Govan Mbeki* cases the fines imposed were not simply punitive. Instead the courts ordered that portions of the fines be used for identified infrastructure repairs, the appointment of technical experts, or environmental compliance measures. These structured fines strike a balance between enforcing accountability and protecting public interests.

Although the imposition of structured statutory fines is aimed at forcing municipalities to use finances to take the required steps to stop and prevent further environmental degradation and pollution, the punitive effect on the municipality and municipal officials is completely lost and, one might argue, the deterrent effect as well. This argument is strengthened by the fact that large percentages of statutory fines imposed on municipalities are suspended on condition that no similar offence is committed within a particular period.⁹⁹ This means that municipalities often avoid the full financial consequences of non-compliance, especially where no further offences are committed, thereby effectively weakening both the punitive and deterrent elements of the sentence.

⁹⁹ See, for example, *S v Rand West Local Municipality* (RC 38/2020), in which R7 million of the R10 million fine was suspended; *S v Thaba Chweu Local Municipality* (Lydenburg CAS 131/03/2020), in which R5 million of the R10 million fine was suspended, as well as another R5 million fine that was wholly suspended; and *S v Govan Mbeki Local Municipality* (RC26/2023) in which R50 million of the R200 million was suspended.

In order to ensure that the deterrent impact of sewage-related convictions remains intact, it is essential to pierce the corporate veil by pursuing prosecution against not only the juristic entity (being the municipality), but also the municipal officials personally liable for the offences having been committed. Holding responsible officials personally liable for environmental harm sends a stronger signal that negligent or reckless conduct will not be tolerated.

4.7 Defence seven: particular municipal officials cannot be held personally liable for sewage-related offences

Municipal officials who are criminally charged for sewage-related environmental offences often raise the defence that they should not be held personally liable merely by virtue of their official position. Defence teams typically argue that: 1) the official did not personally commit the offence; 2) there was no direct involvement or knowledge of the unlawful sewage discharge; 3) the official was not responsible for the physical management of the wastewater infrastructure; 4) the state has failed to identify what "reasonable measures" the official should have taken and 5) the official's duties were not clearly defined or linked to the offence. Furthermore, it is often argued that intention, not negligence, must be proven to establish criminal liability.

However, this defence does not reflect the full scope of personal liability under South African law. National and environmental legislation expressly provides for the personal accountability of municipal officials where statutory obligations are not met. Under the *Municipal Systems Act*, the Municipal Manager can be held accountable for the overall performance of the administration of the Municipality¹⁰⁰ and is responsible for the implementation of national and provincial legislation applicable to the municipality, for instance.¹⁰¹ As the Accounting Officer, the Municipal Manager¹⁰² may be held liable for unauthorised expenditure deliberately or negligently incurred.¹⁰³ In addition, any political office-bearer or official of a municipality who deliberately or negligently commits, makes or authorises an irregular or fruitless and wasteful expenditure is personally liable for that expenditure.¹⁰⁴

Turning to environmental legislation, *NEMA* confirms that employers and employees can be held criminally liable. Employers (including municipalities) may be held liable if their employees, agents or managers commit offences and they failed to take all reasonable steps to prevent

¹⁰⁰ Section 51 of the *Municipal Systems Act*.

¹⁰¹ Section 55 of the *Municipal Systems Act*.

¹⁰² Section 60 of the *Municipal Finance Act*.

¹⁰³ Section 32 of the *Municipal Finance Act*.

¹⁰⁴ Section 32 of the *Municipal Finance Act*.

them.¹⁰⁵ Conversely, employees can be convicted and sentenced as if they were the employers if they omitted to perform tasks that they were responsible for under the employer's authority.¹⁰⁶ The environmental law framework, therefore, establishes that officials are not immune from prosecution simply because they were not physically present at the site of the offence.

