# THE ROLE OF PUBLIC PARTICIPATION IN LANDFILL MANAGEMENT: A COMMUNITY CASE STUDY

**BY**

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## TABLE OF CONTENTS

# CHAPTER 1

# INTRODUCTION

## 1.1. INTRODUCTION

Environmental rights are human rights and public participation is not just a constitutional right, it's a political duty[1] when silence could be construed as consent to decisions harmful to the environment. The consequence being, that unless voiced disagreement is evident, consensus may be presumed. Public participation has been globally recognised as a key element to encourage legitimate and effective governance and improved decision-making on environmental matters.[2] The commitment and right to public participation in environmental decision-making is enshrined in international conventions[3] and in the Constitution of the Republic of South Africa.[4] When drafting the Constitution the legislature envisioned a democracy that was both representative and participatory in nature.[5] And while South Africa's legislative sector has not yet developed a uniform approach to public participation,[6] the concept has been included in a number of statutes.[7] However, in the absence of clear legislative provisions,[8] it will be left up to the courts to decide if

[1] D Harten "The Public Participation Requirement in Environmental and Public land Decision-making: Politics or Practice?" (1990) 11 *Public Land Law Review* 1

[2] J Ebbeson "Public Participation and Privatisation in Environmental Matters: An assessment of the Aarhus Convention." (2011) 4(2) *Erasmus Law Review* 88; SR Arnstein "A Ladder of Citizen Participation." (1969) 35(4) *Journal of the American Planning Association* 216

[3] Rio Declaration on Environment and Development, Principle 10 (1992) and The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

[4] Constitution of the Republic of South Africa,1996, Ch 2, s 24 hereafter referred to as the Constitution

[5] L Nyati "Public Participation: What has the Constitutional Court Given the Public?" 2008 12 *Law, Democracy and Development* 109; Currie and de Waal are of the view that South Africa's democracy is representative, participatory and direct in its nature (see I Currie and J de Waal. *The Bill of Rights Handbook* 6 ed (2013) ch 1: 15) http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org. (Accessed: 09 Aug 2018)

[6] R Scott, R., (2009) "An analysis of public participation in the South African legislative sector" Masters Level (Public Administration). University of Stellenbosch, p. 2. Available at: https://scholar.sun.ac.za/bitstream /handle/10019.1/1837/scott-legislative-2009.pdf (Accessed: 11 May 2017)

[7] For example: The National Environmental Management Act has included public participation as one of its guiding principles: NEMA ch 1, s 2(f) "The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."

[8] J Berry, K Portney, MB Bablitch & R Mahoney, R., (1984) "Public involvement in Administration: The Structural Determinants of Effective Citizen Participation" *Journal of Voluntary Action Research* 15. https://www-heinonline-org.ukzn.idm.oclc.org. (Accessed: 09 Aug 2018)

the public participation that was undertaken was appropriate, reasonable and lawful.[9] Arnstein[10] likens public participation to eating vegetables, "The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you." In theory, public participation is lauded as the panacea for our environmental ills, and everyone knows that it is the right thing to do, but in practice it is fraught with limitations both legislatively and from a practical implementation point of view.

Alongside the growing trend in public participation, waste is emerging as a significantly contentious and highly emotive environmental issue.[11] Within an ever growing population, the need to expand existing infrastructure support facilities is necessary but in doing so, locally unwanted or unacceptable land uses (LULU's) are created and the siting thereof is more often than not, actively resisted by local residents.

Waste remains an ever-growing challenge globally with South Africa being slow to emphasise waste minimisation strategies in its eagerness for economic development. Furthermore, the historically cheaper option of disposal to land has hampered any such initiatives. Decisions regarding where to dispose of waste in many cases are based on a cost evaluation made by the waste generator rather than the most sustainable manner in which to handle the waste. The disposal of hazardous waste on land is an acceptable practice in South Africa, and the associated hazards arise from poor site selection and design and/or poorer management and operation.[12]

Waste management planning and implementation deals not only with the science of waste but also with the social and political agendas of interested parties. It is for this reason that Davies described the environmental conflict which surrounds the siting and management of waste facilities as 'waste wars'.[13] The conflict is based on the

[9] L Nyati "Public Participation: What has the Constitutional Court Given the Public?" 2008 12 *Law, Democracy and Development* 103 - 104
[10] SR Arnstein "A Ladder of Citizen Participation." (1969) 35(4) *Journal of the American Planning Association* 216
[11] A Davies "Waste Wars, Public Attitudes and the politics of place in waste management strategies" (2003) 36(1) *Irish Geography* 77
[12] Davies (see note 11: 80)
[13] *Ibid*

community's perception that these activities pose a risk to their health, to the health of the environment and to the value of their property.[14] LULU's go hand in hand with a phenomenon called the NIMBY ("Not in My Backyard") syndrome which is a no compromise position taken on the part of the public in response to a LULU being situated in the area in which they reside. The NIMBY syndrome has understandably been borne out of a number of issues such as a lack of trust in the authority's skill and expertise to make decisions on these complex issues, historically exclusive and autonomous decision-making and inequalities relating to the siting of LULU's.[15] It is this attitude and emotional outcry that has led government, local authorities, regulators and/or developers to either avoid or to dilute the public participation, if they feel they can escape it without penalties.[16]

The general focus of this study is on post environmental authorisation monitoring and access to information as it relates to landfill management in South Africa. An analysis of the legal provisions for public participation in post authorisation monitoring and access to information in the waste sector will be undertaken and compared to that of another jurisdiction. This issue will be explored against the backdrop of a case study landfill in order to provide insight into the implementation of the law.

The case study is based on the Shongweni Landfill Site, a hazardous waste landfill site situated in the Upper Highway area in KwaZulu Natal. This case study was chosen as the owners of the landfill site are currently embroiled in a high profile legal battle to keep its doors open in the face of a malodour that has plagued residents in the surrounding areas for almost two years. Residents are taking to the streets (and to the Courts) to protest against the violation of their Constitutional right to breathe clean air.

[14] *Ibid*

[15] JW Baxter, JD Eyles and SJ Elliot (1999) "From Siting Principles to Siting Practices: A Case Study of Discord among Trust, Equity and Community Participation." (1999) 42 (4) *Journal of Environmental Planning and Management*, 521 . https://www.researchgate.net/publication/227619143. (Accessed: 08 May 2017)

[16] D Harten "The Public Participation Requirement in Environmental and Public land Decision-making: Politics or Practice?" (1990) 11 *Public Land Law Review* 171

Access to justice will fall outside of the scope of this paper and as such the on-going litigation involving the case study landfill will not be analysed and discussed in any great detail.

## 1.2. STATEMENT OF THE RESEARCH

### 1.2.1. Overall purpose of the study

The purpose of this study is to analyse the law and theory regarding public participation and access to information throughout the life-span of a project or development, more specifically a landfill site, and to compare it to the practice. This research will explore the role that a community has played and ought to have played in the on-going management of a landfill site situated in Shongweni, KwaZulu Natal. The South African legal provisions for public participation in environmental decision-making and specifically for post authorisation monitoring and access to information in the waste sector will be analysed. The reason for using this particular case study is to demonstrate an example of a public participation model, used for post-authorisation monitoring of a landfill, which has not worked. If it had worked then the community would not have turned to the Courts for relief and the high costs of public litigation could have been avoided.

To determine if the current South African approach to post authorisation monitoring adequately provides for public participation, a comparison will be drawn between the environmental legislation of South Africa and New South Wales (NSW), Australia. This foreign jurisdiction was chosen in light of these two countries having a shared common law origin but also to compare the South African public participation regime with that of a developed country whose waste management practices are more advanced than those of a developing nation. The approach used by the government of NSW, Australia will be briefly examined, with a view to establish whether there are any lessons to be learned and recommendations for improving the South African system.

### 1.2.2. Research Objective

The general objective of this study is to present a grounded investigation of public participation in post authorisation monitoring of a waste management facility. This objective will be met by reviewing how South African environmental law facilitates the participation of affected communities and provides for access to information in environmental decision-making and the implementation thereof. Furthermore the requirements and implementation of the law will be studied in the context of the Upper Highway Shongweni Landfill controversy as a case study of public participation models and compared to that of another jurisdiction. .

The rationale for the specific focus on post authorisation monitoring and access to information is that participation, transparency and openness, as it pertains to decisions that impact negatively on the environment, do not appear to adequately extend beyond environmental impact assessment and environmental authorisation. Considering that the negative impacts of such an activity may only be fully realised many years later, it is critical that the affected community be given a fair and equitable opportunity to participate in the on-going management of this activity throughout its lifespan.

### 1.2.3. Research Questions

1. What is public participation and why is it important that the community is involved in decisions that affect them?
2. What are the South African legislative provisions that enable the public to participate over the lifespan of an activity or development and to access information, specifically in the waste sector?
3. What went wrong in the case study landfill, how were the community involved and what redress is available to the community in light of the on-going nuisance caused by the waste site?
4. How does another jurisdiction provide for public participation and access to information in post authorisation monitoring of waste management facilities?

## 1.3. RESEARCH METHODOLOGY

The research will be undertaken on the basis of a desk-top review of literature sources. The study will include a review of relevant international treaties and conventions, statutes, legal and environmental articles and case law, both locally and internationally relating to public participation, waste management and access to information to address the research questions and dissertation topic.

A review of other relevant documentation that is available in the public domain, such as the Landfill permits and licence, the external audit reports, minutes of Monitoring Committee meetings and the Monitoring Committee's Terms of Reference, will be undertaken.

A legal comparative study will be undertaken to identify similarities and differences in public participation and access to information between South Africa and NSW, Australia, in order to identify any lessons which can be learned and applied. This foreign jurisdiction was chosen in order to place the South African regime in a comparative context with a country with shared common law origins. (See section 1.2.1 Overall purpose of the study).

Current information will be collected by way of printed media and social media.

## 1.4. OUTLINING THE STUDY

In order to achieve the above aim and objectives, the dissertation is organised as follows:

Chapter 2 presents the theory of public participation and access to information in South Africa and its importance in the South African context with regards to equity, transformation and environmental justice. This chapter includes the examination of various soft law instruments such as international policies and local guidelines. Local and international case law will be reviewed to examine the precedents set that have shaped the concept of public participation.

Chapter 3 provides an overview of the statutory requirements for public participation and access to information in general and in relation to waste management facilities.

Chapter 4 will look specifically at the issues around the case study, highlighting the problems and issues experienced by the public. This Chapter will also include a review of the case study's relevant documentation, such as Waste Management Licence, Minutes of Monitoring Committees, Audit Reports and media reports covering the case study landfill saga over the past two years.

Chapter 5 will review the legal requirements and any relevant case studies for public participation in environmental decision making in New South Wales, Australia jurisdiction for comparative purposes.

Chapter 6 concludes the dissertation with a summary of the conclusions from the study, and makes recommendations to improve and strengthen the role of public participation and access to information for the protection of the environment in South Africa and in landfill management in particular.

# CHAPTER 2
# THE THEORY REGARDING PUBLIC PARTICIPATION AND ACCESS TO INFORMATION

## 2.1 THEORETICAL BACKGROUND

Global environmental disasters have thrust the plight of the environment into the international arena resulting in a number of factors that have driven the demand for greater participation in environmental decision-making. These factors are an increase in public awareness and concern about the ecological health of the environment and its associated impacts on human health, heightened awareness of environmental rights, a legal framework that supports this right as well as a more active, informed civil society.[17]

Public participation in environmental matters formally emerged in the international arena with the ratification of the 1992 Rio Declaration on Environment & Development[18] which established a set of guiding principles to protect the integrity of the global environment and developmental system. Principle 10 of the Rio Declaration promotes the participation of the public in environmental matters and states the following:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The principle realises three critical aspects of public participation: access to information, participation in decision-making and access to justice.[19][20]

[17] BJ Richardson and J Razzaque "Public participation in Environmental Decision-making." (2005) *Environmental Law for Sustainability* 166

[18] United Nations Conference on Environment and Development - Rio Summit, having met at Rio de Janeiro from 3 to 14 June 1992

[19] Rio Declaration on Environment and Development (1992) Principle 10 https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (Accessed: 27 Nov 2018).

[20] M Kidd "The National Environmental Management Act and public participation" (1999) 6 *SAJELP* 22

Aligned to the Rio Summit, the Convention on Access to Information, Public Participation and Access to Justice[21] (hereafter referred to as the Aarhus Convention) was developed by the United Nations Economic Commission for Europe (UNECE) and came into effect in 2001. Besides elaborating on principle 10 of the Rio Summit, the Aarhus Convention was the first to link environmental rights to human rights and public participation with environmental justice.[22]

The Aarhus Convention aims to reinforce the need for public participation in environmental decision-making on an international scale. Aarhus is based on three pillars; the public's rights regarding access to information, giving the public an opportunity to express its concerns and for these concerns to be acknowledged in order to improve the quality of decisions and lastly access to justice.[23] The Aarhus Convention recognises that the public should be involved in specific development activities (Article 6 specifically includes landfills), participation in plans, programmes and policies[24] and the law-making process.[25]

As laudable as the Aarhus Convention is,[26] it has been argued that it is of limited use as it fails to address and provide measures to enforce the real challenges facing public participation, those being the expertise required to participate as well as equal representation, both aspects being difficult to achieve.[27]

South Africa has embraced the principles of community involvement and public participation is seen as one of the cornerstones of our democracy.[28] The concept of public participation in South African legislation has undergone significant reform in the course of its history. The driving force that has brought about the change is the

[21] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention, was signed on 25 June 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001.
[22] L Paddock "Environmental Accountability and Public Involvement" (2004) 21(2) *Pace Environmental Law Review* 256, 258
[23] Aarhus Convention, Article 1
[24] Aarhus Convention, Article 7
[25] *Supra*, Article 8
[26] M Lee and C Abbot "The Usual Suspects? Public Participation under the Aarhus Convention."(2003) 66 *The Modern Law Review* 81
[27] Lee and Abbot (see Note 26; 207)
[28] MP Sebola "Communication in the South African Public Participation Process" (2017) 9 *African Journal of Public Affairs*, 25

provisions made in the Bill of Rights in the Constitution.[29] These provisions have created the opportunity for the people to speak and to be heard.

