The Legal Duty of Municipalities to Contribute to Estuarine Management in South Africa: The Case of Knysna Local Municipality

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Online ISSN
1727-3781

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Date Submitted

01 December 2025

Date Revised

03 June 2026

Date Accepted

03 June 2026

Date Published

14 July 2026

Editor

Prof Oliver Fuo

Journal Editor

Prof Wian Erlank

How to cite this contribution

Robertson V, Erasmus L "The Legal Duty of Municipalities to Contribute to Estuarine Management in South Africa: The Case of Knysna Local Municipality" *PER / PELJ* 2026(29) - DOI https://dx.doi.org/10.17159/1727-3781/2026/v29i0a24944

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DOI
https://dx.doi.org/10.17159/1727-3781/2026/v29i0a24944

Abstract

Estuaries are ecological treasures providing a range of environmental and socio-economic benefits to their communities. Yet estuaries are also the most threatened and least protected ecosystems in South Africa. Municipalities are ideally positioned to contribute to estuarine management due to their proximity to their communities and their specific needs; however, the environment, and by implication also estuaries, is a functional competence of national and provincial governments. In addition, local governments themselves are sometimes to blame for the pollution of estuaries within their jurisdictions. The Knysna Estuary is a case in point, where the mismanagement of the local Wastewater Treatment Works by the Knysna Local Municipality is partly to blame for the Estuary's deterioration. The Knysna Estuary is currently under the jurisdiction of the South African National Parks and is the most important estuary in South Africa in terms of conservation.

This article examines whether and how municipalities can contribute to estuarine management, with a particular focus on the Knysna Estuary. The authors argue that local government's developmental mandate, coupled with municipalities' obligation to realise the constitutional environmental right, as well as those imposed by the *National Environmental Management Act* 107 of 1998 and numerous other sector-specific environmental laws, place a duty on municipalities to contribute to estuarine management. They further argue that these laws provide municipalities with the necessary governance tools to perform this function effectively.

Keywords

Estuarine management; municipalities; local government law; environmental law; constitutional law; Knysna Local Municipality; Knysna Estuary; Knysna National Lake Area; South Africa.

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1 Introduction

Estuaries are ecological treasures and dynamic socio-economic assets that play a pivotal role in supporting human livelihoods, fostering economic activities, and enhancing community well-being.[1] These environmental assets teem with life and harbour a wealth of natural resources that sustain diverse industries, provide recreational opportunities, and contribute to the cultural identity of coastal communities. However, as indicated in South Africa's latest *National Biodiversity Assessment*, estuaries are the most threatened and least protected ecosystems in the country.[2] This highlights the increased need and importance of conserving and protecting the country's estuaries, which can be achieved, among other measures, through improved estuary management.[3]

The Knysna Estuary (hereafter Estuary), located within the jurisdiction of the Knysna Local Municipality (hereafter Municipality), is but one of the estuaries facing numerous threats and rapid ecological decline, requiring urgent intervention.[4] The Estuary is a productive system and constitutes a valuable socio-economic asset to the local community.[5] It is a key tourism attraction, and tourism is a crucial economic driver in the greater Knysna area.[6] The Estuary is also home to endangered animals listed on the International Union for Conservation of Nature's *Red List of Threatened*

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1 *National Estuarine Management Protocol* (2021) (GN 533 GG 44724 of 18 June 2021) 2-3.

2 SANBI *National Biodiversity Assessment 2018* 2.

3 Sowman and Rebelo "Coastal Environment" 4-8.

4 Claassens *et al* 2020 *African Journal of Aquatic Science* 65-66; Hayes *et al* 2022 https://www.sanparks.org/wp-content/uploads/2024/01/Knysna-Estuary-SAR-2022.pdf (*Knysna Estuary Management Plan: Situation Assessment Report*) v.

5 This includes both sustenance and recreation – *Knysna Estuary Management Plan: Situation Assessment Report* 34; Whitfield, Breen and Read *Knysna Estuary* 12.

6 Whitfield, Breen and Read *Knysna Estuary* 134; *Knysna Estuary Management Plan: Situation Assessment Report* vi.

Species,[7] and, in terms of conservation, it is considered the most important in South Africa.[8]

Despite its considerable value, the Estuary remains vulnerable to numerous harmful anthropogenic activities in its surroundings. For example, the Estuary has lost significant amounts of salt marsh areas to developments such as roads and housing.[9] Additionally, close to 20 per cent of the Estuary's Functional Zone (the 5-meter contour line) has already been covered by developments, which will continue to affect the Estuary well into the future.[10] Coastal squeeze has also become a reality, with existing peripheral developments creating a barrier that prevents salt marshes from expanding in response to climate change-induced sea-level rise.[11] In addition, discharge from the nearby Wastewater Treatment Works (hereafter WWTW), which is under the control of the Municipality and not functioning in compliance with the law, is a major source of nutrient pollution in the Estuary, and in particular in the shallow Ashmead Channel.[12] This causes eutrophication that promotes macroalgal blooms. Valuable seagrass beds have been lost due to these blooms, and they also have a negative impact on the Estuary's overall biota.[13] The discharge also raises E. coli levels, which not only affect the Estuary's ecological health but also its recreational and tourism value.[14] Stormwater runoff, another responsibility of the Municipality, likewise poses a threat to the Estuary's

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7 The *Red List of Threatened Species* was established in 1964 and is the world's most comprehensive source of information on the global conservation status of animal, fungi, and plant species – IUCN 2023 https://www.iucnredlist.org/.

8 Claassens *et al* 2020 *African Journal of Aquatic Science* 65; Whitfield, Breen and Read *Knysna Estuary* 1. Conservational importance is calculated based on weighted size, habitat, zonal type, rarity, and biodiversity importance scores – Turpie *et al* 2002 *Water SA* 199. The Hippocampus capensis is the world's only known estuarine seahorse and is only found in the Keurbooms, Knysna, and Swartvlei estuaries – Bell *et al* 2003 *Environmental Biology of Fishes* 35-46.

9 Whitfield, Breen and Read *Knysna Estuary* 126; Claassens *et al* 2020 *African Journal of Aquatic Science* 72.

10 Whitfield, Breen and Read *Knysna Estuary* 127; Claassens *et al* 2020 *African Journal of Aquatic Science* 70-72.

11 Whitfield, Breen and Read *Knysna Estuary* 127; Claassens *et al* 2020 *African Journal of Aquatic Science* 72.

12 Ashmead Channel is a protected arm of the estuary which surrounds Thesen Island – Whitfield, Breen and Read *Knysna Estuary* 118.