Notably, the elements of an offence include unlawfulness, causation, liability and fault. South African criminal law generally requires intent (*dolus*) to establish fault, unless exceptional circumstances apply.¹⁰⁷ One of these exceptions includes that the legislation is directed against a dangerous and prevalent social problem, which would include legislation aimed at preventing environmental pollution and degradation caused by sewage discharge. In these instances negligence may suffice to establish fault. Nonetheless, to establish personal liability a factual enquiry is required. This includes assessing the municipal officials' tasks and positions within the organisation at the time when the offence was committed, and a verification of whether municipal officials fulfilled their tasks and duties sufficiently. The high official turnover rate within municipalities significantly complicates this type of investigation.

4.8 Defence eight: no proof of high pollution levels is provided

Where the state alleges that environmental pollution was caused by the unlawful discharge of sewage, defence teams have in the past argued that the state has failed to present scientific evidence proving that the pollution was of an unacceptably high level or that it caused actual harm. They argue that the state cannot, in the absence of this, simply argue that a municipality has breached citizens' constitutional environmental right by unlawfully discharging sewage into the environment.

However, this line of reasoning was rejected in a recent judgment.¹⁰⁸ The court confirmed that it is not necessary for the state to prove that the pollution caused was unacceptably high and caused harm in order to prove that an offence had been committed. Although it would be better to put before a court the exact levels of pollution or harm caused, this court found that the fact that no scientific or medical evidence had been provided to establish unacceptable levels of pollution was not a valid defence by the Municipality.¹⁰⁹ The court emphasised that the interpretation of the constitutional environmental right in section 24 has evolved into being less technical and more sociological. It is not limited to measurable harm but

¹⁰⁵ Section 34(5) of *NEMA*.

¹⁰⁶ Section 34(6) of *NEMA*.

¹⁰⁷ *S v Ngwenya* 1979 2 SA 96 (A) para 100A.

¹⁰⁸ *Msunduzi* case.

¹⁰⁹ *Msunduzi* case para 58.

encompasses the broader right to a healthy and balanced environment.¹¹⁰ In this regard section 24(b) of the *Constitution* imposes a general duty of care on the state, and by extension municipalities, to protect the environment, even in the absence of concrete evidence of physical harm.¹¹¹

5 Recent developments in the water and sanitation legislative regime

Amid rising criminal prosecutions in the water sector and mounting concerns about poor municipal performance, South Africa has introduced notable reforms aimed at strengthening compliance, improving accountability and enhancing water and sanitation service delivery, which will now be discussed.

5.1 Water Services Amendment Bill

In November 2023, the Minister of Water and Sanitation published the draft National Water Amendment Bill (NWAB) for public consultation.¹¹² The draft Water Services Amendment Bill, 2023 (WSAB) was simultaneously published and proposes amendments to the WSA.

From the outset, it may be noted that the enforcement and penalty provisions in section 63 of the *WSA* were arguably inadequate to date.¹¹³ The WSAB seeks to address this by introducing new sections (see sections 22A-D and 62A of the WSAB) that significantly strengthen the enforcement of the compliance mechanisms. Section 62A, in particular, empowers the Department to issue directives to water services institutions to ensure compliance. In terms of the NWAB. Non-compliance with such directives will constitute a criminal offence punishable by a fine of R10 million or ten years' imprisonment.¹¹⁴ These provisions bring the *WSA* and the *NWA* in line with the stricter enforcement standards set by *NEMA*. This alignment is set to enhance the DWS's ability to respond more effectively to incidents of water pollution. Moreover, municipal managers and company directors may be held personally liable for non-compliance.

Another notable reform introduced by the Bill is a licensing system for Water Services Providers (WSPs).¹¹⁵ This new system is based on minimum competency standards and is intended to ensure that WSPs meet

¹¹⁰ *Msunduzi* case para 97.

¹¹¹ *Msunduzi* case para 97.

¹¹² GN 4097 in GG 49733 of 17 November 2023.

¹¹³ Currently, ss 62 and 63 of the *WSA* enable the Department of Water and Sanitation (DWS) to intervene in municipalities where monitoring by DWS indicates failure to adhere to national norms and standards, subject to s 139 of the *Constitution*.

¹¹⁴ See the proposed amendment of s 151 of the *NWA*; s 28 of the National Water Amendment Bill, 2023 (NWAB).