### 2.1.1 The challenges to defining public participation

Defining public participation is a moving target. The term public participation is not easily defined and consensus has neither been reached regarding its meaning nor its purpose as was observed from the many definitions encountered in the literature.

A reason for this ambiguity is possibly that public participation has not been developed from a singular field or practice.[30] In South Africa, its origins were in politics (imbizos, bosperaads, lekgotlas),[31] but later extended to other fields such as law-making, public administration, urban planning and environmental management.

To add to the ambiguity, the term public participation has been used interchangeably with other concepts such as public involvement, community consultation and stakeholder engagement, as observed by Sebola.[32]

A description which meets all the common objectives of a public participation process was rather aptly phrased by the US EPA, and is as follows:

> "Public participation is a process, not a single event. It consists of a series of activities and actions over the full lifespan of a project to both inform the public and obtain input from them. Public participation affords stakeholders (those that have an interest or stake in an issue, such as individuals, interest groups, communities) the opportunity to influence decisions that affect their lives."[33]

The US EPA goes on to refine the term and adds:

> "Public participation can be defined as any process that directly engages the public in decision-making and gives full consideration to public input in making that decision."

[29] Act 108 of 1996

[30] NCOSS "Have your say…but how? Improving public participation in NSW" (2014) *NCOSS Research Report*, University of Sydney 9 https://www.ncoss.org.au/sites/default/files/141128-participation.pdf (Accessed: 15 Sept 2018)

[31] *Doctors for Life* case" J Ngcobo at paragraph [101]

[32] MP Sebola "Communication in the South African Public Participation Process" (2017) 9 *African Journal of Public Affairs*, 25

[33] US EPA "Public Participation Guide: Introduction to Public Participation" online www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation (Accessed: 15 Sept 2018)

To further define what public participation is or is not, it is prudent to look at the precedents set down in case law. A number of cases have been brought before the Constitutional Court, challenging the absence or inadequacy of the public participation process and these will be discussed below. While many of these cases do however, relate to public participation in the law-making process, the jurisprudence is important to the concept of public participation and should apply in all instances where the public feel that their right to participate in matters that affect them has been violated.

In the case of *Doctors for Life International v The Speaker of the National Assembly and Others,*[34] the applicants won their case challenging the constitutionality of certain health bills in the absence of a public participation process as required by the Constitution.[35]

Ngcobo J, the presiding judge, ruled that the state firstly has a duty to provide meaningful opportunities for the public to get involved and secondly to ensure that people are able to take advantage of the opportunities provided through access to information, building awareness and partnering in decision making.[36]

The honourable judge made it clear in his judgement that "allowing the public to participate in the conduct of public affairs is not a new concept"[37] and that "the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of both participation and consultation."[38] Thus re-inforcing the right that the public have to be heard, and to participate in matters that affect them.

A different scenario played out in the case of *Moutse Demarcation Forum v President of the Republic of South Africa (CCT 40/08)*,[39] whereby the constitutionality of an amendment to the Constitution and the passing of a law abolishing cross-boundary municipalities was challenged. The challenge was based on the fact that the community of Moutse claimed that public participation process was inadequate as it did not reflect the views of the community, which opposed the transfer of Moutse

[34] (2006) ZACC 11 – hereafter referred to as *Doctors for Life* case
[35] Act 108 of 1996 ss 57(1)(b) and 70(1)(b)
[36] *Doctors for Life* case – paragraph [129]
[37] *Doctors for Life* case – paragraph [101]
[38] *Doctors for Life* case – paragraph [145]
[39] (2011) ZACC 27 – hereafter referred to as *Moutse Demarcation* case

from Mpumalanga to Limpopo.[40] The application did not succeed as the judge ruled that reasonable consultation did in fact take place, in this case public hearings were held, and that the legislature had fulfilled its duty to facilitate to public participation in terms of the Constitution.[41] Judge Jafta further acknowledged that the legislature was free to choose whatever form of consultation it deemed appropriate under the given circumstances.[42]

In the case between the *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*,[43] the Applicant claimed that the Respondent failed to facilitate a public participation as required by the Constitution,[44] when passing the Restitution of Land Rights Amendment Act.[45] The facts of the matter were that limited timeframes were imposed on the NCOP to facilitate the public participation process, to which, the public also objected. Judge Madlanga, concurred and reasoned that the timeline for consultation was inherently unreasonable and that the NCOP failed to follow their own procedures, knowing that issues surrounding land are highly emotive and would attract considerable public interest.[46]

Madlanga J in his judgement at paragraph [125] quoted with approval from *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* where Sachs J in his minority judgement observed:

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.[47]"

The judge ruled in favour of the application and the Restitution of Land Rights Amendment Act was declared invalid due to the unconstitutional public participation process.

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[40] *Moutse Demarcation* case – paragraph [68]
[41] Act 108 of 1996; ss 57(1)(b) and 70(1)(b)
[42] *Moutse Demarcation* case at paragraph [80]
[43] (2016) ZACC 22 - hereafter referred to as *Land Access Movement* case
[44] Act 108 of 1996; ss 72(10(a), 59, 118(1)(a) and 119
[45] Act 15 of 2014
[46] *Land Access Movement* case at paragraph [67]
[47] (2005) ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (New Clicks) at paragraph 630. This extract was quoted with approval by Ngcobo J in Doctors For Life at paragraph [125]

In a similar case to the above,[48] the Matatiele Municipality challenged the constitutional validity of altering a provincial boundary in terms of the Constitution Twelfth Amendment Bill of 2005. Part of the debate concerned the obligation for the provincial legislature to consult with the people who are affected by the alteration, in order to comply with the provisions of the Constitution.[49]

In his deliberations, Ngcobo J stressed two points, the first one being the Constitutional goal of "a society based on democratic values [and] social justice" and that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people."[50]

The second point Ngcobo J made and which was aligned with the judgement of Jafta J[51] was that "parliament and provincial legislatures have a discretion to determine how best to facilitate public participation in a given case,"[52] once again reiterating that the courts will not debate on the method used. The legislature has not prescribed these processes only providing that they must be appropriate and reasonable for any given case. The test for 'reasonableness' is then applied by the courts.

Ngcobo J, found that there was sufficient evidence to show that the legislature and committees of the Eastern Cape did consult with the affected people through public hearings, however, the legislature of KwaZulu-Natal had in fact not.[53]

The court ruled that the failure by Kwa-Zulu Natal to facilitate public involvement in the approval of that part of the Twelfth Amendment, was indeed a violation of the provisions of section 118(1)(a) of the Constitution, and therefore rendered that part of the Act invalid with a period of grace in which to rectify the situation.[54]

The case of *Merafong Demarcation Forum and Others v the President of South Africa and Others (CCT 41/07)*[55] deals again with municipal boundaries. The complaint was however that the public participation was not meaningful, as the

[48] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006) – hereafter referred to as Matatiele case
[49] Act 108 of 1996; s 118(1)(a)
[50] *Matatiele* case at Paragraph [65]
[51] *Moutse Demarcation* case at paragraph [80]
[52] *Moutse Demarcation* case at Paragraph [49]
[53] Matatiele case at Paragraph [69]
[54] *Matatiele* case at paragraph [71]
[55] (2008) ZACC 10; (13 June 2008) – hereafter referred to as *Merafong* case

outcome was already a done deal. The Applicants further complained that the conduct of the NCOP was unreasonable as they were never consulted when the NCOP changed their vote in favour of the Twelfth Amendment Bill from that which was agreed during the consultation process.[56] In this case the applicants challenge failed,[57] but it's not so much the outcome of the ruling than the jurisprudence established that is of importance to defining public participation and provides a view of what public participation is not.

Van der Westhuizen, in the majority judgement in the *Merafong* case, advanced that public participation must not be confused with decision-making, by stating at *Paragraph [50]* that:

> But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or to veto it.

The Constitutional Court ruled that the Gauteng Provincial legislature did facilitate adequate public involvement as it did call for oral and written comment and held a public hearing.[58] The judge acknowledged the fact that the committee did not provide feedback to the community regarding the change of vote, was discourteous, but was not unconstitutional.[59]

The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*[60] differs from the other case law mentioned above, in that it deals more explicitly with public participation in the context of engagement with the executive. The case involved the appeal of an order

[56] *Merafong* case – at paragraph [41a & b]
[57] *Merafong* case – at paragraph [61]
[58] *Merafong* case – at paragraph [116]
[59] *Merafong* case - at paragraphs [56] and [60]
[60] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008) – hereafter referred to as the *Olivia Road* case.

by the Supreme Court of Appeal to evict more than 400 occupiers (the applicants) from a number of derelict buildings in the inner city of Johannesburg by the City of Johannesburg (the City). Importantly, one of the arguments raised by the applicants 'attacked the constitutional validity of the decision by the City to evict them as being unfair because it had been taken without giving them a hearing'.[61] The honourable Judge Yacoob found that the City had not meaningfully engaged with the occupiers prior to proceeding with the eviction order. The judge ordered the City to engage with the occupiers in a manner that was both meaningful and reasonable. Interesting to note, was the requirement for both parties to file affidavits on the outcome of the engagement process in order to obtain the Court's approval before the case would be decided.[62]

Yacoob J importantly offered further clarity around the definition and importance of public participation by providing; that 'Engagement is a two-way process…',[63] and 'Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process.'[64]

Yacoob J notably indicates 'that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy.'[65] The judge further emphasises that the process of engagement must take place prior to litigation commencing unless certain circumstances prohibit it.[66]

The Department of Water Affairs and Forestry's (DWAF) generic guide to public participation[67] supports the above view and further clarifies "that public participation does not mean that the public makes decisions together with the decision-makers. Rather, it means that the public's views and opinions are available to decision-makers and are considered in the decision-making process."[68]

Taking into account the jurisprudence set in the cases reviewed, and in the absence of definitive legislation, the courts have had to fulfil the crucial role in settling disputes

[61] *Olivia Road* case – paragraph [7]
[62] *Olivia Road* case – paragraph [9]
[63] *Olivia Road* case – paragraph [14]
[64] *Olivia Road* case – paragraph [15]
[65] *Olivia Road* case – paragraph [21]
[66] *Olivia Road* case – paragraph [30]
[67] R van Jaarsveld "Generic Public Participation Guidelines" (2001) DWAF
[68] Van Jaarsveld (see note 67; 1)

regarding the absence or inadequacy of the public participation process and have thus built on the concept of public participation. The courts have clarified the following as it pertains to public participation:

Firstly, public participation must take place and failure to facilitate public participation is a violation of a Constitutional right (see *Doctor's for Life, Matatiele* and *Olivia Road* cases). Secondly, public participation must be adequate, meaningful (see *Moutse Demarcation* and *Olivia Road* cases) and reasonable (see *Land Access Movement* and *Olivia Road* cases) but it will not always reflect the will of the people, where that will is in conflict with government policy (see *Merafong* and *Moutse Demarcation* cases).

The scope of public participation as recognised by the courts is that legislative requirements for public participation are non-prescriptive. Agencies and proponents alike are free to determine how much participation fulfils its obligations, and the reasonableness of the process in any given case will depend on a number of factors, as no two situations are alike.[69]

The public participation process should be commensurate with the nature and scale of the activity or development, together with the degree of public interest and potential for controversy and the characteristics of potentially affected parties, there is no one-size-fits-all solution.[70] Different participation models have been developed which illustrate the spectrum of participation opportunities available in order to determine the level of participation that is required.[71] Examples of these different models can be found in the International Association for Public Participation's ($IAP^2$) spectrum of public participation,[72] Arnstein's 'ladder'[73] as well as in the NEMA, Public

[69] *Merafong* case - at paragraph [27]

[70] GNR 807 GG No. 35769 NEMA – Pubic Participation (2010) Public Participation in the EIA process ch 5; 9

[71] BJ Richardson and J Razzaque "Public participation in Environmental Decision-making." (2005) *Environmental Law for Sustainability* 167

[72] "IAP2's Spectrum of Public Participation was designed to assist with the selection of the level of participation that defines the public's role in any public participation process. The Spectrum is used internationally, and it is found in many public participation plans." https://www.iap2.org/

[73] SR Arnstein "A Ladder Of Citizen Participation" (1969) 35(4) *Journal of the American Planning Association*, 217 Note: Arnstein describes eight levels of participation arranged in a ladder pattern to describe the increasing degrees of decision-making influence with the bottom rungs being types of 'non-participation' and the top rungs being types of genuine participation. The bottom rungs include (1) manipulation and (2) therapy where power holders 'educate' or 'cure' participants. Further up the ladder the levels describe 'a hear and be heard' approach, to (3) Inform and (4) consult, still not genuine participation. The top few rungs describe the highest degree of citizen power and include (6) Partnership, (7) Delegated Power and (8) Citizen Control.

Participation Guideline.[74] The merits of the different participation models falls outside of the scope of this discussion.