13 Claassens *et al* 2020 *African Journal of Aquatic Science* 71; Whitfield, Breen and Read *Knysna Estuary* 118. See also *Minister of Water and Sanitation v Msukaligwa Local Municipality* (MP) (unreported) case number 4860/2022 of 20 September 2023 (hereafter the *Msukaligwa* case) para 32, where the municipality was found to have violated its constitutional obligations because its WWTW polluted a nearby water resource.

14 Claassens *et al* 2020 *African Journal of Aquatic Science* 70, 77; Western Cape Government 2021 https://www.westerncape.gov.za/eadp/coastal-management (*Report on the Implementation of the Western Cape Estuary Management Programme*) 55.

biota by carrying nutrient-rich effluent into the waterbody.[15] The Estuary, therefore, faces numerous threats, and the Municipality's mismanagement of its WWTW and stormwater runoff, among others, is clearly a cause for concern.[16]

The Estuary is located within the Knysna National Lakes Area that has been proclaimed as a Protected Environment in terms of the *National Environmental Management: Protected Areas Act* 57 of 2003 (hereafter the *NEM:PAA*); and it also forms part of the Garden Route National Park that constitutes a Protected Area in terms of the same Act.[17] These areas are managed by the South African National Parks (hereafter SANParks).[18] SANParks exercises its authority by virtue of section 56 of the *NEM:PAA*, and in this case, in particular, also in accordance with the *Regulations for the Proper Administration of the Knysna Protected Environment* (2009). But while it manages activities within the Estuary, it has no control over external factors that may influence it, such as pollution originating in the surrounding urban area.[19] As such, SANParks' ability to protect and conserve the Estuary is limited because its current management strategy does not account for external influences that threaten its condition.[20] Since the surrounding localised catchments up to the mean spring high water mark of the Estuary fall under the jurisdiction of the Municipality, though, this management gap may well be filled by the Municipality insofar as its functions overlap with those that relate to the conservation and protection of an estuary in the general sense. In fact, as per Claassens *et al*, cooperation between SANParks and the Municipality is vital if the Estuary is to be managed successfully.[21]

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15 Claassens *et al* 2020 *African Journal of Aquatic Science* 70, 72.

16 *Report on the Implementation of the Western Cape Estuary Management Programme* 47.

17 See the *Regulations for the Proper Administration of the Knysna Protected Environment* (2009) (GN R1175 in GG 32797 of 11 December 2009); ss 1, 9 of the *NEM:PAA*; *Knysna Estuary Management Plan: Situation Assessment Report* iv. Note that the Knysna National Lakes Area was initially proclaimed as the Knysna Lake Section in terms of the *Lake Areas Development Act* 39 of 1975, but this Act has since been repealed and replaced by the current *NEM:PAA*.

18 SANParks was established under the *National Parks Act* 57 of 1976, and since the repeal of this Act continues to exist as a juristic entity by virtue of s 54(1)-(2) of the *NEM:PAA*. SANParks is the leading national conservation authority in South Africa and operates under the jurisdiction of the Department of Forestry, Fisheries and the Environment (DFFE). For more on SANParks – see DFFE 2023 https://www.dffe.gov.za/statutorybodies/sanparks.

19 This refers to areas outside of the "development control area" as defined in reg 1 of the *Regulations for the Proper Administration of the Knysna Protected Environment* (2009). See Whitfield, Breen and Read *Knysna Estuary* 278.

20 Whitfield, Breen and Read *Knysna Estuary* 278; Claassens *et al* 2020 *African Journal of Aquatic Science* 66.

21 Claassens *et al* 2020 *African Journal of Aquatic Science* 66.

This article seeks to demonstrate that municipalities have a legal duty to contribute to the management of estuaries, as well as to offer suggestions on how they can do so by exercising their original powers and fulfilling their statutory functions – and this applies even though the management of some estuaries falls under the authority of SANParks or other institutions.[22] To achieve this, the article is structured into two parts. The first part focuses on the legal provisions that underpin municipalities' duty to contribute to estuarine management. The second part considers the potential limitations that may be imposed on local governments in this regard by the constitutional division of powers and functions. The article then concludes with suggestions on whether and how local government can execute this responsibility.

2 Municipalities' duty to contribute towards estuary management – the legal basis

Following the adoption of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*), local government obtained a new developmental role that transcends service delivery and embraces the promotion of a safe and healthy environment, which has been interpreted to mean that municipalities must also take responsibility for the management of the environment.[23] This new role is reflected in several constitutional provisions and various laws that aim to give effect to those provisions. The discussion below will evaluate and consider the implications of local government's developmental mandate within the context of the pursuit towards sustainability, the responsibilities emanating from local government's obligation to realise the constitutional environmental right entrenched in the Bill of Rights,[24] and the duties that arise from relevant environmental legislation that purports to give effect to the above. This will indicate how these provisions serve as the basis for, and impose a legal duty on, municipalities to contribute to the management of estuaries in their respective jurisdictions.

2.1 Local government's developmental mandate

Local government is mandated to execute a developmental agenda. This mandate stems from the *Constitution*, the *White Paper on Local Government* (1998) (hereafter the *White Paper*), and the *Local Government: Municipal Systems Act* 32 of 2000 (hereafter the *Systems Act*). The *Constitution*, as the supreme law in South Africa, outlines the objects of local government, stating that municipalities must not only provide services to

22 Currently, 36 of the approximately 300 functional estuaries in South Africa fall under the jurisdiction of SANParks – Coetsee *et al* 2024 https://www.sanparks.org/wp-content/uploads/2023/12/RR-22-23-web-version-final-1.pdf 10.

23 Du Plessis 2010 *Stell LR* 265.

24 Chapter 2 of the *Constitution* constitutes the Bill of Rights.

their communities, but must also promote "social and economic development" and a "safe and healthy environment", among other objectives.[25] The *Constitution* further provides that a municipality must:

> structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.[26]

It is therefore clear that municipalities have to prioritise the development of their communities. This latter provision, though, notably refers only to social and economic development and does not include an ecological component. The absence of such could arguably imply, in the context of executing this developmental mandate, that local government need not be concerned about promoting development that is also ecologically sustainable. However, as with all constitutional provisions, this section should not be read on its own but rather interpreted generously, contextually, and purposively.[27] And in light of all the listed constitutional objects of local government, municipalities may also need to consider environmental considerations in any event.[28] This much is confirmed in the *White Paper*, the seminal policy document that laid the basis for the current local governance system, which provides that:

> the central responsibility of municipalities [is] to work together with local communities to find sustainable ways to meet their needs and improve the quality of their lives.[29]

And further that:

> [e]nvironmental sustainability is a key challenge in both urban and rural settlements. Municipalities can enhance environmental sustainability by including environmental issues in their planning processes. … [It] requires municipalities to develop long-term strategic action plans that address priority sustainable development concerns.[30]

In addition, the *Systems Act*, which is the principal law regulating the governance affairs of local government,[31] provides that municipalities must strive to achieve their constitutional objects, give effect to their developmental mandate, and contribute to the realisation of the fundamental rights in the *Constitution*.[32] An important aspect here is that the

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25 Section 152(1)(b)-(d) of the *Constitution*.