¹¹⁵ See ss 22A-D of the Water Services Amendment Bill, (2023 (WSAB).

prescribed service delivery and performance benchmarks.¹¹⁶ This licensing regime will strengthen the DWS's capacity for regulatory enforcement and oversight, particularly in light of the deteriorating performance of wastewater treatment and sanitation systems.¹¹⁷

The Bill furthermore empowers the Minister to intervene and rectify instances of non-compliance at the expense of the relevant water services institution.¹¹⁸ While the Bill does not alter the status of municipalities as Water Services Authorities, it does introduce the possibility of revoking licences and replacing WSPs in cases of ongoing or systemic failure.¹¹⁹

5.2 Water services provider licensing system and regulations

Following the promulgation of the Bill, it is anticipated that regulations governing the licensing and contracting of WSPs will be published within 12 months,¹²⁰ along with the formal establishment of a Licensing Authority.¹²¹ Within a further twelve months a licensing platform will become operational, requiring all WSPs to apply for licences.¹²² This window will also open opportunities for new entrants to apply for WSP licences. Temporary licenses may be converted to full licenses if the compliance criteria are met.¹²³ The new licensing standards will prioritise sustainability and efficiency. The exact implementation timeline will ultimately depend on the outcomes of stakeholder consultations and the administrative capability to receive and process WSP license applications effectively.

5.3 Compulsory national minimum norms and standards for water services

In January 2024 the Minister, under section 9(1) of the *WSA*, published draft regulations on compulsory national norms and standards for public comment, which have since been finalised. Key revisions include the introduction of minimum service standards for the provision of water services. Notably, the standard requires a household connection rather than a communal standpipe, and bucket toilets are expressly prohibited. With regard to water and wastewater systems, the regulations introduce measures, such as restrictions on new service connections where existing infrastructure systems are already overburdened, stricter controls to reduce non-revenue water, and the requirement for full compliance with SANS 241

¹¹⁶ See s 22B of the WSAB.

¹¹⁷ DWS 2022 https://ws.dws.gov.za/iris/releases/Report_NATIONAL%20_FINAL_30March22_MNEdit_web.pdf.

¹¹⁸ See s 62A of the WSAB.

¹¹⁹ See s 22D of the WSAB.

¹²⁰ See s 22B of the WSAB.

¹²¹ See s 22B of the WSAB.

¹²² See s 22B of the WSAB.

¹²³ See s 22C of the WSAB.

for drinking water quality. The latter is particularly important, as the law mandates that treated water must meet the South African Bureau of Standards criteria for potable water, and municipalities are required to regularly test compliance. A further priority is the professionalisation of water services management. This includes the specification of minimum qualifications for key municipal staff working in water and sanitation services.

5.4 Norms and standards for municipal tariff setting

In terms of section 10 of the *WSA*, and on 27 May 2024 the Minister, with the concurrence of the Minister of Finance, gazetted new norms and standards for municipal tariff setting, which will come into effect on 1 April 2026.¹²⁴ The 2025/26 financial year will serve as a transition period for all water services institutions to prepare for implementation. The revised framework introduces multi-year tariff planning and incorporates measures to improve alignment and affordability across the sector. Water Services Authorities and WSPs may not substantially deviate from these standards without ministerial approval. The critical role of municipal tariff setting in supporting local government service delivery cannot be overstated. Sound pricing, effective revenue collection and long-term financial planning are essential to enable municipalities to sustainably deliver key services, including wastewater management.

5.5 National polluters register

The DWS also plans to establish a public register of polluters, anticipated for implementation in the 2025/2026 financial year.¹²⁵ This register will list entities that have either been criminally sanctioned for pollution-related offences or have been the subject of court orders (judgments) resulting from civil proceedings concerning the pollution of water resources. The initiative is intended to promote transparency, to place public pressure on repeat offenders to comply with legal requirements and to serve as a further deterrent measure.

5.6 DWS performance oversight

Lastly, it should be noted that the wastewater crisis has been escalated to the Deputy President and has even been incorporated into the Operation Vulindlela programme – a joint initiative between the Presidency and the National Treasury aimed at accelerating structural reforms and improving

¹²⁴ GN 2524 in GG 50716 of 27 May 2024.