### 2.1.2 Defining access to information mean and its importance in public participation

Access to information as an allied right to participation has become associated with a clean environment and environmental governance. It is a key element for fostering trust, transparency and accountability in public and private bodies. The realisation of the Constitutional right to a healthy environment cannot be fulfilled in the absence of environmental information.[75]

Access to information and civil society participation in environmental governance are fundamental to environmental management and public interest groups acting in the interest of the environment are often hindered by a lack of information.[76] Public participation should provide participants with the right information, in the right form and at the right time in order for them to participate in a meaningful way. An investigation conducted by the Centre for Environmental Rights (CER), noted that notwithstanding a few exceptions, many private and public bodies in South Africa are in violation of PAIA and the principles of NEMA, by failing to give access to even the most basic environmental information.[77]

The right to access information in the fight for environmental justice has been affirmed in the courts as was highlighted in a case that came before the Supreme Court of Appeal. In the matter of *Company Secretary of Arcellor Mittal SA and another v Vaal Environmental Justice Alliance (VEJA)*,[78] the issue dealt with a request for environmental related information held by a private company, Arcellor

[74] DWAF, Publication of Public Participation Guidelines, GNR 807 GG No. 35769 dated 10 October 2012 Part 5. Guidance on the level of public participation p 9 – 10.
[75] A du Plessis "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" (2008) 2 *PER* 12.
[76] N Gunningham "Beyond Regulation: Proactive Environmental Management." (1995) 1 *SAJELP* 81 and EJ Nealer "Access to information, public participation and Access to Justice in environmental decision-making." (2005) 40 (3.2) *Journal of Public Administration* 482
[77] CER (2010) "Unlock the Doors. How Greater Transparency by Public and Private Bodies can Improve the realisation of Environmental Rights." 14 https://cer.org.za/wp-content/uploads/2012/04/Unlock-the-Doors.pdf (Accessed 08 Aug 2018)
[78] (2015) 1 All SA 261 (SCA) – hereafter referred to as *Arcellor Mittal v VEJA* case

Mittal, in terms of the requirements of ss 50(1) and 53 of the Promotion of Access to Information Act 2 of 2000 (PAIA).

At paragraph [42] Navsa ADP, stated that "a refusal of VEJA's application would hamper the organisation in championing the preservation and protection of the environment."

Navsa ADP warned that a culture of secrecy and unresponsiveness, which "before the advent of a constitutional democracy often led to an abuse of power and a violation of human rights", [79] have no place in our new democracy.

The judge admonished Arcellor Mittal for their attitude and for withholding what he deemed to be crucial environmental information. He accused Arcellor Mittal of the following at paragraph [81]:

> …being disingenuous in claiming ignorance of the existence of its own Master Plan. Feigning ignorance is probably a more accurate description. It dithered and appeared at one stage to be gravitating towards disclosure before resisting the request altogether. From a purely public relations perspective it ought to have considered more carefully the consequences for its image.[80]

Navsa ADP furthered his argument by saying:

> [82] Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.

Arcellor Mittal lost the appeal, the court finding that VEJA was entitled to the information they sought. A significant win in the fight for environmental justice.

Further abroad, a matter for which at least part of the complaint related to access to information came before the European Court of Human Rights. In the case of *Guerra and others v Italy,*[81] the applicants complained "not of an act of State but of the State's failure to act."[82] The applicants claimed that the State failed to provide the local population with information about risk factors and how to proceed in the event of an accident at a nearby chemical factory."[83] The applicants considered that their right to freedom of information had been infringed upon, and that therefore *inter alia*,

[79] *Arcellor Mittal v VEJA* - paragraph [78]
[80] *Arcellor Mittal v VEJA* - paragraph [81]
[81] European Court of Human Rights 1998 (116/1996/735/932)
[82] *Guerra and others v Italy* at paragraph [58]
[83] *Guerra and others v Italy* at paragraph [58]

a State had breached its obligations in term of Article 10 of the Convention of Human Rights.[84]

And while the complaint was not entirely a matter regarding access to information, and the commission found that Article 10 was not applicable under the circumstances, the commission furthered the importance of accessing information by stating:

> 52. Like the applicants, the Commission was of the opinion that the provision of information to the public was now one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk.

Access to information will not alone ensure equitable participation. Knowledge and power gaps will always prevail in society and often trust between stakeholders is deficient.[85] Full disclosure is a sign of good faith, and will go a long way to demonstrate willingness on behalf of a company or proponent to show commitment and take accountability for their actions.

### 2.1.3 The objectives of public participation

The goals of public participation are two-fold; it should reduce conflict or achieve the public's goals by altering the outcome of a decision as well as improving citizen satisfaction in the decision-making process.[86] According to the IAP$^2$ Core Values of Participation, public participation should strive to achieve the following:

[84] *Guerra and others v Italy*) at Paragraph [39] refers to Paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him"

[85] RE Kasperson, D Golding and S Tuler, S "Social distrust as a factor in siting hazardous facilities and communicating risks." (1992) 48(4) Journal *of Social Issues*. 164

[86] DM Daly "Public Participation and Environmental Policy: What Factors Shape State Agency's Public Participation Provisions?" (2008) 25(1) *Review of Policy Research*, 22

Table 1: IAP$^2$ Core Values of Participation (IAP$^2$ 2007)[87]

| |
|---|
| 1. The public should have a say in decisions about actions that could affect their lives. |
| 2. Public participation includes the promise that the public's contribution will influence the decision. |
| 3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision-makers. |
| 4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision. |
| 5. Public participation seeks input from participants in designing how they participate. |
| 6. Public participation provides participants with the information they need to participate in a meaningful way. |
| 7. Public participation communicates to participants how their input affected the decision. |

A public participation process in its infinite number of variations should have the following common elements to achieve the above-mentioned goals:

Firstly the process must involve two-way communication. Interaction is important, the public must be informed and information obtained from them. Secondly, public opinion must be able to influence the decision-making. This is an important aspect of public participation as Bradshaw & Burger[88] identified in their research that people are losing faith in the public participation process as it would appear that they are not able to influence the outcome of decisions. This stems from developers that hold a public participation process in order to satisfy the application process requirements with no intention to try and resolve the contentious issues that arise; they merely gather the issues and responses and forward them to the relevant authority for them to make a decision.

### 2.1.4 The importance and benefits of public participation

Public participation is an important aspect of a representative and participative democratic society and concerned citizens are demanding greater consultation and more transparent and accountable decisions.[89]

[87] AIP2 Website - Core Values https://www.iap2.org/page/corevalues (Accessed: 30 Jul 2018)

[88] G Bradshaw and W Burger "Public participation, sustainable development and public disputes: Public scoping processes in the Coega deep water port and industrial development zone."(2005) 35(1) *Africanus* 53

[89] BJ Richardson and J Razzaque "Public participation in Environmental Decision-making." (2005) *Environmental Law for Sustainability* 167.

Public involvement in administrative and legislative processes is important for a number of reasons:

- more informed decision-making through the consideration of all interests and issues at stake,
- inspires confidence in the decision making process by giving all interested and affected persons an opportunity to be heard (*audi alteram partem* rule);
- improves the legitimacy of the policy, legislation, decision through greater transparency and accountability in the decision-making process;
- provides proactive opportunities to clear up misunderstandings, resolve disputes and reconcile conflicting interests;
- contributes toward maintaining a healthy, vibrant democracy[90]

Weidemann and Femers rather jadedly refer to the benefits of public participation as "assumptions and hopes".[91] While Stewart and Sinclair (as cited in O'Faircheallaigh) conclude that, "the benefits of public participation have been clearly described in both theoretical and practical terms…[but] the design and implementation of specific public participation remains contentious."[92]

Tuchman perhaps naively, believes "that if you explain to people what's happening, and they feel that the process by which these decisions will be made is first, rational and second, provides them with an opportunity to be heard, and then they will ultimately concur with the conclusion reached." [93]

One of the guiding principles of environmental management provided for in NEMA, holds that 'the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.'[94] It therefore stands to reason that if the environment is held in public trust for the people, then the people must be made aware of the manner in which the government and private bodies are addressing

[90] M Kidd "The National Environmental Management Act and Public Participation." (1999) 6 *SAJELP* 22; Aucamp, Nadeem & Fischer, DWAF Public participation Guidelines, GNR 807 GG No. 35769 dated 10 October 2012

[91] PM Wiedemann and S Femers "Public Participation in waste management decision-making: Analysis and management of conflicts."(1993) 33 *Journal of Hazardous Materials* 356

[92] C O'Faircheallaigh "Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making" (2010) *Environmental Impact Assessment Review* 19

[93] R Tuchmann "Public projects and Citizen Participation. The Challenge of co-ordinating meaningful public participation over time" 32(2) *Boston College Environmental Affairs Law Review* 363

[94] NEMA, Chapter 1, Section 2(4)(o)

environmental problems and be involved in the decision–making process. It is known that Governments alone cannot solve environmental problems[95] and therefore involving those that are both part of the cause and the solution will provide for decisions that are ultimately better informed and more sustainable in the long run.

### 2.1.5 The importance of public participation in post-authorisation monitoring

Public participation in the environmental impact assessment process should not stop with the issuance of an environmental authorisation. Community involvement in post authorisation monitoring, throughout the operational and closure phase of any development / project, is a critical aspect of the environmental impact assessment (EIA) regime.[96] This is because the potential environmental and socio-economic impacts predicted in the EIA process will only materialise after implementation and operation, which could take place several years after the authorisation has been issued. Monitoring is a control mechanism that should be applied throughout the lifespan of a project / development or activity. The establishment of an environmental monitoring committee (EMC) is just one of the tools available for post-authorisation monitoring of the conditions of an environmental authorisation and/or licence. Environmental Monitoring Committees have become an acceptable practice in South Africa.[97] And while there are currently no legislated provisions for the formation of an EMC, it is clear that EMC's embody the concept of environmental governance articulated in NEMA.[98] EMC's advise and inform, while the environmental authority retains the power of decision-making. The inclusion of a condition to form an EMC in the conditions of a licence or environmental authorisation will give EMC's legal standing, this would however be at the discretion of the competent authority. The key purpose of an Environmental Monitoring

[95] Pring, G. and Noé, S.Y. (2002) 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development' in Zillman, D.M., Lucas, A. and Pring, G.(eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, Oxford University Press, Oxford, P 76.

[96] DWAF, Publication of Public Participation Guidelines, GNR 807 GG No. 35769 dated 10 October 2012

[97] R Midgely (2005) "Environmental Monitoring Committees"(2005) 12 *SAJELP* 38 – (Note - see for example Thesen Island EMC, Coega/Ngqura EMC, Blouvlei EMC, Bergwater Project EMC).

[98] Act 107 of 1998 Preamble: AND WHEREAS it is desirable- that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance; and s2(4)(f).

Committee is to ensure that environmental management does not end with the finalisation of the EIA process.[99]

In 2005 the Department of Environmental Affairs and Tourism developed, as part of a set of overview information documents, a guideline document for Environmental Monitoring Committees (EMC).[100] This guideline serves to provide information and assistance to industries and government in the setting up of monitoring committees, not just for landfills but for all projects that warrant it. It builds on the requirements for monitoring committees set out in the Minimum Requirements,[101] and serves to progress the effectiveness of EMC's, this document is however, only a guiding document and therefore compliance is not mandatory.

According to Midgely in 2005, there were few academic publications or material focussing on the topic of community involvement after an authorisation, permit or licence has been issued, let alone any research on functioning monitoring committees.[102] However in 2017, Chamberlain, makes an interesting case against public interest litigation in the environmental sector and suggests a number of alternative strategies to deal with human and environmental rights violations. One such suggestion is collaborative compliance monitoring in the form of an EMC, using the Mapungubwe community's experiences as a case study.[103] Chamberlain acknowledges that many lessons were learnt along the way, the most important being that above all 'EMC's need trust, transparency and teeth'.[104]

The EMC guideline is more prescriptive about monitoring committees than the Minimum requirements[105] and suggests the competent authority, as the ultimate decision maker, should take a more authoritative role in the entire EMC process. By way of an example of this is the recommendation made in the EMC guideline document for the chairman to be independent, and for the competent authority to

[99] DEAT (2005) "Environmental Monitoring Committees (EMCs)" Integrated Environmental Management Information Series 21, 7
[100] DEAT (2005) "Environmental Monitoring Committees (EMCs)" Integrated Environmental Management Information Series 21
[101] DWAF, Minimum Requirements for the Disposal of Waste, 2nd edition, 1998
[102] R Midgely "Environmental Monitoring Committees."(2005) 12 *SAJELP* 38
[103] L Chamberlain (2017) "Beyond litigation: the need for creativity in working to realise environmental rights" 13/1 *Law, Environment and Development Journal* p. 10
[104] Refer to note 103 p. 11
[105] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill 2ed. S 11

approve the identification and appointment of the Chairman.[106] There is no such requirement in the Minimum Requirements.

### 2.1.6 Community participation in post-authorisation monitoring of a landfill site

Back in 1996 public participation in landfill development projects became mandatory even though no guidelines or regulations existed.[107] The EIA Regulations[108] only remedied this situation when they were promulgated in 1997.