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

27 Section 39(1)(a)-(b) of the *Constitution*; Du Plessis *Re-Interpretation of Statutes* 272-237.

28 Especially because municipalities must promote a "safe and healthy environment".

29 Section B para 1 of the *White Paper*.

30 Section B para 2.2 of the *White Paper.*

31 Preamble to the *Systems Act*.

32 Section 23(1) of the *Systems Act*. Note that this latter aspect concerning the constitutional environmental right is addressed in para 2.2 below.

Act also prescribes that the term development refers to "sustainable development", and in this local governance context, the term is defined as:

> integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community.[33]

The *Systems Act* also reiterates, in section 73, that, as a general duty, municipalities must give effect to the provisions of the Constitution, promote the development of their local communities, and, significantly, provide municipal services that are "environmentally sustainable".[34]

Based on the above, it is evident that municipalities must develop their communities, and further, that municipalities must, in fact, promote development that is also environmentally sustainable. Or put differently – local government must pursue sustainability.[35] The implication hereof is that while municipalities must endeavour to maximise economic growth and the social upliftment of their communities, they should only do so having regard to and by considering the impact this may have on the environment.[36] Granted, in practice, the three dimensions of sustainability typically conflict with one another, and trade-offs among them are bound to occur.[37] And given the global historical trajectory in which economic growth has often been pursued at the expense of environmental degradation, it appears that the economic dimension often takes precedence over social upliftment and environmental protection.[38] Insofar as estuaries are concerned, however, they constitute valuable socio-economic assets in their own right, and this makes their conservation and protection (the environmental dimension) all the more important in the context of communal development.[39] The developmental mandate of local government, therefore, establishes a general duty on municipalities to contribute to achieving sustainability, and this, in the very least, means that municipalities should not permit the degradation of estuaries in the pursuit of extra-socio-economic

33 Section 1 of the *Systems Act*.

34 Sections 4(2)(d), 73(1)(b) and 73(2)(d) of the *Systems Act*. The *Systems Act* defines environmentally sustainable as: "the provision of a municipal service in a manner aimed at ensuring that – (a) the risk of harm to the environment and to human health and safety is minimised to the extent reasonably possible under the circumstances; (b) the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances; and (c) legislation intended to protect the environment and human health and safety is complied with".

35 Nel and Alberts "Environmental Management and Environmental Law" 7-10.

36 See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) (hereafter the *BP Southern Africa* case) 150; Feris 2008 *SAJHR* 40; Du Plessis and Nel "Introduction" 8-13, 33-39.

37 Field "Local Economic Development" 5-13.

38 Field "Local Economic Development" 5-13.

39 This is also particularly significant for socio-economically challenged groups who rely on the environment for basic needs such as food and water – Currie and De Waal *Bill of Rights Handbook* 526.

development, and further also conserve and protect estuaries for the socio-economic benefits that the estuaries themselves can provide. It is also worth mentioning at this juncture that all municipalities must adopt Integrated Development Plans (hereafter IDP) that underpin their developmental mandates and thereby essentially guide their developmental priorities and actions.[40] If municipalities are to concern themselves with environmental matters and make it a part of their developmental outcomes, including the protection and conservation of an estuary, such considerations must be included in their IDPs.[41]

The source of local government's developmental mandate is not limited to the above provisions. As alluded to above, it is also reinforced by the duties that arise from government's obligation to realise the fundamental rights in the Bill of Rights.[42] A discussion of these follows below.

2.2 Estuary management and the constitutional environmental right

The Bill of Rights in the *Constitution* forms the cornerstone of democracy in South Africa and entrenches several fundamental rights that apply to everyone in the country, including both government and local communities.[43] In the context of estuarine management, the constitutional environmental right under section 24 is particularly relevant.

Section 24 of the *Constitution* provides that:

> Everyone has the right–
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that–
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[44]

Much has already been written on the scope and content of this right and need not be repeated here.[45] But a few aspects deserve closer scrutiny. As a point of departure, it should be reiterated that this right is inherently anthropocentric.[46] It is aimed at people and their needs, placing humans at the centre of its entitlements. While it may recognise that non-human

40 Sections 25-26 of the *Systems Act*.

41 See Steytler and De Visser *Local Government Law* ch 7 for more on IDPs.

42 Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 72.

43 Sections 7-8 of the *Constitution*.

44 Section 24 of the *Constitution.*

45 For a summary of these – see Erasmus *Implementation and Enforcement of the Legal Environmental Health Mandate* 232-237.

46 Scholtz 2005 *TSAR* 70-75; Feris 2008 *SAJHR* 30-33; Nel and Alberts "Environmental Management and Environmental Law" 2-7; Du Plessis 2015 *PELJ* 1864-1865.

entities have inherent value, it does not confer juristic status on them.[47] In other words, an estuary is not entitled to legal protection by virtue merely of its existence and for itself only. This does not mean that estuaries do not qualify for legal protection, though. An estuary is nevertheless part and parcel of the "environment", and by this token should not be "harmful to [people's] health or well-being". The *Constitution*, therefore, also implicitly demands that estuaries be protected from pollution and ecological degradation, conserved as natural resources, and used sustainably.[48]

Section 24(a) of the *Constitution*, which seemingly provides an unqualified entitlement to be free from environmental harm,[49] is concerned with both people's health and their well-being in relation to potential harmful environmental impacts. The concept of health is understood to refer to a person's mental and physical integrity.[50] While the idea of well-being, on the other hand, is a more open-ended concept, as the High Court has also confirmed, affording protection for a much broader state of the human condition than that covered by "health" alone.[51] The scope of well-being cannot be so broad as to cater for every conceivable emotional insecurity or aesthetic discomfort; yet, a person need not suffer mental or physical damage for their well-being to be affected.[52] Or as Glazewski puts it, the term well-being encompasses the "essence of environmental concern", that sense that we ought to "utilise the environment in a morally responsible and ethical manner".[53] One could, as such, argue that a person's well-being may be legitimately affected by their reasonable anticipation of, or actual threat to, the environment (and/or eventual damage to it). This has a considerable impact on the protection afforded by section 24(a), justifiably extending its scope of application to matters relating to conservation and protection of biodiversity as well. So, while the degradation of an estuary may not necessarily pose a threat to a person's health as such, it could potentially

47 Glazewski "Nature and Scope of Environmental Law" 8-12; Feris 2008 *SAJHR* 30-32. Note that the *National Environmental Management Act* 107 of 1998 (hereafter the *NEMA*) also provides that people and their needs must be placed at the forefront of environmental management, confirming that the constitutional environmental right is anthropocentric in nature.