¹²⁵ DWS 2024 <https://www.dws.gov.za/Communications/PressReleases/2024/MS%20-%20Polluters%20of%20the%20environment%20and%20water%20sources%20to%20be%20dealt%20with%20harshly.pdf>; Odendaal 2024 <https://www.engineeringnews.co.za/article/national-register-of-polluters-necessary-to-deal-with-water-pollution-says-dws-2024-04-15>.

economic growth.¹²⁶ In addressing the poor performance of municipal wastewater systems, the DWS is currently examining several critical issues. These include the effectiveness of existing enforcement mechanisms, the role and functionality of the District Development Model, and the need for broader reforms within local government.¹²⁷

6 Concluding remarks and recommendations

This article has examined the urgent and escalating crisis of municipal sewage pollution in South Africa and its significant contribution to the country's broader water crisis. Despite clear constitutional and legislative obligations, many municipalities continue to discharge untreated or partially treated sewage due to ageing and inadequate infrastructure. In response, the state is increasingly turning to criminal prosecution to enforce compliance.

Significantly, the article has scrutinised the common defences raised by municipalities and officials in litigation. These include misconceived reliance on intergovernmental dispute provisions, claims of insufficient support from other spheres of government, and the assertion of resource constraints. Courts have consistently emphasised that while resource limitations may influence sentencing, they do not excuse unlawful conduct. The analysis of typical defences has demonstrated that while municipalities often raise various legal defences to avoid liability, courts have largely rejected these arguments, affirming that resource constraints or intergovernmental disputes do not justify unlawful conduct.

Encouragingly, recent legislative and policy developments suggest a shift towards more rigorous oversight and improved service delivery. These include the proposed WSAB, the introduction of a licensing regime for WSPs, and enhanced national norms, standards, and compliance mechanisms. Initiatives such as the National Polluters Register and the prioritisation of wastewater issues under Operation Vulindlela further reflect an integrated approach to resolving the crisis.

While recent successful prosecutions and ongoing legislative reforms demonstrate progress towards accountability, the article raises concerns that threaten to undermine the progress. One of these is the frequent suspension of penalties imposed on offending municipalities, which risks diluting the deterrent effect of criminal sanctions. In addition, persistent limitations in the monitoring and enforcement capacities of the DWS and

¹²⁶ State of the Nation 2025 <https://www.stateofthenation.gov.za/operation-vulindlela>.

¹²⁷ DWS 2025 <https://infrastructurenews.co.za/2025/03/28/2025-water-sanitation-indaba-a-call-for-action-on-south-africas-water-security/>.

Catchment Management Agencies continue to hamper effective regulatory oversight.

To strengthen municipal accountability and the protection of South Africa's water resources, the article proposes more consistent enforcement and targeted reforms. These include 1) ensuring that municipal officials who are personally responsible for non-compliance are held criminally liable, 2) enhancing the institutional capacity of regulatory authorities to conduct rigorous monitoring and enforcement, and 3) promoting genuine, coordinated intergovernmental cooperation to address systemic failures in wastewater management. If implemented effectively these measures have the potential not only to reinforce legal compliance but also to drive sustainable improvements in wastewater infrastructure and service delivery. In doing so they would contribute meaningfully to the realisation of section 24 of the *Constitution*.

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List of Abbreviations

DWS	Department of Water and Sanitation
DFFE	Department of Forestry, Fisheries and the Environment
IGRFA	Intergovernmental Relations Framework Act 13 of 2005

NEMA	National Environmental Management Act 107 of 1998
NEM:ICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEM:WA	National Environmental Management: Waste Act 59 of 2008
NWA	National Water Act 36 of 1998
NWAB	National Water Amendment Bill, 2023
NPA	National Prosecuting Authority
PMG	Parliamentary Monitoring Group
PSA	Public Service Act 103 of 1994
SEMA	Specific Environmental Management Act
WSA	Water Services Act 108 of 1997
WSAB	Water Services Amendment Bill, 2023
WSP	Water Services Provider
WWTWs	Wastewater Treatment Works
WUL	Water Use Licence