The Minimum Requirements for the Disposal of Waste by Landfill,[109] (hereafter referred to as the Minimum Requirements) developed by the Department of Water Affairs was part of a Waste Management Series drafted in an effort to ensure that the same environmental standards are applied to all landfills across South Africa.[110] This series of documents, considering that environmental law reform had not yet taken place, was a major development in setting a standard for waste management. It addressed the siting, design, construction, management, monitoring and rehabilitation of waste management facilities, as well as requirements for the disposal of hazardous waste. It did not, however, have legal standing, and only became legally binding once incorporated as a condition of the disposal site permit. The Minimum Requirements could therefore only be enforced on permitted landfill sites.[111] It was the Minimum Requirements that first recognised the Monitoring Committee as a formal and legitimate structure for Interested and Affected Parties (IAP's) to be involved in the development of a landfill site and to monitor the operation to ensure compliance with the permit conditions.[112] In terms of the Minimum Requirements, landfill monitoring committees are a minimum requirement for all hazardous and large landfills.[113]

The Minimum Requirements has the following definition of a monitoring committee:

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[106] DEAT (2005) "Environmental Monitoring Committees (EMCs)" Integrated Environmental Management Information Series 21, 10

[107] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill 2ed. 1-2

[108] Government Gazette 18261 Notice R. 1183 of 5 September 1997

[109] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill 2ed.

[110] DWAF (see note 107; 1-4)

[111] S Oelofse. Landfills and the Waste Act implementation – what has changed? (2013) CSIR 1 https://researchspace.csir.co.za/dspace/bitstream/handle/10204/7327/Oelofse2_2013.pdf

[112] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill 2ed. 5-5(Refer to 5.2.8 Operation and Control)

[113] *Op cit* section 11.2

> A committee comprising the Permit Holder or his or her authorised representatives (Responsible Person), the Department and IAPs. The function of the Monitoring Committee is to monitor the operation of the landfill and to disseminate information to relevant people e.g. the public.[114]

The Minimum Requirements importantly provides that:

> The objective of this committee is to provide a mechanism whereby the needs and concerns of the IAPs can be addressed in the operation of the facility. In the interests of transparency, IAPs should, through the Monitoring Committee, be given access to the site and information relating to the operation.[115]

In terms of membership, the Minimum Requirements specifies that membership (both individuals and representatives of organisations) would need to be appointed or elected during the environmental authorisation process, however it is important to note that the guideline also states "IAP's who have not been elected but who are interested in joining the committee or attending the meetings, may do so at any time'.[116]

Key to the smooth functioning of a landfill monitoring committee is the development of the committee's Terms of Reference (hereafter referred to as the ToR). The ToR is determined by the monitoring committee, and as a best practice the Minimum Requirements suggests, could include details such as *inter alia*, the identification, investigation and remediation of problems on site and most importantly "keeping the public informed of activities / developments on the site and disseminating consensus information."[117] The Minimum Requirements advises meeting more often when problems arise.[118]

The Minimum Requirements promotes the communication and dissemination of information by the Monitoring Committee as part of their accountability to their constituencies and to do this by holding a public information workshop at least once a year to inform IAP's of the activities of the Landfill Monitoring Committee. Minutes

[114] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed. G2-7
[115] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed. Section 10.4.8 10-14
[116] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed. A11-1
[117] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed Appendix 4.1: Public Participation, section 7.5
[118] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed. A4-7

of the Landfill Monitoring Committee must be recorded and made available to the public.[119]

The role of the Monitoring Committee is a monitoring role, the monitoring committee may make recommendations for improvements and monitor compliance to permit conditions, it is not a day-to-day management role and ultimate decision-making in terms of the legal compliance of the landfill site rests with the Licensing Authority, which is the Department of Environmental Affairs.[120]

Monitoring Committees advise and inform decisions while environmental authorities retain the power of decision-making. Committee members should interact in good faith, polarisation of stakeholders (for instance North of the N2 vs. South of the N2 – as in the case study) will take place "if an adversarial or all-or-nothing approach" is taken.[121]

There appears to be a knowledge gap in the implementation of public participation in the form of monitoring committees and therefore very little information for comparative purposes exists.[122] The effectiveness of monitoring committees that are established is also an area that should come under scrutiny, to avoid any tick-box exercises taking place. This is, however, a subject for another time, outside of the scope of this paper.

After examining forty-five (45) public participation programs, Berry, Portney, Bablitch & Mahoney, statistically found that among all the variables that exist in influencing the success of a public participation process, a significant correlation exists between agencies that do more than what is required of them by law and the success of the public participation program.[123]

[119] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed Appendix 11: Landfill Monitoring Committee

[120] DWAF (1998) Minimum Requirements for Waste Disposal by Landfill, 2 ed Appendix 11: Landfill Monitoring Committee A11-3

[121] DEAT "Environmental Monitoring Committees." (2005) Integrated Environmental Management Information Series 21 8

[122] R Midgely "Environmental Monitoring Committees."(2005) 12 *SAJELP* 38

[123] J Berry, K Portney, MB Bablitch & R Mahoney, R "Public involvement in Administration: The Structural Determinants of Effective Citizen Participation" (1984) *Journal of Voluntary Action Research* https://www-heinonline-org.ukzn.idm.oclc.org. (Accessed: 09 Aug 2018) p 18

## 2.2 SUMMARY

In summary, public participation, however it is defined, has the overall goal of better, more informed decisions that are supported by the public. And what works and does not work will change according to the circumstances. Berry *et al* rather aptly summarises their study done on public participation programs by concluding that "citizen involvement is a bold experiment in the development of public administration. It has neither conclusively succeeded nor conclusively failed."[124]

To be effective, public participation must not be a once-off event, but a sustained iterative process. Kidd concurs that without the critical aspects of access to information, participation in decision-making and access to justice, public participation is a hollow right.[125]

[124] Berry *et al* (See note 123; 19)
[125] M Kidd "The National Environmental Management Act and public participation" (1999) 6(1) *SAJELP* 22

# CHAPTER 3

# THE LEGISLATIVE FRAMEWORK FOR PUBLIC PARTICIPATION AND ACCESS TO INFORMATION IN SOUTH AFRICA

South Africa has a Constitution that guarantees environmental rights, and environmental laws that strive to protect that right.

The right of the public to participate in matters that affect them and to access information is drawn from four main sources: international protocols, the constitutional dispensation and general regulatory statutes, local bylaws and policy guidelines.

## 3.1. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

More than 20 years ago, in 1996, the Constitution[126] of a newly democratic South Africa was promulgated by President Nelson Mandela and laid the foundation for a country that is to be ruled by 'the people'.[127] It is the highest law of the land, and no other law or government action can supersede it. In a country with a history of injustices in administrative decision making, especially in terms of land use and resources, the Constitution and the rights entrenched in the Constitution, wholly support community involvement and access to information in environmental decision-making.[128] The Constitution provides for a Bill of Rights,[129] which is the cornerstone of a democratic South Africa, the right to *inter alia*: "an environment that is not harmful to [people's] health or well-being",[130] property,[131] access to information and just administration, as well as the right to access the courts.[132] All of which are important provisions to put pressure on government to remain accountable to its citizens and to strengthen the role that individuals, NGO's and communities can play in matters which affect or interest them.[133] Human rights feature prominently, and

[126] Constitution of the Republic of South Africa (1996, Chapter 2
[127] Constitution of the Republic of South Africa (1996) ; Preamble
[128] A du Plessis "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" (2008) 2 *PER* 12.
[129] Constitution of the Republic of South Africa (1996); Chapter 2
[130] *Ibid* Chapter 2, s24
[131] *Ibid* Chapter 2, s 25
[132] *Ibid* Chapter 2, s32, s33 and s 34
[133] R Hamman "South African Challenges to the Theory and Practice of Public Participation in Environmental Assessment." (2003) 10(1) *SAJELP* 23.

one of the most progressive human rights, recognised by the Constitution, is that a healthy environment is a basic human right.[134]

Section 24 of the Constitution contains South Africa's environmental right, stating 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.

Sections 24, 32[135] and 33[136], of the Bill of Rights are generally considered the source for giving effect to environmental governance and hence public participation in environmental decision-making. And whilst the provision for the public to participate is inferred in section 24(b) through government's duty to protect the environment 'through reasonable legislative and other means', Section 32, the right to access information and section 33[137] the right to just administrative action, are far more implicit and provide clear support for public participation.[138]

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[134] Department of Environmental Affairs, (2014) "Know your Environmental Rights" 4

[135] Constitution of the Republic of South Africa (1996); Ch 2. s32. Access to information
(1) Everyone has the right of access to -
a. any information held by the state; and
b. any information that is held by another person and that is required for the exercise or protection of any rights.

[136] Constitution of the Republic of South Africa (1996); Ch 2 s 33 Just administrative action
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

[137] Constitution of the Republic of South Africa (1996); Ch 2 s33. Just administrative action
1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[138] A Du Plessis "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" (2008) 2 *PER* 12

Additional provisions to further the right to participate can be found in section 152(1)(e) of the Constitution, whereby it is one of the objectives of local government to encourage communities and community organisations to get involved in the matters of local government.

Sections 195(e), (f) and (g) of the Constitution defines the values and principles which must underpin all public administration which includes *inter alia* that the needs of the people must be responded to and the public encouraged to participate in policy-making.[139] Administration must be accountable[140] and transparent – achieving this through the timely provision of information that is both accessible and accurate.[141]

South Africa has made its intentions clear in the Constitution with regards to public participation providing adequately for the public to influence government policy outcomes so that they reflect the 'will of the people'.[142]

The constitutional framework is supplemented by, *inter alia*, the National Environmental Management Act 107 of 1998, the National Environmental Management: Waste Management Act 59 of 2008, as well as the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the Promotion of Access to Information Act 2 of 2000 (PAIA), as it pertains to environmental decision-making. A review of the legal provisions of PAJA as it pertains to public participation falls outside of the scope of this research and will not be discussed further.

## 3.2. NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998

When the National Environmental Management Act (the NEMA)[143] was promulgated in 1998, it repealed the Environment Conservation Act 73 of 1989, and became the

[139] Constitution of the Republic of South Africa (1996); s 195(1)(e)
[140] See *id* at ; s 195(1)(f)
[141] See *id* at; s 195(1)(g)
[142] Public Participation Framework for South African Legislative Sector. (2013) 12
[143] Act 107 of 1998

overarching framework legislation for dealing with environmental matters giving effect to section 24 of the Constitution.[144]

There are numerous provisions in the NEMA providing for the public to participate in environmental decision making. A set of national environmental management principles, as defined in chapter 2, were developed to guide all stakeholders in the manner in which they make decisions regarding the environment.

The NEMA recognises, in s2(2), that "environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably" together with s2(3) that states that "development must be socially, environmentally sustainable."

Importantly for environmental management in general, is s2(4)(b) of the NEMA which provides:

> (b) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

Even more significantly for public participation is s2(4)(f) of NEMA which states the following:

> (f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

Specifically in relation to access to information NEMA provides in s24(k) that:

> (k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

And whilst NEMA states that the principles set out in section 2 of the Act apply to the actions of all organs of state, the judgement heard before the Supreme Court of Appeal set an important precedent for these principles to also apply to private bodies in the matter of *Company Secretary of Arcellor Mittal South Africa v Vaal*

[144] Constitution of the Republic of South Africa (1996)

*Environmental Justice Alliance.*[145] The honourable judge had this to say about the NEMA principles, which bears repeating:

> Navsa ADP [66] I accept that this relates principally to the state. However, the same must, in principle apply to corporate decisions and activities that impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval.

The paragraph above related to the NEMA principle for accessing information,[146] however it is unlikely that this would only apply to this principle and not to all the principles of NEMA.

NEMA defines a "public participation process"[147] as follows::

> "public participation process", in relation to the assessment of the environmental impact of <u>any application</u> for an environmental authorisation, means a process by which potential interested and affected parties are given opportunity to comment on, or raise issues <u>relevant to, the application</u>; (Definition of "public participation process" inserted by section 1(p) of Act 62 of 2008)

The definition only applies to eliciting a response from the public when there is an application for environmental authorisation, which is unfortunate, as this is a rather narrow view of public participation and could be a limiting factor to the promotion of participation beyond the application process.

Under the General Objectives of Integrated Environmental Management[148] s23(2)(d) NEMA requires that "adequate and appropriate opportunities for public participation in decisions that may affect the environment take place." Section 24 further specifies that when applying for an environmental authorisation, "interested and affected parties, including all organs of state that may have jurisdiction over any aspect of the activity be informed and participate in the procedures by being given a <u>reasonable</u> opportunity to participate in these information and participation procedures."[149]

In addition to the above, the application must include a plan for investigation and monitoring thus providing for post implementation monitoring of a development in NEMA section 24(4)(v) which states:

[145] ZASCA 184 (26 November 2014)
[146] Act 107 of 1998; s2(4)(k)
[147] Act 107 of 1998; ch 1; 8
[148] Act 107 of 1998; ch 5, s 23
[149] Act 107 of 1998; ch 5, s 24(4)(a)(v)

Investigation and formulation of arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation.

Section 32 of NEMA provides for legal standing, and has thrown the doors wide open for any interested or affected party to seek relief in terms of a breach of any environmental management Act; this is an important aspect in terms of access to justice and therefore the right to participate.

Public participation is mandatory as part of the Environmental Authorisation (EIA) process,[150] and is the only requirement for which exemption cannot be given, it is the most critical aspect of the environmental authorisation process.[151]

NEMA allows for greater access to information before an environmental authorisation is granted, rather than once the application has been approved. Once granted, there is no provision for making the authorisation or its provisions available to IAP's.[152]

NEMA makes an important provision in terms of access to information and the rights for refusal, defining 'commercially confidential information' as "details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provisions of the Act or any other law."