48 Section 24(a) and (b) of the *Constitution*.

49 It is unqualified in the sense that it does not have to be realised progressively or within the state's available financial means, unlike all the other socio-economic rights in the Bill of Rights.

50 Currie and De Waal *Bill of Rights Handbook* 526; preamble to the *Constitution of the World Health Organisation* (1946); Erasmus *Implementation and Enforcement of the Legal Environmental Health Mandate* 233-234.

51 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) (hereafter the *HTF Developers* case) para 18; Du Plessis 2011 *SAJHR* 295-297; Erasmus *Implementation and Enforcement of the Legal Environmental Health Mandate* 234-235; Du Plessis 2018 *SAJHR* 191-208.

52 Currie and De Waal *Bill of Rights Handbook* 526; Du Plessis 2018 *SAJHR* 199.

53 Glazewski "Environmental Right" 14.

affect a person's well-being, thereby also triggering the protection afforded by this constitutional right.[54]

Section 24(b) of the *Constitution* recognises that environmental protection and social and economic development go hand in hand.[55] The Constitutional Court has also stated that sustainable development is "at the core of environmental protection", that its essence is a "balanced integration of socio-economic development and environmental concerns", and that it provides a "framework for reconciling socio-economic development and environmental protection".[56] Chikuruwo goes even further, arguing that the specific reference to "ecologically sustainable development" in the *Constitution* shifts the concept from development that is sustainable to sustaining the earth's ecology.[57] For this reason, preference should be given to environmental interests and the preservation of Earth's ecology over socio-economic interests.[58] However, the mere fact that a balance must be achieved between socio-economic needs and environmental protection in the pursuit of sustainability is indicative that the degradation of estuaries should be avoided or minimised in any event, and their integrity should not be jeopardised. This is without even having to elevate environmental interests above social upliftment and economic growth to achieve sustainability.

It is therefore clear that estuaries do fall within the scope of legal protection of the constitutional environmental right as a subject of people's interest, for the purpose of their well-being, and towards achieving sustainability.[59] All three spheres of government must respect, protect, promote, and fulfil the fundamental rights in the *Constitution*.[60] This generally translates into a negative and/or positive duty, depending on the wording of the specific right. The former means that government should refrain from doing something so as not to interfere with the existing enjoyment of a right, whereas the latter means that government should actively do something to realise the entitlements guaranteed by such a right.[61] In the context of the

54 Currie and De Waal *Bill of Rights Handbook* 526; Feris 2008 *SAJHR* 49.

55 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) (hereafter the *Fuel Retailers* case) para 45.

56 *Fuel Retailers* case paras 45, 55, 113. The Constitutional Court reiterated this point in *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 2 SA 319 (CC) para 61. The High Court also made it clear that "[p]ure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable" – *BP Southern Africa* case 144.

57 Section 24(b)(iii) of the *Constitution*; Chikuruwo 2024 *SAYIL* 24.

58 Chikuruwo 2024 *SAYIL* 3, 23.

59 *Knysna Estuary Management Plan: Situation Assessment Report* 78.

60 Sections 7 and 239 of the *Constitution*.

61 De Vos *et al South African Constitutional Law* 672.

environmental right in section 24 of the *Constitution*, this means that government must respect everyone's right to a healthy environment by not interfering with people's enjoyment thereof, and government must enact legislation and take other measures to prevent ecological degradation, promote conservation, and secure sustainable development.[62] These duties, of course, apply not only to national and provincial government, but also to local government,[63] and indeed also in relation to the management of estuaries. Municipalities must therefore participate in the management of an estuary as an environmental asset in their jurisdictions to the extent that they are responsible for fulfilling the constitutional environmental right. Put differently, municipalities must take measures to protect the environment and, by implication, may not pollute estuaries. This much has also been confirmed in the *Msukaligwa* case. In this matter, a municipality was taken to task for allowing its WWTW to fall into a state of dysfunction due to improper maintenance, resulting in the discharge of contaminated water into a stream.[64] The Court found that the municipality was in breach of, and its actions seriously violated, the constitutional rights of the communities impacted by the water pollution, and specifically also the environmental right.[65] The Court further reiterated the importance of the municipality's role in taking measures to prevent violations of fundamental rights.[66] It is, therefore, indisputable that municipalities must take reasonable measures to prevent pollution of water resources (including an estuary). A discussion of some of the legislation subsequently enacted in this regard follows below.

2.3 Local government's responsibility towards estuary management emanating from national environmental legislation

Several laws have been enacted to give effect to the constitutional environmental right that has a bearing on the management of estuaries in some way or another. This includes the *NEMA* as well as some of the Specific Environmental Management Acts (hereafter SEMAs), such as the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (hereafter the *NEM:ICMA*), the *NEM:PAA*, and the *National Environmental Management: Biodiversity Act* 10 of 2004 (hereafter the *NEM:BA*).

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62 It has been argued that s 24(a) of the *Constitution* generally only invokes a negative duty on government, whereas s 24(b) of the *Constitution* demands that government must act. See the *HTF Developers* case para 17 for more on this. Note that both can be fulfilled by a municipality through the exercise of its executive and legislative authority – Du Plessis "Understanding the Legal Context" 11.

63 The extent of local government's duties in this regard is constrained by the allocation of functional areas in the *Constitution*. This issue is addressed in further detail in para 3 below.

64 *Msukaligwa* case para 4.

65 *Msukaligwa* case para 32.

66 *Msukaligwa* case para 34.

The *NEMA* provides a general legal framework for environmental management in South Africa.[67] For this purpose, the Act lists numerous principles that ought to guide all decision-making on matters that affect the environment.[68] The principles apply throughout the country to the actions of all organs of state that may significantly affect the environment, including the activities and decisions of municipalities.[69] While the principles are not legal rules that must be followed blindly, they cannot be ignored as non-binding policy either. Instead, they can be viewed as norms within a value system that informs a logical chain of reasoning, serving as a guideline and general framework for government actors when they make decisions that affect the environment.[70] It therefore stands to reason that whenever a municipality needs to make a decision that may have a significant impact on the environment (or an estuary), it must also pay due regard to the *NEMA* principles.[71] The Act, moreover, enables municipalities to enter into environmental management cooperation agreements with any person or any community to ensure compliance with the *NEMA* principles,[72] and such agreements may be utilised to safeguard estuaries.[73] Some of the principles of note that are listed in the *NEMA* include that a risk-averse and cautious approach must be followed (precautionary principle);[74] that negative impacts on the environment must be anticipated and prevented or minimised (preventative principle);[75] that decisions must take the interests, needs, and values of all interested and affected parties into account (responsiveness principle);[76] that governmental bodies must coordinate

67 Nel and Du Plessis 2001 *SAJELP* 1-2. The SEMAs are also subject to some of the provisions in the *NEMA*.

68 Section 2(4)(a)-(r) of the *NEMA*.

69 Section 2(1) of the *NEMA*; s 239 of the *Constitution*.

70 Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 134-145; Glazewski and Murombo "National Environmental Management Act" 7-13; Paterson 2018 *PELJ* 21.

71 Municipalities must adhere to the principles when drafting their IDPs – see s 16(4) of the *NEMA*.

72 Section 35(1) of the *NEMA.* See also Nel, Du Plessis and Du Plessis "Instruments for Local Environmental Governance" 3-45; Knox-Mosdell and Kotzé "Regulation and Mitigation of Environmental Pollution" 7-36.

73 The respective parties must all agree thereto, however – see s 35(2)-(3) of the *NEMA*; Nel, Du Plessis and Du Plessis "Instruments for Local Environmental Governance" 3-45; Knox-Mosdell and Kotzé "Regulation and Mitigation of Environmental Pollution" 7-36.

74 Section 2(4)(a)(vii) of the *NEMA*. See also Knox-Mosdell and Kotzé "Regulation and Mitigation of Environmental Pollution" 7-25 concerning the best practical environmental option.

75 Section 2(4)(a)(viii) of the *NEMA*.

76 Section 2(4)(g) of the *NEMA*. This may be of particular importance where municipal decisions and activities lead to the degradation of an estuary that holds socio-economic and/or other forms of value to the local community.

their actions (cooperative-governance principle);[77] and that sensitive and vulnerable ecosystems, such as estuaries, demand special attention (flagged ecosystem principle).[78] These principles are unambiguously geared towards positive environmental outcomes, and in this way serve as a strong motivation for municipalities to take measures to protect and conserve the estuaries in their jurisdictions.

The *NEMA* also establishes a general duty of environmental care whereby every person must essentially take reasonable measures to prevent pollution from occurring.[79] The impact of this duty is two-fold. On the one hand, it empowers a municipality to issue directives instructing people to stop polluting and to remedy the effects of their polluting activities.[80] This may be an especially useful tool that municipalities can utilise in cases where an estuary is being polluted or harmed. But on the other hand, because of the generality of this provision, municipalities are also subject to this duty. This means that, as potential polluters, they too need to take reasonable measures to prevent estuary pollution in their own jurisdictions arising from their conduct and can be held strictly liable in this regard.[81]

The *NEM:ICMA* compels coastal municipalities to prepare, adopt, and administer Municipal Coastal Management Programmes (hereafter MCMPs) to manage those areas.[82] Municipalities must include a vision and objectives for managing their coastal zones in their MCMPs, along with the priorities and strategies they have identified to achieve those objectives.[83] To facilitate the process, municipalities may establish Municipal Coastal Committees that can advise them on developing, reviewing, and amending their MCMPs.[84] And they may also adopt bylaws to govern the

77 Section 2(4)(l) of the *NEMA*. This implies that SANParks and the Municipality need to work together as far as the management of the Estuary is concerned.

78 Section 2(4)(r) of the *NEMA*. As per the concept of sustainable development, the *NEMA* principles also include that all the social, economic, and environmental factors relevant to a particular decision-making process must be integrated and reconciled to find a balance between them – see s 2(4)(a)(i)-(viii) of the *NEMA*; para 2.2 above.

79 Section 28(1) of the *NEMA*.

80 Section 28(3)-(4) of the *NEMA*. Note that any person can approach a competent court to compel a municipality to issue such a directive if they do not do so on their own accord – see s 28(12) of the *NEMA*.

81 See s 28(2) of the *NEMA* and *Bareki v Gencor Limited* 2006 1 SA 432 (T) 440-441 for more on the general applicability of the duty of care. See also Glazewski and Murombo "National Environmental Management Act" 21-27; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 176-180.

82 Section 48(1)(a) of the *NEM:ICMA.* Coastal zones encompass the entire coastal area, including estuaries that form part of the coastal waters – see s 1 of the *NEM:ICMA*. MCMPs may also be prepared as part of a municipality's IDP – see s 48(4) of the *NEM:ICMA*.

83 Section 49(2) of the *NEM:ICMA.*

84 Section 42(1)-(4) of the *NEM:ICMA.*

implementation, administration, and enforcement of their MCMPs.[85] The implication hereof is that municipalities have the authority to determine and implement their own objectives for their coastal zones and, in this way, can exercise their autonomy to achieve particular environmental outcomes, including those related to estuaries. MCMPs must be consistent with National and Provincial Coastal Management Programmes, though, which require cooperation between the spheres of government.[86] In addition, the *National Estuarine Management Protocol* (2021),[87] adopted as required by the *NEM:ICMA*, provides that estuaries must also be managed in accordance with Estuarine Management Plans (hereafter EMPs).[88] While municipalities *per se* do not have to draft such EMPs, they must be consulted during the process, and such Plans must be consistent with their relevant MCMPs.[89] SANParks is currently developing an EMP for the Knysna Estuary.[90]

The *NEM:ICMA* further also extends the application of the duty of care as articulated in the *NEMA* by expressly including the coastal environment within its ambit of application, and, more usefully, provides that significant pollution must be read as "including an *adverse effect* on the coastal environment",[91] which constitutes a lower threshold of impact than that in section 28 of the *NEMA*, the latter of which is triggered only when pollution is "significant". In other words, the duty of care applies to estuaries not only where significant pollution occurs, but whenever they are adversely affected. This means that municipalities are empowered by this provision to take legal action to protect the estuaries in their jurisdictions as soon as anyone adversely affects them.

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85 Section 50 of the *NEM:ICMA*.

86 Section 49(1)(b)(i)-(ii) of the *NEM:ICMA.* Note that IDPs must be aligned with and give effect to the National and relevant Provincial Coastal Management Programmes – see s 51 of the *NEM:ICMA*.

87 Some of the objectives of the Protocol are to conserve, manage, and enhance the sustainable economic and social use of estuaries without compromising their ecological integrity and functioning, as well as to manage estuaries co-operatively through all spheres of government. For this purpose the Protocol, among others, provides that estuarine management must be based on several of the principles as listed in the *NEMA* – see the *National Estuarine Management Protocol* (2021) 5-6; s 2(4) of the *NEMA*.

88 Section 34 of the *NEM:ICMA*; *National Estuarine Management Protocol* (2021) 12-13.

89 Section 43(1)(b)(ii) of the *NEM:ICMA*. The responsible authority in this regard depends on the location of the estuary. This will be provincial environmental departments in those cases where an estuary falls within the boundaries of one municipality only, or SANParks if an estuary falls within a protected environment as is the case with the Knysna Estuary – see *National Estuarine Management Protocol* (2021) 7.