### 3.3. ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2014

Environmental Impact Assessment (EIA) has been in use in South Africa for more than 20 years, having been introduced in 1997 under section 21 the Environment Conservation Act. [153] The EIA is South Africa's key regulatory instrument to mitigate or manage the impacts of new developments or activities that have the potential to infringe on the right to an environment that is not harmful to health and well-being. EIA integrates social, economic and environmental factors in the decision making process. The Environmental Impact Assessment Regime has been reinforced by

[150] Act 107 of 1998; ch 5, s24.
[151] GNR 807 GG No. 35769 dated 10 October 2012 – Public participation in the Environmental Impact Assessment Process
[152] CER "Turn on the Floodlights. Trends in disclosure of Environmental Licences and compliance data"(2013) 2. https://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf (Accessed: 30 Aug 2018)
[153] Regulations regarding Activities identified under section 21(1) of Act 73 of 1989 published in GN R1183 of 1997 (GG 182261 of 5 September 1997) in terms of sections 26 and 28 of the Environment Conservation Act, 1989 (Act 73 of 1989)

Chapter 5 of NEMA.[154] Chapter 5, which addresses Integrated Environmental Management, was implemented through the Environmental Impact Assessment Regulations and Listing Notices.[155] NEMA provides for comprehensive public participation in an application for environmental authorisation, which includes access to reports and assessments. IAP's must be notified about the outcome of the environmental authorisation however there is no stipulation as to how much information should be disclosed.

EIA plays a key role in managing environmental impacts, and while much emphasis has been placed on the application process which only deals with predicting the impacts of a new development or activity, it is through on-going monitoring after the authorisation has taken place when the actual impacts will be realised and the proposed mitigation measures would be assessed for adequacy.

The EIA Regulations as a legal instrument has sufficiently recognised the importance of public participation and the allied right to access information when it comes to environmental decision-making and has provided for these rights in the following manner.

Significantly, section 26(d) of the EIA Regulations[156] makes provision for post-authorisation monitoring in the content of the environmental authorisation, stating that:

> An environmental authorisation must specify—
>
> (d) the conditions subject to which the activity may be undertaken, including conditions determining—
>
> (iv) requirements for the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity additional to those contained in the approved EMPr, and where applicable the closure plan;

The right to access to information is advanced through section 26(h), which provides:

> 26 (h) a requirement that the environmental authorisation, approved EMPr, any independent assessments of financial provision for rehabilitation and environmental liability, closure plans,

[154] Act 107 of 1998; ch 5

[155] Environmental Impact Assessment Regulations, 2006, which were repealed and substituted with the Environmental Impact Assessment Regulations, 2010 (GNR.543, in GG No. 33306 of 18 June 2010), and then repealed and substituted by the Environmental Assessment Regulations, 2014 (GNR.982 in GG No. 38282 of 4 December 2014).

[156] EIA Regulations (2014) GN R982 in GG 38282 (4 December 2014); ch 4; Part 4: Environmental Authorisation

where applicable, audit reports including the environmental audit report contemplated by regulation 34, and all compliance monitoring reports be made available for inspection and copying—

(i) at the site of the authorised activity;

(ii) to anyone on request; and

(iii) where the holder of the environmental authorisation has a website, on such publicly accessible website;

The EIA Regulations emphasise the importance of on-going consultation with interested and affected parties by providing further opportunities for post-authorisation public participation and access to information in regulations 32(1)(a)(aa),[157] 34(5)[158] and 37(2)[159] which respectively call for a public participation process for any substantial amendments to the environmental authorisation, any recommendations to amend the environmental management programme (EMPr) as a result of an audit and finally any proposed amendments to the impact management outcomes of the EMPr.

The Regulations further provide that the audit report, as stipulated in Reg. 34 must within a short time frame of having been submitted to the competent authority notify all potential and registered interested and affected parties of the submission of the report and make this report immediately available to anyone on request and on a publicly accessible website, where the holder has such a website.

Chapter 6 of the EIA Regulations provide a number of opportunities for comment and input from interested and affected parties, throughout the relevant stages contemplated in the EIA process, which must be taken into consideration by the competent authority when making a decision.[160]

Importantly, an appeals process is provided in section 37(9)(c)[161], and appeals may be lodged against a decision made in terms of the National Appeals Regulations.

[157] EIA Regulations (2014) GN R982 in GG 38282 (4 December 2014); ch 5, Part 2: Amendment where a change in scope occurs.

[158] EIA Regulations (see note 155; Part 3: Regulation 34. Auditing compliance with environmental authorisations, environmental management programme and closure plan.)

[159] EIA Regulations (see note 155; Part 4: Other amendments of environmental management programme or closure plan)

[160] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* (2005) ZAWCHC 7; 2005 3 SA 156 at paragraph [89]

[161] EIA Regulations (see note 155; Ch 5)

Waste disposal to land was, at one point, included in the list of activities specified by the Minister of Environmental Affairs for which an environmental authorisation in terms of the EIA Regulations had to be obtained before the activity could commence.[162] However this changed with the promulgation of the National Environmental Management: Waste Act, No. 59 of 2008 and the publication of the List of Waste Management Activities that have, or are likely to have a Detrimental Effect on the Environment.[163] The construction of facilities or infrastructure, including associated structures or infrastructure, for the final disposal of waste was listed in Listing Notice 2,[164] which required a full scoping and environmental impact assessment under the EIA Regulations.

### 3.4. THE NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE ACT, 2008

Waste management in South Africa is regulated by, *inter alia*, the National Environmental Management: Waste Act, No. 59 of 2008 (hereafter referred to as NEMWA). The overall objective of this Act is "to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being."[165]

An important objective of the NEMWA, as set out in section 2(b) is:

> (b) to ensure that people are aware of the impact of waste on their health, well-being and the environment;

Section 2(b) therefore explicitly provides that where waste is concerned, people have the right to know, and its implied provisions for access to information regarding waste are important to note. Other objectives, include *inter alia*, providing reasonable measures to protect the environment through minimising the use of natural

[162] GG 28753 GNR 387 of 21 April 2006; List of Activities and competent authorities identified in terms of section 24 and 24D of the National Environmental Management Act, 1998

[163] GNR 718 in GG32368 of 3 July 2009 List of Waste Management Activities that have, or are likely to have a Detrimental Effect on the Environment.

[164] EIA Regulations (see note 155; Schedule – Activities identified in terms of Section 24(2)(a) and (d) of the Act, which may not commence without environmental authorisation from the competent authority and in respect of which the investigation, assessment and communication of potential impact of activities must follow the procedure as described in Regulations 27 to 36 of the Environmental Impact Assessment Regulations, 2006, promulgated in terms of section 24(5) of the Act.

[165] Act 59 of 2008; s 2(d)

resources, waste avoidance and minimisation, recycling and re-use, treating and disposing of waste as a last resort.[166]

Whilst there is no definition for public participation in the NEMWA, the Act does provide a number of provisions for the consultation and participation of interested and affected parties, these will be discussed in detail below.

The Minister is the licensing authority in respect of waste management activities that involve the operation of a facility at which hazardous waste is to be stored, treated or disposed of.[167] NEMWA provides for public participation in the procedure for waste management licence applications[168] which states:

> An applicant must take appropriate steps to bring the application to the attention of relevant organs of state, interested persons and the public.

The NEMWA does not, however, provide any guidance on what those appropriate steps should be only to provide that a notice be published in an least two newspapers circulating in the area in which the waste management activity applied for is to be carried out.[169] The licensing process of a waste activity is, however, subject to either a basic assessment or a full scoping and environmental impact assessment depending on the category of activity, as part of the waste management licence application.[170]

Section 51 of the NEMWA refers to the contents of the waste management license and states that, *inter alia*, the license must specify monitoring, auditing and reporting requirements.[171]

Section 51(2) provides additional content that may be included in the waste management licence for instance s51(2)(c) requires the holder of a waste management licence to establish committees for the participation of interested and affected parties.

[166] Act 59 of 2008; s2
[167] Act 59 of 2008; s 43(1)(a)
[168] Act 59 of 2008; s 47(2)
[169] Act 59 of 2008; s 47(4)
[170] GNR. 718 in GG.32368 of 3 July 2009 List of Waste Management Activities that have, or are likely to have, a detrimental effect on the environment.
[171] Act 59 of 2008; s 51(1)(k)

The Minister is required "to review a waste management licence at the specified intervals in the licence, or when circumstances demand that a review is necessary".[172] There is no requirement to consult with the public during this process.

Variations of the Waste Management Licence, which can include changes to the conditions of a licence, are not subject to a consultation process with interested persons and the public, unless the variation is requested by the licence holder and then only if the variation is likely to impact adversely on other parties or where the intention is to increase the environmental footprint.[173]

NEMWA section 55 provides for a license renewal process, and includes a provision:

> 55(4) If the environment or the rights or interest of other parties are likely to be adversely affected, the licensing authority must, before deciding the application, request the applicant to conduct a consultation process that may be appropriate in the circumstances to bring the application for the renewal of a waste management licence to the attention of relevant organs of state, interested person and the public.

Sections 72 and 73 of NEMWA place an obligation on the local and provincial authorities to engage in consultation with the public and for ensuring that public participation takes place.

Notably, NEMWA does not include an appeals procedure whereby the public could appeal a decision to authorise an activity.

NEMWA does provide for access to information in section 60 whereby the Minister has a duty to establish a National Waste Information System. This database has been established but is the only database containing environmental information that is accessible to the public.[174] A limitation of this database is the lack of availability of supporting documentation used to make the decision to licence an activity or process.

[172] Act 59 of 2008; s 53
[173] Act 59 of 2008; s 54
[174] CER. Turn on the Floodlights.(2013) 11 https://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf (Accessed 15 Sept 2018)

Section 64 of NEMWA establishes that access to information contained in the national or provincial waste information systems must be made available subject to the Promotion of Access to Information Act (PAIA).[175]

> Information contained in the national waste information system or a provincial waste information system established in terms of section 60 or 62, as the case may be, must be made available by the Minister or MEC, subject to the Promotion of Access to Information Act, 2000(Act No. 2 of 2000).

## 3.5. PROMOTION OF ACCESS TO INFORMATION ACT (PAIA), 2001

Everyone has a Constitutional right of access to information either "held by the State and by other persons, when that information is required to exercise or protect any rights."[176] PAIA gives effect to section 32 of the Constitution, and strives to foster a culture of transparency and accountability in both public and private bodies.[177] The objectives of PAIA are *inter alia*, "to promote effective governance by empowering and educating people to understand their legal rights and to scrutinize and participate in decisions made by public bodies, especially when such decisions affect their rights."[178]

Since the promulgation of the PAIA, the provisions made for accessing information in other environmental legislation such as NEMA and NEMWA, were repealed[179]. Therefore much of South Africa's environmental legislation relies on PAIA when it comes to accessing information. This has some limitations.

The applicable section of the Act which regulates a request for information from private bodies is Section 50 which provides:

> s50. Right of access to records of private bodies
>
> (1) A requester must be given access to a record of a private body if –
>
> (a) that record is required for the exercise or protection of any rights;
>
> (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

[175] Act 2 of 2000
[176] Act 108 of 1996; s 32(1).
[177] R van Jaarsveld "Generic Public Participation Guidelines" (2001) DWAF 13
[178] Act 2 of 2000; s9
[179] National Environment Law Amendment Act 14 of 2009, at s.13.

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

The Constitution provides "National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."[180] It is unclear though whether PAIA has in fact achieved this. Enforcement of PAIA thus far has been through the judicial system, which has placed and will continue to place a significant burden on the courts as well as civil society to exercise remedies through expensive legal action.[181] The recent establishment of the Information Regulator, an independent body that has within its mandate the promotion of access to information in line with PAIA ought to alleviate the burden on the courts in this regard.

### 3.6. SUMMARY

South African legislation and other initiatives have strong requirements for public participation and access to information. The policies and legislation that have been enacted clearly indicate a commitment to involve the public. However, the legislation provides neither the how nor the extent of public participation. In summary, it is fair to conclude that legislation does provide for public participation to take place but does not mandate the manner in which it should take place.

Also, once authorisation has taken place, there is very little by way of legislative provisions to govern the role of the public and/or community in the on-going operation and monitoring of an activity that has the potential to impact on the environment and the surrounding community.

Murombo posits that "It appears that the public participation process contemplated by Chapter 5 of the NEMA read with Chapter 6 of the EIA Regulations ends with the granting or rejection of authorisation." [182] However the author respectfully disagrees, when considering the number of opportunities provided by the EIA Regulations, in

[180] Constitution of the Republic of South Africa (1996) ; s 32(2)
[181] CER (2010) *Unlock the Doors. How Greater Transparency by Public and Private Bodies can Improve the realisation of Environmental Rights*. 16 https://cer.org.za/wp-content/uploads/2012/04/Unlock-the-Doors.pdf (Accessed 08 Aug 2018)
[182] T Murombo "Beyond Public Participation: The Disjunction between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development" (2008) 3(1) *PELJ.* 11

terms of amendments, suspensions and auditing of compliance with environmental authorisations and environmental management programmes[183] which provide considerable opportunities for the public to be involved in post authorisation monitoring and therefore the limitations to public participation cannot be blamed on the legislation itself, but instead on the implementation thereof.

The same, however, cannot be said of the NEMWA. And while the Waste Management Licencing process[184] provided in NEMWA closely resembles that of the EIA process as far as involving the public in the decision making plans, it unfortunately has none of the post authorisation public participation and access to information requirements mentioned in the EIA Regulations.[185]

Even the requirement to establish a monitoring committee is subject to the licensing authority's discretion by the use of the word "may" include this in the content of the licence.[186]

A system that encompasses the three pillars of the Aarhus Convention, is a system that would have the most hope of succeeding. Without access to information, there can be no public participation, without access to the courts, procedural fairness will not be guaranteed.