90 *Knysna Estuary Management Plan: Situation Assessment Report* 2.

91 Emphasis added – see s 58(1) of the *NEM:ICMA*.

The *NEM:PAA* regulates the management of protected areas.[92] While the Act does not grant local government specific functions or powers in this regard, it does involve municipalities because, before an area within their respective jurisdictions can be declared a protected area, they must be consulted by either national or provincial governments, as the case may be.[93] The authorities responsible for managing protected areas are also tasked with preparing management plans for those areas. And similarly, any applicable aspects in the IDPs of relevant municipalities must also be considered in this process, thereby again involving local government. The management authority of a protected area may also enter into a co-management agreement with a municipality for that area.[94] As such, municipalities can contribute to the management of protected areas (and estuaries in those areas) by way of compulsory consultation. The *Regulations for the Proper Administration of the Knysna Protected Environment* (2009) was adopted for the management of the Knysna National Lakes Area specifically, which includes the Estuary. However, the Regulations does not incorporate aspects related to the Municipality or its relevant functions and competencies.

The *NEM:BA* regulates the management and conservation of biodiversity in South Africa and is concerned with all human activities that affect biological diversity and ecosystems, including estuaries.[95] The latest *National Biodiversity Framework* (2019-2024) that was published under the Act provides for an integrated, coordinated and uniform approach to biodiversity management.[96] In this regard states that:

> [a]ll local governments in South Africa (including Metropolitan, District and Local Municipalities) play an increasingly important role in spatial planning and land-use management (including biodiversity management and integrated environmental management). They also provide a strategic opportunity to mainstream biodiversity into sustainable development through the integration of nature-based opportunities into [their] integrated development plans.[97]

The *NEM:BA* requires all municipalities to incorporate the applicable provisions of the *National Biodiversity Framework* into their IDPs, and to

92 Protected areas are those as listed in s 9 of the *NEM:PAA*, and may include estuaries if declared as such. The Knysna Estuary is one of those – see para 1 above.

93 Sections 31(b)(ii), 32(a)(ii) of the *NEM:PAA*.

94 Section 42(1)(a) of the *NEM:PAA*.

95 Sections 2, 4 of the *NEM:BA.*

96 Sections 38-39 of the *NEM:BA*.

97 *National Biodiversity Framework* (2019-2024) (GN 2423 in GG 46798 of 26 August 2022) 14. The *White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity* (2023) (GN 3537 in GG 48785 of 14 June 2023) para 1.6.3 likewise provides that: "[l]ocal government plays an important role in biodiversity conservation as they have land that includes important biodiversity features, and areas that support biodiversity and ecosystem functioning, which need to be conserved and used sustainably".

demonstrate how those provisions will be implemented.[98] They must also take into account the need to protect listed ecosystems in their IDPs and make provision for the monitoring, control, and eradication of listed invasive species.[99] In doing so, municipalities bind their councils to protect the environment (and an estuary), as they must give effect to their IDPs.[100]

The *NEM:BA* further empowers and compels municipalities to adopt and implement Biodiversity Management Plans (hereafter BMPs) for specific ecosystems, ensuring their long-term survival.[101] A prospective BMP must also take the IDP of the relevant municipality into account and may not conflict with it, thereby aligning the objectives and activities of that municipality with its conservation of biodiversity and ecosystems.[102] It therefore stands to reason that if a municipality wants to manage its estuaries in a particular way, it may well do so through a BMP.

Evidently, the *NEMA* and all the SEMAs create avenues for local governments to participate in the management of estuaries, reinforcing the point that municipalities are responsible for, and must contribute to, the conservation and protection of these areas. This is despite the fact that the "environment" is not a functional area of local government *per se*. A discussion of the constitutional division of functions and powers and its implications for municipalities in the management of estuaries follows below.

3 Potential constitutional limitations on the exercise of municipal authority concerning estuarine management

The three spheres of government are autonomous, and they may not assume any power or function unless conferred upon them by the *Constitution* or other legislation.[103] The *Constitution* allocates distinct functional areas to each sphere.[104] They may exercise their authority over those areas without interference from the other spheres.[105] In the local

98 Section 48(2)(a)-(c) of the *NEM:BA.*

99 Sections 54, 76(2)(b) of the *NEM:BA*.

100 Section 36 of the *Systems Act*. See also *Parkhurst Village Association v Capela* 2010 JOL 25759 (GSJ) para 7.

101 Note that BMPs must be submitted to the Minister of the DFFE for approval, and the Minister must assign the responsibility for the implementation of those BMPs to the relevant municipalities – see ss 43-45 of the *NEM:BA*.

102 Sections 45(d), 48(1)(b) of the *NEM:BA*.

103 This is based on the rule of law – see ss 41(f) and (g), 152(2), and 153(a) of the *Constitution*.

104 Note that, at the local government sphere, the functional areas are also divided between district and local municipalities by way of ss 83-84 of the *Local Government: Municipal Structures Act* 117 of 1998. See also Steytler and De Visser *Local Government Law* ch 5 para 4 for more in this regard.

105 See s 40(1) and schedules 4 and 5 of the *Constitution*. See Steytler and De Visser *Local Government Law* ch 5 para 3 for an in-depth discussion on this topic.

government context, this means municipalities have both executive and legislative authority and the right to administer their own affairs (functional areas) as well as matters assigned to them.[106] Yet the "environment" is a shared functional area of national and provincial government.[107] By this token, therefore, local government does not have the authority to regulate environmental matters, including estuaries. Or so it would seem. But the *Constitution* further provides that:

> a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.[108]

The courts, moreover, have all but dispelled this belief that local government is excluded from environmental management.

In *Maccsand (Pty) Ltd v City of Cape Town* (hereafter the *Maccsand* case),[109] a case concerning the authority of the respective spheres of government in relation to mining (an exclusive functional area of national government) versus municipal planning (a functional area of local government), the Court explained that, while the functional areas are distinct from one another, they are not contained in "hermetically sealed compartments".[110] This becomes evident considering that many of the functional areas allocated to local government cannot be practically separated from the environment. These areas, among others, include air pollution, building regulations, municipal planning, municipal health services, stormwater management systems, potable water supply and domestic wastewater and sewage disposal systems, beaches, pontoons and jetties, the control of public nuisances, noise pollution, and refuse removal and waste disposal. The implication hereof is that the functional areas do sometimes overlap, and the actions that one sphere of government takes in relation to a particular functional area would not necessarily constitute "an impermissible intrusion" into the area of another.[111] Due to such instances, the *Constitution* obliges the three spheres of government to cooperate and coordinate their actions.[112] Many local government functions are innately related to estuaries. For example, the existence of an estuary will always be accompanied by a beach. Stormwater and sewage run-off often flow into estuaries due to their location. In addition, pontoons

106 Note that municipal bylaws may not be in conflict with national or provincial legislation – see s 156(1)-(4) of the *Constitution*.

107 Section 104 and part A of schedule 4 of the *Constitution.*

108 Section 156(5) of the *Constitution*. See also Steytler and De Visser *Local Government Law* ch 5 para 1.3.

109 2012 4 SA 181 (CC).

110 *Maccsand* case para 47.

111 See the *Maccsand* case paras 43, 47; Humby 2014 *PELJ* 1671-1681; Freedman 2014 *PELJ* 588-592.

112 *Maccsand* case para 47; ss 40-41 of the *Constitution*; Paterson 2018 *PELJ* 20.

and jetties are typically erected on estuaries.[113] Accordingly, municipalities must sometimes regulate and manage environmental (or estuarine)-related aspects in line with their constitutionally allocated competencies. This is even though they may seemingly intrude on the authority of the other spheres of government, in which case they must execute their functions and fulfil their objectives in relation to such "environmental" matters within the context of the principles of cooperative governance.[114] Consequently, while the respective spheres must exercise their powers in a manner that does not encroach on the functional areas of the others, municipalities may not be prohibited from performing their functions by virtue of this constitutional imperative, and especially not at the expense of their own autonomy. Section 151(4) of the *Constitution* substantiates this point by expressly providing that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

As a further case in point, in *RA Le Sueur v Ethekwini Municipality* (hereafter the *Le Sueur* case),[115] the applicant approached the High Court to declare certain resolutions adopted by the city unconstitutional on the grounds that local government may not exercise legislative or executive authority over environmental matters, and in adopting some of those resolutions, it was argued, the city did just that.[116] Among those resolutions were amendments that upgraded the legal status of the city's management plan for protecting biodiversity and ecosystem services within and around the municipal area, known as the Durban Municipality Open Space System (hereafter the D-MOSS). The implication of this upgrade to the D-MOSS was that private property owners were forbidden from commencing with certain developments without obtaining environmental authorisation from the city's Environmental Planning and Climate Protection Department. The Court, however, dismissed the applicant's argument and held that:

> [m]unicipalities are entitled to regulate environmental matters from micro level for the protection of the environment.[117]

The Court's decision was based on the obligations imposed by section 24 of the *Constitution*,[118] the executive and legislative powers provided to municipalities by section 156 of the *Constitution*,[119] the responsibilities that flow from the constitutional principles of cooperative governance,[120] the

113 Paterson 2018 *PELJ* 23.
114 Paterson 2018 *PELJ* 19; Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 78.
115 (KZP) (unreported) case number 9714/11 of 30 January 2013.
116 *Le Sueur* case paras 1, 4, 16.
117 *Le Sueur* case para 37.
118 See para 2.1 above; *Le Sueur* case para 19.
119 *Le Sueur* case para 19.
120 *Le Sueur* case para 20; s 40 of the *Constitution*.

ambit of municipal planning *vis-à-vis* environmental protection,[121] as well as national and provincial legislation that recognises as much.[122] This judgment therefore confirms local government's rightful place, whereby municipalities can and must take co-responsibility for the realisation of section 24 of the *Constitution* (protection of the environment) and make effective and meaningful contributions in this regard.[123] This means that municipalities may, in fact, contribute towards estuarine management notwithstanding the constitutional division of functions and powers, as long as they do not encroach on the authority of the other spheres *ultra vires*.

The above position was also confirmed in *Nel v Hessequa Municipality* (hereafter the *Nel* case).[124] This case addressed the constitutionality of a bylaw that was adopted by a municipality regarding the management of boats and the use of rivers, a local government function encompassing local amenities, municipal recreation, and public spaces.[125] The applicant argued that the bylaw conflicts with the *National Water Act* 36 of 1998, among others, and is therefore invalid.[126] The Court, citing both the *Maccsand* case and the *Le Sueur* case, disagreed with the applicant's contentions, finding that the bylaw did not conflict with those national laws and, significantly, that local government may pass bylaws to administer its own local affairs, a power afforded to it by the *Constitution* itself.[127]

While these cases illustrate that local government may in fact perform certain "environmental" functions that would otherwise resort under the concurrent authority of national and provincial governments as contemplated in part A of schedule 4 in the *Constitution*, the judgment in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (hereafter the *Blue Moonlight* case) shows that municipalities may sometimes even be compelled to do so.[128] This case concerns the eviction of unlawful occupants, and in particular, also whether the municipality had an obligation to provide temporary emergency housing to

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121 The Court found that municipal planning, which is an exclusive competence of local government, should be interpreted having regard to ss 24 and 152(1)(d) of the *Constitution*, and as such imposes environmental-related duties on local government – *Le Sueur* case paras 21-26.

122 *Le Sueur* case para 39. For more commentary on this judgment – see among others Humby 2014 *PELJ* 1661-1671; Du Plessis and Van den Berg 2014 *Stell LR* 582-589; Freedman 2014 *PELJ* 584-588. See also para 2.3 above for a discussion on the national legislation relevant to estuarine management.

123 Humby 2014 *PELJ* 1684.

124 (WC) (unreported) case number 12576/2013 of 14 December 2015.

125 *Nel* case para 1; part B of schedule 5 of the *Constitution.*

126 *Nel* case para 2.

127 *Nel* case paras 10-16, 24-36; s 156(1)-(3) of the *Constitution*. See also Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 72-77 for more on the implications of this judgment.

128 2012 2 SA 104 (CC).

those evictees.[129] The municipality contended that it did not have to provide such housing, partly because housing is a national and provincial competency, and it therefore only has a secondary and limited role to play in this regard.[130] However, having access to adequate housing, like the environmental right, is also a fundamental right invoking a responsibility on all three spheres of government for its fulfilment.[131] In addition, this intertwined responsibility is further entrenched by national legislation, such as the *Housing Act* 107 of 1997, which gives municipalities specific responsibilities in this regard and, in certain circumstances, even assigns specific functions to them.[132] The result was that the Court found the municipality did, in fact, have an obligation to provide temporary emergency housing, the constitutional allocation of functional areas notwithstanding. The same reasoning would apply to environmental matters, particularly in light of the numerous environmental responsibilities local government has under the *NEMA* and the respective SEMAs,[133] thereby solidifying municipalities' duty to contribute to estuarine management where appropriate. This ability, of course, is also buffered by the constitutional authority that municipalities have to exercise any incidental right that may be necessary to be able to perform their functions.[134]

It deserves mention, though, that these "incidental powers" are not described in any way, yet surely cannot refer only to local government's original powers – which makes them somewhat ambiguous.[135] It has subsequently been argued that the interpretation of local government's incidental powers must be guided by two principles: 1) they must be linked to municipalities' developmental mandate, and 2) they should not expand their core competencies but rather "enhance the efficiency of administering existing functional areas".[136] In other words, they do not grant local government the power to usurp national or provincial governments' authority in estuarine management, but can instead be used only in furtherance of their core competencies that happen to be related to estuarine management. Coincidentally, this also means municipalities could adopt innovative approaches to their governance instrumentation for environmental or estuarine management that exceed the expectations

129 *Blue Moonlight* case para 1.