[183] EIA Regulations (see note 155; ch 5)
[184] Act 59 of 2008; ss 50, 51, 52, 53, 54 and 55
[185] EIA Regulations (see note 155; ch 5)
[186] Act 59 of 2008; s 50

# CHAPTER 4

# CASE STUDY

In order to satisfy the study objective to analyse the role the community played in the on-going monitoring of a landfill and what legal re-dress was available to them, a review of the media reports covering the case study landfill saga over the past two years was undertaken. The landfill site's permits and licences, as well as the Terms of Reference of the monitoring committee and minutes of monitoring committee meetings were reviewed and analysed in order to understand what transpired.

## 4.1. DESCRIPTION OF THE PROBLEM

The case study involves the Shongweni landfill site, a hazardous waste facility located in KwaZulu-Natal, situated amongst the communities of KwaNdengezi, Dassenhoek and Hillcrest. The landfill site is approximately 4 kms from the nearest rural community and about 9kms from the nearest town, Hillcrest, and is one of only two landfill facilities licenced to accept hazardous waste in Kwa-Zulu Natal. It is owned by Enviroserv Holdings and operated by Enviroserv Waste Management (Pty) Ltd ("the Company") who acquired the site in 1996.

The Hillcrest and KwaNdengezi communities are characterised by substantial differences in socio-economic conditions. As a result these communities have different expectations and requirements when it comes to development, even if the development is a locally unwanted land use. Hillcrest is an affluent neighbourhood, home to many up-market gated estates, shopping centres, schools and health care facilities. Hillcrest's population is made up of 84% whites.[187] KwaNdengezi on the other hand is largely a rural area, with a general lack of bulk infrastructure and basic services such as schools and health facilities. KwaNdengezi community is made up of predominantly isiZulu-speaking black Africans; they account for 99,4% of the population in this area.[188]

The landfill was originally developed and started operating in the early 1990's. Pre-1994 legislative regimes were however not known for actively pursuing consultation with communities affected by unpopular land uses, especially disadvantaged ones and therefore it is unlikely that any public participation was undertaken at the

[187] http://www.citypopulation.de/php/southafrica-ethekwini.php?cityid=599100 [Accessed 17.07.2019]
[188] http://www.citypopulation.de/php/southafrica-ethekwini.php?cityid=599139 [Accessed 17.07.2019]

development stage. The landfill was also originally classified as a Class 2a landfill for domestic and industrial waste, which would have attracted little interest from the surrounding communities, let alone vociferous opposition. The fact that public participation in the development of a landfill site was also not a mandatory requirement during this era, would support the above assumption.[189]

The Company's first permit to operate the landfill was issued by the then-Department of Water Affairs and Forestry in August 1997, in terms of Section 20 of the Environment Conservation Act (73 of 1989).[190] The landfill site transitioned from the s20 Permit to Waste Management Licence (WML), in accordance with s19 of NEMWA, in 2014.[191] It is important to note the various activities that were authorised under the WML. Category A activities were listed as the storage of general waste, temporary storage of hazardous waste, storage of waste tyres and the expansion or changes to the facility. Category B activities were listed as reuse, recycle and treatment of hazardous waste as well as the disposal of any quantity of hazardous waste to land and the disposal of general waste.[192]

The conditions of the licence include, *inter alia*, that the activities must be managed and operated in accordance with a documented Environmental Management System which identifies risks and minimises the risk of pollution, in accordance with the licence conditions and any other written instruction by the Director.[193] The classification, acceptance and disposal of waste must conform to the latest edition of the Minimum Requirements for the Handling, Classification and Disposal of Hazardous Waste, Waste Management Series, Department of Water Affairs and Forestry, or its successor.[194]

The licence states that impacts such as spillages, generation of leachate, odours and occurrence of nuisance conditions or health hazards must be minimised or prevented.[195] The licence holder is compelled to investigate any pollution, nuisances

[189] Prior to the new Constitution, Environmental Impact Assessment Regulations only published in 1997, Minimum requirements, 1st Edition published in 1996
[190] Section 20 Permit No. 16/2/7/U602/B3/Y1/P270 issued 28th August 1997
[191] Waste Management Licence No. 12/9/11/L1200/4 issued 8th April 2014. Available on http://sawic.environment.gov.za (Accessed on the 1 Jul 2018)
[192] See note 191
[193] See note 191; Condition 2.1.1
[194] See note 191; Condition 3.2
[195] See note 191; Condition 5

or health risks caused by the site, and must submit any mitigation measures required to satisfy the Director.[196]

Only one condition in the licence deals with community involvement in the operation of the landfill, and that is condition 11, which states the following:

> 11.1 The Licence Holder, must maintain and ensure continued functioning of a Monitoring Committee for the normal operative lifetime of the Site and for a period of at least two years after the closure of the Site, or such longer period as may be determined by the Director.
>
> 11.2 The Monitoring Committee must formulate terms of reference and code of conduct, according to the Minimum Requirements, Second Edition 1998 by the Department of Water Affairs and Forestry or its successor.
>
> 11.3 The Monitoring Committee must be comprised of relevant interested and affected persons.
>
> 11.4 The Monitoring Committee must meet at least once every six months. The latest external audit report must be presented in the meetings.
>
> 11.5 The Licence Holder must keep minutes of the Monitoring Committee and distribute these minutes to all members of the Monitoring Committee within 14 days after the meeting.[197]

Besides the condition to establish a monitoring committee and make the external audit report available to the committee, the licence makes no specific provision for the licence holder to make any other records pertaining to the operation of the landfill site available and accessible to the public.

For many years the landfill site and surrounding communities were good neighbours, with an insignificant number of complaints being fielded by the landfill operators.[198] All that changed during 2016 when members of the community started complaining that the emission of an offensive odour from the site was severely impacting on their health. The community claimed that the "toxic fumes" emanating from the site was responsible for a host of ailments, such as breathing problems, asthma, nausea and headaches, irritation to the eyes and nose, not to mention the nuisance factor cause by the perpetual stink in people's homes and lives.

[196] See note 191; Condition 7
[197] See note 191; Condition 11
[198] See Minutes of the Shongweni Landfill Site Monitoring Committee dated 31st March 2016, whereby Landfill Manager, Clive Kidd at point 38 stated that only two odour complaints had been received in February 2016.

The situation deteriorated into what is probably best described by Davies as a 'waste war',[199] and the situation went from bad to worse with the community calling for the closure of the site.

The first sign that a major pollution problem was brewing was in April 2016 when odour related complaints escalated both in number and intensity, with children being particularly badly affected and living conditions in the nearby communities becoming unbearable. The graphical representation of the escalation in complaints shown in Figure 1 is indicative of the enormity of the problem. A total of 15 990 complaints were logged on a website created by the Upper Highway Air organisation between May and December 2016, a further 153 297 complaints were logged in 2017.

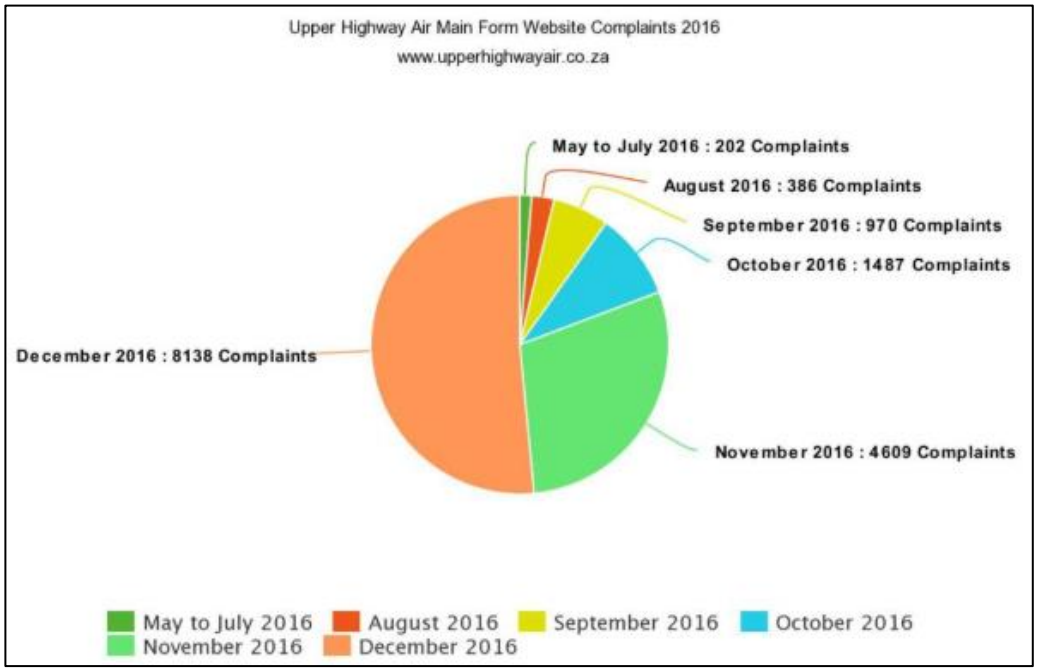


Figure 1. Statistics as presented by UHA on www.upperhighwayair.co.za

The stink was placed firmly at the doorstep of the Shongweni Landfill site, one only had to drive passed the facility to recognise the smell, and the community demanded to know what remedial action they were going to take. Furthermore, the residents insisted that the landfill operator disclose what chemicals were being dumped at the

[199] A Davies "Waste Wars, Public Attitudes and the politics of place in waste management strategies" (2003) 36(1) *Irish Geography* 77

landfill, claiming that it is these "toxic" chemicals that are responsible for the smell and the subsequent health effects.[200]

The Company was slow to react, and initially denied that the landfill was the source of the malodour.[201] In April 2016, the Landfill Manager informed the community that they were aware of the problem and were investigating, acknowledging only that there is a 'possibility' that odours from the site could be migrating into nearby communities but in the same statement claimed that "the odours could also be attributed to other sources in the area who operate under similar conditions."[202] Months later, the Company, by its own volition admitted that "from April to August 2016 the company was in denial and had been complacent."[203]

The Company then attempted to prove that it was not the only source of the odour, and collected two weeks of air quality sampling data from a sampling station installed inside one of the upmarket estates that was most vocal in their complaints. A community meeting was held with the Hillcrest community, in which the Company and its independent specialists presented their findings – claiming that the levels monitored were unlikely to cause health problems and that the odour is likely to be from another source. The community was outraged that in the face of a mounting problem the Company was more interested in trying to absolve themselves of any liability, than finding a solution to the problem. The community "rubbished" the reports, calling the science behind the studies "junk science" and the company was accused of attempting to divert attention away from themselves.[204]

In the face of the challenge to the integrity of their results, and to tackle this complex issue, the Company agreed to establish a "working group" consisting of community members, Company employees, municipal officials, air quality specialists and an

[200] Gaseous smells leave residents 'fuming'. *Hillcrest Fever online*. 19 April 2016. www.news24.co.za (Accessed 15 Sept 2018)
[201] See also *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* [2009] (10083/2008) [2009] ZAWCHC 6Ltd whereby a group of residents were complaining about a premises that emits noxious and offensive gases, causing health issues. They sought an interdict to restrain the respondent from operating. The respondent opposed the relief sought and disputed that except for the periodic distinct creosote odour that emanated from the factory, there was no causal link between the health issues and the manufacturing activities. They even questioned the authenticity of the applicant's experiences.
[202] Stink over 'toxic air'. *IOL News online*. 4 May 2016. www.iol.co.za. (Accessed 15 Sept 2018)
[203] Landfill closure could leave toxic waste backlog. *IOL News Online*. 10 Feb. 2017. www.iol.co.za (Accessed 15 Sept 2018)
[204] 'Chemical odours' causing residents to fall ill. *IOL News Online*. www.iol.xo.za/business-report/companies/chemical-odours-causing-residents-to-fall-ill_2021278 (Accessed 15 Sept. 2018)

independent health consultant, to determine the source of the odours and the associated health impacts. And while the community agreed that this was a step in the right direction there were still many matters that the Company declined to deal with or for which had still not provided the requested information.[205]

After months of extensive research, based on the available data, the air quality specialists concluded that a leachate storage tank at the Shongweni landfill site was the major contributor to the malodour, but found it unlikely that this is the only contributor and that the levels of contaminants thus far measured would not cause the chronic health effects being reported.[206] Despite the inclusion, in this working group, of an environmental specialist nominated by the community, the findings were again disputed by the community and the working group was disbanded.

In October 2016 the Department of Environmental Affairs issued a compliance notice to the Company in terms of section 31L of the NEMA, after an inspection by the 'Green Scorpions' revealed that there were reasonable grounds to believe that the Company had broken the law. The Company were compelled to urgently implement certain remedial measures as directed by the department, they however, objected to the notice and applied for a suspension citing unrealistic timeframes and some 'impractical' actions that the department had requested. The Company believed that they were doing everything that they had agreed to with the Department.

Despite the remedial action taken by the Company, the smell continued unabated, and in late October 2016, what started as an informal group of concerned residents, became an officially registered Non-Profit Company called Upper Highway Air (UHA), formed to represent the interests of the Upper Highway communities in their fight for the right to once again breathe clean air.