130 *Blue Moonlight* case paras 46, 50.

131 Section 26 of the *Constitution*; *Blue Moonlight* case paras 18-21, 42.

132 See the *Blue Moonlight* case paras 16-27; Mudao 2025 *Journal of Comparative Law in Africa* 16-31 for more on those responsibilities.

133 See para 2.3 above.

134 Section 156(5) of the *Constitution.*

135 Du Plessis and Fuo 2017 *Commonwealth Journal of Local Governance* 77.

136 Steytler and De Visser *Local Government Law* ch 5 para 1.5. See also *Ex Parte Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North-West Provincial Government* 2001 1 SA 500 (CC); Paterson 2018 *PELJ* 28.

placed on them by a strictly literal reading of the *Constitution's* functional areas.[137]

4 Concluding thoughts: Can municipalities contribute to the management of estuaries, and how can this be achieved?

The country's estuaries are vulnerable ecological treasures, facing external threats that the authorities responsible for managing them cannot account for. Local authorities may well bridge this management gap, but they, too, are sometimes to blame for the deteriorating condition of estuaries, the Knysna Estuary being a case in point. It is in this context that this article set out to explore whether and how municipalities can contribute to the management of estuaries.

The discussion above demonstrates that local government bears responsibility for the environment, and, by implication, municipalities have a duty to contribute to the management of estuaries within their jurisdictions, as estuaries cannot be divorced from the environment in any practical sense. This duty arises from municipalities' developmental mandate, their obligation to fulfil the constitutional environmental right, and from several other environmental-related statutory responsibilities.[138] And this is despite the positioning of the "environment" as a national and provincial competency within the constitutional division of functional areas among the respective spheres of government, as evidenced by the *Maccsand* case, *Le Sueur* case, the *Nel* case, and the *Blue Moonlight* case.[139]

Local government's developmental mandate directs municipalities to develop their communities while pursuing sustainability; in the context of estuaries, this translates into extracting their socio-economic benefits and conserving their use for future generations. The *Constitution* demands, in fulfilling the environmental right, that municipalities prevent environmental harm to people (negative obligation) and take measures to ensure environmental protection (positive obligation). The principles in the *NEMA* constitute a normative framework for environmental management, compelling municipalities to take cognisance of, and refrain from, decisions that pose a significant threat to estuaries. The environmental duty of care established by the *NEMA* (and the *NEM:ICMA*) likewise imposes an obligation on municipalities (and communities) not to pollute or degrade estuaries. And municipalities must implement Biodiversity Management

137 Nel, Du Plessis and Du Plessis "Instruments for Local Environmental Governance" 3-8.

138 See paras 2.1-2.3 above.

139 See para 3 above.

Plans to ensure the long-term survival of estuaries situated within their jurisdictions.[140]

As to the how: municipalities may simply utilise the statutory tools and implement the administrative mechanisms at their disposal, thereby exercising their lawful authority to contribute to estuarine management and fulfil their responsibility in this regard. These are underscored by local government's developmental mandate and present in the *NEMA*, the relevant SEMAs, as well as the *Constitution* itself. Municipalities must, in the first instance, cater for estuarine management in their IDPs. They may administer and therefore also pass bylaws to regulate those functional areas listed in part B of schedules 4 and 5 of the *Constitution* that are linked to estuarine management. They can enter into environmental management cooperation agreements with relevant parties to manage estuaries in compliance with the *NEMA* principles. They could issue directives in accordance with the *NEMA* and the *NEM:ICMA* to enforce the duty of care – and also need to comply with this duty themselves. They must incorporate estuarine conservation into their Municipal Coastal Management Programmes and implement those programmes. They must actively participate and consult with other authorities as required whenever estuarine management is concerned, such as in the development of Estuarine Management Plans, the declaration of protected areas, and the development of management plans for those protected areas (which include estuaries), while also implementing and complying with the relevant plans. They must incorporate the relevant aspects of the *National Biodiversity Framework* into their IDPs. And they must do all of the above in accordance with the principles of co-operative governance by working with SANParks and national or provincial governments, as the case may be, in furtherance of this objective.[141]

Furthermore, local government's service delivery mandate may and must be utilised to this effect, too. This is because municipalities must be responsive to the needs of their communities and must provide at least the basic minimum services to their communities in an environmentally sustainable manner, the latter of which refers to those:

> necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.[142]

Considering the vital role that estuaries play in communities as socio-economic assets and as ecological treasures, their protection and

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140 See paras 2.1-2.3 above.

141 See paras 2.1-2.3 above.

142 Sections 1, 6(2)(a), 73(1)(a) and 73(1)(c) of the *Systems Act.* See also para 2.2 above; Nel, Du Plessis and Retief "Key Elements for Municipal Action" 2-40.

conservation are intricately linked to the delivery of these services.[143] It is therefore of the utmost importance that municipalities fulfil and execute their service delivery mandate properly, lest they cause the opposite – actually contribute to the decline of estuaries via water resources pollution, among others, thereby violating the constitutional environmental right as also transpired in the *Msukaligwa* case, and failing their communities as required by the *Systems Act*.

Admittedly, whether a municipality can effectively contribute to the management of an estuary largely hinges on political will, even though the law not only permits but also expects local government to stake its claim and play its part to ensure that estuaries are conserved for present and future generations. Given, however, that the Knysna Local Municipality itself is partly to blame for the deteriorating condition of the Knysna Estuary through the mismanagement of its WWTWs, among other factors, it does not bode well for members of the local community who rely on the Estuary for their livelihoods.

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List of Abbreviations

BMP	Biodiversity Management Plan
DFFE	Department of Forestry, Fisheries and the Environment
D-MOSS	Durban Municipality Open Space System
DWS	Department of Water and Sanitation
EMP	Estuarine Management Plan
IDP	Integrated Development Plan
IUCN	International Union for Conservation of Nature
MCMP	Municipal Coastal Management Programme
NEM:BA	National Environmental Management: Biodiversity Act 10 of 2004
NEM:ICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEM:PAA	National Environmental Management: Protected Areas Act 57 of 2003
NEMA	National Environmental Management Act 107 of 1998
PELJ	Potchefstroom Electronic Law Journal

SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SANBI	South African National Biodiversity Institute
SANParks	South African National Parks
SAYIL	South African Yearbook of International Law
SEMA	Specific Environmental Management Act
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
WWTW	Wastewater Treatment Works