Communities were working through UHA to urgently access information that they believed would assist in understanding the reasons behind the health problems. A PAIA application was submitted by UHA in January when efforts to obtain the

[205] Action taken to tackle Hillcrest odour. *The Citizen online*. 28 Jul 2016. www.citizen.co.za (Accessed 15 Sept 2018)
[206] Toxic stench continues. *News24 Online*. 01 Aug 2016. https://www.news24.com/SouthAfrica/Local/Hillcrest-Fever/toxic-stench-continues-20160801. (Accessed 15 Sept 2018)

information informally failed.[207] Despite the requests being acknowledged, the information was not forthcoming.[208] UHA were also concerned as to why the Company's licence was not being suspended or withdrawn in light of the fact that they were found to be non-compliant with the conditions of their licence, and vowed to take action to ensure 'that the departments fulfil their enforcement obligations and take the appropriate remedial action'.[209] Due to a lack of response from both the Company and the provincial environmental department the UHA were left with no choice but to seek legal recourse in the form of class action.

A complete breakdown in trust ensued between the Upper Highway communities and the Company, when in January 2017 the Company commissioned an independent statistical analysis of all the complaints received and based on this analysis tried to pin the odour on a nearby pipeline and pump station. The Company had previously alleged that the community lodging the complaints was part of 'an orchestrated campaign' to discredit the company, claiming that the complaints were not authentic.[210] The Company was accused of trying to side-step the issue of the horrendous, toxic smell, complaints poured in and the community called the Company 'disgusting and evil'.[211]

In April 2017, almost an entire year after the complaints began, the DEA suspended the acceptance, treatment and disposal of waste at the landfill site. Claiming that despite the remedial interventions taken, the site was still emitting unacceptably high levels of landfill gases, the authority having confirmed that the landfill site was in fact the source of the malodour. The Department advanced that in light of the potential threat to human health and/or the environment, "the decision to suspend the Waste Management Licence (WML) was therefore one of the significant steps to a

[207] Asthma, bronchitis, nosebleeds – residents say dump is making them sick . *City Press Online*. 20 Dec 2016. https://city-press.news24.com/News/asthma-bronchitis-nosebleeds-residents-say-dump-is-making-them-sick-20161216 (Accessed 15 Sept 2018) Refer: According to Charmaine Nel (UHA legal rep) correspondence was sent to Dept. Director in Enforcement for Environmental impact and pollution and Minister of Environmental Affairs in mid- November requested information.
[208] 'What exactly is that smell?' *IOL News online*. 25 Jan 2017. www.iol.co.za (Accessed 15 Sept 2018)
[209] Asthma, bronchitis, nosebleeds – residents say dump is making them sick. *City Press Online*. 20 Dec 2016. https://city-press.news24.com/News/asthma-bronchitis-nosebleeds-residents-say-dump-is-making-them-sick-20161216 (Accessed 15 Sept 2018)
[210] Shongweni landfill site banned from accepting waste. *ENCA online*. 29 Oct 2016. www.enca.com (Accessed 15 Sept 2018)
[211] 'Hillcrest stench blame game drags on'. *The Highway Mail*. 11 Jan 2017 www.highwaymail.co.za, (Accessed 15 Sept 2018)

permanent solution in this catastrophic situation."[212] The Company lodged an appeal against the suspension, and therefore it had not taken effect when the UHA instituted action against the Company in the High Court.

The failure of the Department to enforce the suspension however (since an appeal had been lodged), together with the failed attempts to obtain information regarding exactly what hazardous waste has ended up on the landfill and its possible toxic effects, led the UHA to lodge urgent interdict proceedings. UHA sought the following relief from the Courts: "The relief claimed is an interdict restraining the Company from conducting any waste management activities on the site except those necessary for the mitigation and remediation of the problem."[213] At the same time a call was made for the release of the toxicology report. To which the Company's lawyers argued "that the toxicology report was not for public knowledge, it had been paid for by the Company and it was confidential."[214] The urgent interdict was granted and the Judge lambasted the Company for failing to make the much anticipated toxicology report available. The Honourable Judge Kruger admonished the Company saying, "The time for playing games is over. My main concern is for members in the greater area who have been falling ill, but what concerns me more are the little kids who have been affected. Human lives are at stake." and ordered the Company to file a copy of the toxicology report with the court immediately.[215]

When the Company eventually acknowledged that the odour was being emitted from the landfill they claimed it was caused by a sulphate reducing bacteria present in the landfill which is generating the hydrogen sulphide and has been allowed to proliferate reducing the pH of the waste body and generating the malodour. The Company blamed the change in legislation introduced in 2013, brought about by changes in waste classification and treatment.[216] They claimed that the new waste treatment

[212] DEA. Press Release. Department of Environmental Affairs suspends acceptance, treatment and disposal of waste at Enviroserv's Shongweni Landfill Site, 04 April 2017

[213] *UHA v Enviroserve Waste Management (Pty) Ltd and Others* Case no. 3692/2017 HC KZN Ploos van Amstel J Paragraph [14]

[214] Upper Highway Air NPC wins interdict order against Enviroserve. *Highway Mail*. 26 Apr. 2017 www.highwaymail.co.za (Accessed 15 Sept 2018)

[215] Upper Highway Air NPC wins interdict order against Enviroserv. *Highway Mail*. 26 Apr. 2017. www. highwaymail.co.za/258987/watch-upper-highway-air-npc-wins-interdict-order-enviroserv/ (Accessed: 15 Sept 2018)

[216] The release of the Waste Classification and Management Regulations and the National Norms and Standards for Disposal of Waste to Landfill in terms of the National Environmental Management: Waste Act, 2008. GNR 634, 635 and 636 published in GG 36784 on the 23 August 2013.

regime was responsible for the problem. The DEA empathically denied this, stating that the Company's statements regarding the Regulations were wholly unsubstantiated and should have been anticipated and corrected.[217]

In times of crisis, it is rarely effective to embark a public participation process.[218] And after a few unsuccessful attempts to effectively engage with communities via public meetings, the Company turned to the only mandatory requirement provided in their licence to engage with the local communities – the Shongweni Landfill Site Monitoring Committee. This long established monitoring committee however became a particularly hostile environment, with community activists accusing the Company of sowing racial division among the members. Large crowds turned up for meetings, which was not conducive to problem solving. One such meeting deteriorated into a shouting match, when a group of KwaNdengezi residents and employees of the landfill site "complained about inadequate representation of black people on the committee" and accused the UHA of "having mobilised only white community members to support an imperialist agenda of outvoting the existing monitoring committee members."[219]

Instead of becoming more transparent and inclusive the Monitoring Committee agreed on fewer opportunities to involve interested and affected parties and became less inclusive. This was evident in the decision to revise the current Terms of Reference (ToR). The ToR is the guiding principles and Code of Conduct for the monitoring committee and is binding on the committee until set aside. The current ToR gave wide powers to the committee to oversee the operation of the landfill site together with the monitoring of compliance to the licence conditions. The current ToR provided that there shall be no limit to the number of representatives provided all were given a chance to be heard.[220] Voting was however restricted to a single

[217] DEA denies change in law led to odour at EnviroServ site. *IOl News Online*. 2 Jul 2017. https://www.iol.co.za/sunday-tribune/news/dea-denies-change-in-law-led-to-odour-at-enviroserv-site-10088686 (Accessed 15 September 2018)

[218] PM Wiedemann and S Femers "Public Participation in waste management decision-making: Analysis and management of conflicts."(1993) 33 *Journal of Hazardous Materials* 356

[219] Shongweni landfill saga leaves bad odour between Durban communities. *IOL News Online*. 3 Sept 2017 www.iol.co.za (Accessed: 15 Sept. 2018)

[220] Code of Conduct and Terms of Reference for the Shongweni Landfill Site Monitoring Committee, paragraph 3.2 (document circulated by the facilitator of the Shongweni Landfill Monitoring Committee, Pravin Amar)

vote by each affected group, thereby limiting community members who are interested and affected from voting directly.[221]

In light of the groundswell in attendance at these meetings, the DEA recommended that the Monitoring Committee adopt a representative model of participation, and only recognise nominated representatives of a community, effectively reconstituting the membership of the Monitoring Committee.[222] A number of issues with the Monitoring Committee presented themselves, on one occasion the venue selection was challenged due to perceived threats of violence against some of the members, relevant information regarding the meeting was either withheld or provided with insufficient time for the members to meaningfully comment.[223] From a review of the minutes of the meetings, there also appeared to be less consensus seeking in the meeting and more voting.[224]

The proposed revised Terms of Reference were vehemently opposed by the UHA and other committee members, but at a meeting where these members did not attend due to perceived threats to their safety, the revised ToR were debated and accepted.[225] The UHA accused the Company of hijacking the meeting, with the express intention of excluding them.

UHA NPC prepared a fresh application against the Monitoring Committee and the Company, to enforce compliance with the current Terms of Reference. UHA claimed that Enviroserv are in breach of their licence conditions.[226] They also challenged the irregular convening of the MC meeting and unilateral reconstitution of the monitoring committee as well as to declare that any decisions taken therein are *ultra vires* and should be set aside.[227]

The minutes of the Monitoring Committee meetings which have been held over many years remain largely unavailable to the general public, they do not appear on any

[221] Code of Conduct and Terms of Reference for the Shongweni Landfill Site Monitoring Committee, paragraph 3.4 supra note 220
[222] Minutes of the Shongweni Landfill Site Monitoring Committee 15th August 2107 at Paragraph 22.
[223] Civic group unable to attend meeting with Enviroserv. *IOL News Online*. 20 Aug 2017. www.iol.co.za (Accessed: 15 Sept 2018)
[224] Minutes of the SLSMC Meeting held on the 14th of December 2017 (emailed by Enviroserv) at paragraph 61
[225] Minutes of the SLSMC Meeting held on the 14th of December 2017 (emailed by Enviroserv)
[226] Civic group unable to attend meeting with Enviroserv. *IOL News Online*. 20 Aug 2017. www.iol.co.za
[227] Minutes of the SLSMC held on the 21st of September 2017 (emailed by EnviroServ)

public or company website and requests to obtain the minutes were met with either no response, a negative response or a slow response.

## 4.2. ANALYSIS OF THE PROBLEM

The establishment of a monitoring committee, while not prescribed in any specific legislation is made legally binding when included in the conditions of the waste management licence. It was observed from the above investigation, that the monitoring committee, being the only legal mechanism,[228] for engaging with the local communities in the case study landfill, failed for a number of reasons. The below analysis will highlight four areas that may have contributed to the complete breakdown in the relationship between the Company and the surrounding communities and in fact between the affected communities themselves.

The first area of analysis is the enabling legislation governing waste management at the time the landfill site was developed and subsequently thereafter, which has resulted in less not more community involvement.

When the site was first developed, back in 1993, the application for a Section 20 Permit[229] issued in terms of the Environment Conservation Act,[230] had limited scope for public participation. When the permit was first issued in July of 1993, there were no specific public participation requirements in the provisions of the ECA, nor were there any principles or definitions referring to public participation in the Act. The section regarding Waste Management[231] makes no reference to seeking public input into the application for a waste disposal permit and only refers to information that may be required by the Minister in order to come to a decision regarding the application. The same can be said for Section 22 (of which waste and sewage disposal constitutes such an identified activity[232]), the provisions only call for the

[228] Shongweni Landfill Waste Management Licence no. 12/9/11/L1200/4 Condition 11. Available on : www.sawic .co.za (Accessed: 1 Oct 2018)
[229] Section 20 Permit No. : B33/1/1920/P71, issued 8th July 1993 Available on: www.sawic.co.za (Accessed: 1 Oct 2018)
[230] Environment Conservation Act, 73 of 1989, Government Gazette No. 11927, Notice No. 1188 commencement date 9 June 1989
[231] Act 73 of 1989; s 20
[232] Act 73 of 1989; s21(2)(i)

submission of reports concerning the impact of certain activities and the alternatives.[233]

There were also no regulations in place to govern these 'identified activities' until September 1997 when the Regulations regarding activities identified under section 21(1) commenced which only then included that an applicant "is responsible for the public participation process to ensure that all interested parties, including government departments that may have jurisdiction over any aspect of the activity, are given the opportunity to participate in all the relevant procedures contemplated in these regulations." [234] There were however no provisions for post-authorisation monitoring, these were only introduced with the promulgation of NEMA.

A further limitation identified in the legislation, was that the provisions for Waste Management Licences under NEMWA[235] provides fewer opportunities for post authorisation participation and access to information when compared to those of the EIA Regulations[236] as discussed below.

There are a number of processes in the EIA Regulations which offer post authorisation public participation opportunities. These include any substantial amendments to the scope of any authorisation,[237] as well as any requests for changes to be made to an EMPr or Closure Plan as a result of a non-compliance having been identified in an audit.[238]

Looking at the access to information provisions in the EIA Regulations there is a specific requirement to provide the public with access to all information pertaining to the authorisation.[239] In addition to the above, section 34(6), compels all authorisation holders to notify potential and registered interested and affected parties of the submission of the audit report and make it publically available on a website, if the holder has such a website.

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[233] Act 73 of 1989; s 22 – Prohibition of undertaking identified activities

[234] Regulations regarding activities identified under section 21(1) Government Notice R 1183 Government Gazette No. 8261 of 5th September 1997

[235] Act 59 of 2008

[236] EIA Regulations (2014) GN R982 in GG 38282 (4 December 2014)

[237] EIA Regulations (2014) GN R982 in GG 38282 (4 December 2014; Regulation 30. Process and consideration of application for amendment and decision

[238] EIA Regulations (2014) Regulation 34(5)

[239] Section 26(h) provides for environmental authorisation, approved EMPr, any independent financial provisions, closure plan, audit reports and all compliance monitoring reports available at the site and to anyone on request and where the holder has a website, on such publicly accessible website

NEMWA makes no such provisions.[240] All information relating to the landfill (albeit the WML only provides for the minutes of the committee meetings and the external audit report to be made available[241]) is channelled through the monitoring committee. There are no provisions in the conditions of the licence to provide any information to the public or to make it accessible to the public through the licence holder's website. And while the South African Waste Information System (SAWIC) as required by section 64 of NEMWA has been implemented, it is of limited use, it only makes a copy of the licence available, all other information such as annual reports (as contemplated by Conditions 5.2.1 and 8.1), monitoring information and compliance notices are not available.

The requirements of the different licencing processes are therefore not well aligned.

A second area of investigation are the missed opportunities to facilitate a public participation process during the permit amendments as well as when the Section 20 permit transitioned to a Waste Management Licence.

The Shongweni Landfill Section 20 permit issued in 1997[242] was amended several times[243] prior to the transition to the Waste Management Licence in 2014.[244] The regulations in place at the time of the amendments[245] were silent regarding interested and affected parties participating in the permit amendment process and therefore it is unlikely that the Company would have actively sought to engage the local communities in this process.

Despite the repeal of section 20 of the Environment Conservation Act, the s20 permit remained valid until the licensing authority requested the permit holder to apply for a Waste Management Licence.[246]

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[240] Act 59 of 2008 – see s 51. Contents of WML

[241] WML 12/9/11/L1200/4 (see note 228; Condition 11.4 and 11.5)

[242] Section 20 Permit - Permit No. 16/2/7/U602/B3/Y1/P270 issued 28th August 1997

[243] Permit no. 16/2/7/U602/B3/Y1/P2 was issued 28th August 1997 and reviewed on the 28th of September 2005, and again on the 7th August 2007.

[244] WML No. 12/9/11/L1200/4 for a Class H:h Disposal Facility for the disposal of Category A and B waste management activities. (See note 228)

[245] Regulations regarding activities identified under section 21(1) Government Notice R 1183 Government Gazette No. 8261 of 5th September 1997, Policy on Hazardous Waste Management (GG No 1986, in Government Gazette 12703 dates 24 August 1990, Regulations regarding Waste Disposal Sites (GG No. 1196 in Government Gazette 15832 dated 8 July 1994)

[246] Act 59 of 2008; s 81(2)

Section 81(2) of NEMWA provides that the holder of a section 20 Permit must apply for a waste management licence in terms this Act. The Act requires that a Waste Management Licence application must be brought to the attention of all interested and affected parties, and stipulated that as part of this public participation process, notices must be published in two locally distributed newspapers.[247] A landfill site is definitely "a waste management activity that has, or is likely to have, a detrimental effect on the environment" and therefore the process outlined in the List of waste management activities that have, or is likely to have, a detrimental effect on the environment[248] should apply. These regulations stipulate that any person who wishes to commence, undertake or conduct a waste management activity listed under either Category A or B, must comply with the process as set out in the Environmental Impact Assessment Regulations.[249]

Had this process been followed it would have required the permit holder to once again engage with interested and affected parties, which would have produced an up-to-date register of interested and affected parties, from which representatives for the Monitoring Committee could have been elected, and to whom relevant correspondence regarding the landfill could have been sent. This would ensure that members of the Monitoring Committee remain relevant and representative of all parties involved. It would also have meant that the communities would have been involved in the decision making process before the problems arose.

Instead, as part of the transition from s20 Permit to WML, the licensing authorities decided to conduct a Waste Management Licence Review. This decision appeared to be based on the fact that all activities were authorised before the coming into effect of NEMWA and all licensing requirements were found to be in place and the site appeared well managed.[250] The licence was issued which permitted the site to operate in accordance with the NEMWA and its Regulations.[251] A waste management licence review in terms of section 53 of NEMWA does not make public participation a mandatory requirement. This also has implications for the 5 yearly

[247] Act 59 of 2008; ss 47(2) and 47(3)
[248] Government Notice 718, Government Gazette 32368, dated 3 July 2009
[249] At the time of the transition to the WML, the 2010 Environmental Impact Assessment Regulations (GNR. 543 in Government Gazette 33306 of 18 June 2010 would have been applicable.
[250] Refer to WML No. 12/9/11/L1200/4 – DEA Letter - Approval of a Waste Management Licence Review appended to the WML.
[251] Waste Classification and Management Regulations, published in GG 36784, GNR 634 23rd August 2013.

review of the licence which will also not be subjected to a public participation process in terms of the Act.[252] The period of validity of the licence was extended from 5 to 10 years. Therefore the next legally mandated opportunity for the community to have any say in the licence conditions will be when the licence is renewed in 2024. As per section 55(4) which provides that:

> If the environment or the rights or interest of other parties are likely to be adversely affected, the licensing authority must, before deciding the application, request the applicant to conduct a consultation process that may be appropriate in the circumstances to bring the application for the renewal of a waste management licence to the attention of relevant organs of state, interested persons and the public.

It was observed that within the transition from section 20 permit to WML that a number of post authorisation monitoring requirements were relaxed, which is concerning considering the high socio-economic costs to the community who house the landfill. The condition to maintain the Monitoring Committee was carried over from the Section 20 permit[253] to the WML. However the requirement to meet every quarter was reduced to only being required to meet once every six months.[254] The other condition pertaining to monitoring was the change in frequency of auditing, the external audits being reduced from twice per year to only once per year. Bearing in mind that this is the only report that was considered mandatory to share with the monitoring committee, this would greatly impact on transparency.[255]

The Shongweni landfill site over a number of years gradually transformed from a general waste disposal site to a low hazardous waste disposal site to a high hazardous waste treatment facility – without a semblance of a public participation process. The community's reaction to the perceived threat of a health risk caused by the landfill is therefore not unreasonable. Transparency, inclusiveness and fairness lead to trust and a shared vision among stakeholders.

[252] Act 59 of 2008; s 53 Review of waste management licences
[253] Section 20 Permit No. 16/2/7/U602/B3/Y1/P270 Paragraph 9.3
[254] WML 12/9/11/L1200/4 (see note 228; Paragraph 11.4)
[255] WML 12/9/11/L1200/4 (see note 228; Paragraph 10.1.1)

The third area of investigation looks at the revision of the Terms of Reference (ToR) of the Monitoring Committee and compares the 'draft' ToR to the 'original' ToR,[256] as well as to those of another Monitoring Committee and best practice.

A brief comparison between the 'original' ToR and Enviroserv's proposed ToR[257] (hereafter referred to as the 'draft' ToR), yielded some areas of concern which will be discussed further below. Issues such as access to information, a reduced mandate for the committee and a lower tolerance for consensus seeking were highlighted.

Significantly in terms of promoting access to information, a provision for making the proceedings of the meetings accessible to the public has been removed altogether.[258] A requirement for "all parties to have access to relevant information relating to the work of the committee which relates to monitoring"[259] has also been removed. There is also no requirement to compel the members of the monitoring committee to disseminate information to the constituencies that they represent, and in fact any dissemination of information will require written permission from the licence holder.[260]

Membership has also become a controversial issue, the 'original' ToR placed no limit on the number of representatives of any interested or affected group being able to attend the Committee Meeting. The 'draft' ToR requires that only duly nominated representatives may attend the Committee Meeting. When challenged on the issue of membership, the facilitator of the MC at the meeting held on the 15th August 2017, pointed out that the process of nominating representatives was proposed by the Department of Environmental Affairs (DEA). At the meeting on the 28th June 2017, the facilitator clarified "… that representatives of organisations will be part of the monitoring committee not the public."[261]

It would seem that the above is *ultra vires* considering that the Minimum Requirements provide "that additional IAP's can be elected or appointed, however

[256] Both the original ToR's and Enviroserv's proposed ToR's can be found at http://www.upperhighwayair.co.za/2017/06/23/monitoring-committe-meeting-28th-june-2017/#more-1433 (Accessed 1 Oct 2018)
[257] Shongweni Landfill Site Monitoring Committee Terms of Reference (See note 256)
[258] Code of Conduct and Terms of Reference for the Shongweni Landfill site Monitoring Committee – original version – paragraph 1.1
[259] See note 256; paragraph 1.5
[260] Draft ToR – (see note 256) – paragraph 6(b)
[261] SLMC Minutes of Meeting held 15th August 2017, at paragraph 22.

"IAP's who have not been elected but who are interested in joining the committee or attending the meetings, may do so at any time".[262] Compliance with the Minimum Requirements is a condition of the licence,[263] therefore one would presume that in adopting the above representative model, the Shongweni Landfill would be in contravention of a condition of their licence. However this unlawful model is being proposed by the very department responsible for enforcing the licence conditions, which is a serious cause for concern.

The purpose of the Monitoring Committee has been reduced from previously having, *inter alia,* an oversight role into the operation of the landfill site, monitoring the impacts on the environment, the effectiveness of mitigation measures, promoting environmental awareness and developing trust,[264] to "the monitoring of compliance to the Waste Management Licence, providing support to the licence holder to comply with the licence and to allow recognised communities to raise issues as they relate to the landfill site."[265] This is a much narrower scope, limiting the committee in its oversight role.

The 'draft' ToR provides that resolutions of the SLSMC should be undertaken with 'sufficient consensus' and shall be arrived at by dialogue. It is not clear what sufficient consensus means. A review of the minutes of the monitoring committee indicated that very little consensus seeking is taking place, and voting is undertaken at each impasse. This was evident, from the minutes of the committee meeting held on the 21st of September 2017, which documented that a suggestion put forward by the DEA was rejected by one member of the MC, the matter was put to vote and the draft Terms of Reference were adopted. The DEA representative had proposed that all comments and suggestions received regarding the 'draft' ToR were to be forwarded to "the DEA for reassessment and consideration for adoption." Midgely warns of the danger of voting when it comes to social relations, and contends that voting is not the best option for MC situations, as voting forces a decision on the minority, it should only be used as a last resort. If consensus is reached even though

[262] DWAF Minimum Requirements for Waste Disposal by Landfill, 2nd Edition, 1998, A11-1
[263] Shongweni Landfill Management Licence No. 12/9/11/L1200/4 Condition 11.2
[264] 'Original" ToR – at section 2. (see note 256)
[265] New version of the ToR – refer paragraph 2.1 (See note 256)

it may not be the first or preferred option for everyone, but all parties agree that it is an option that they can at least live with.[266]

Adopting the 'draft' ToR could see the Monitoring Committee lose its impartiality and objectivity. The 'draft' ToR states that the SLSMC shall be facilitated by a facilitator appointed and paid for by the Company.[267] This situation would not be conducive to an objective view of the issues. This could already be seen in the minutes of the meeting held on the 14th of December 2017 whereby the committee members unanimously agreed that there were improvements following the remedial actions taken.[268] Only a minority of the members objected to this. There were 17 354 complaints logged in December 2017, up from 16 848 logged in November 2017. It is clear that a major problem still exists and remedial measures are not working.

Lastly, a brief comparison with the requirements for the establishment of the Environmental Monitoring Committee in the Coega/Ngqura Environmental Authorisation[269] highlighted that the Shongweni Landfill MC was given substantially more autonomy than that afforded to the Coega/Ngqura EMC by the Competent Authority.

The Coega/Ngqura EA specifies that the purpose, outcome, role and function of the EMC, including the ToR, along with any changes to the EMPr must be submitted to the monitoring committee for review and the Department for approval.[270] There is no requirement for any of the above to be approved by the Licensing Authority in the Shongweni Landfill WML.

The only impartial party in this matter should be the Department, provided there are no political influences. The Department should have no hidden agendas, unlike those of the Licence Holder and the communities.

[266] R Midgely (2005) "Environmental Monitoring Committees"(2005) 12 *SAJELP* 54
[267] New version of the ToR at paragraph 4.15 (See note 256)
[268] Minutes of the SLSMC 14th December 2017 at paragraph 54.
[269] Department of Environmental Affairs, Environmental Authorisation Reg No. 14/12/16/3/3/2/319/AM1 Amendment of the Environmental Authorisation issued on 10 July 2014 for the proposed manganese export facility and associated infrastructure in the Coega Industrial Development Zone (IDZ) Port of Ngqura and Tankatara area, Port Elizabeth, Eastern Cape Province.
[270] Environmental Authorisation Coega Industrial Development Zone (See note 269; Condition 17.2 and 17.4)

## 4.3 SUMMARY

It is evident from the above discussion that the post authorisation mechanism provided for in the Waste Management Licence has not met the needs of all interested and affected parties, if public participation and access to information had been dealt with effectively through the Monitoring Committee, matters would not have escalated so dramatically, and communities would not have turned to the Courts for relief. An analysis of the various media reports, certain characteristics of the licence condition, ToR and minutes of meetings, yielded some tentative conclusions as to why this mechanism is not working.

Despite a 'functioning' Monitoring Committee, the community still felt that neither the Company nor the Licensing Authority were listening to them, it was for this reason that they turned to litigation. The root cause of this issue is the complete breakdown in trust between the company, the authorities and the affected communities, and once trust is broken it is difficult to re-build. Communities will take matters into their own hands when they feel that the authorities have abandoned them.

Community participation efforts seldom work in a crisis situation. It is a case of too little too late. Besides the monitoring committee, the Company had not over the years actively engaged the communities surrounding the landfill site in initiatives to educate the community about the landfill and waste management (this could have taken the form of community advisory panel, annual information sharing workshop or a safety forum).[271] It does not appear that the Company went beyond the requirements of the licence conditions in any meaningful way. According to Nguyen in a study of community concerns about landfills, companies that go beyond the call of duty are those that will persevere.[272]

Access to information played a major role in the community's discontent. Although access to information is required by law,[273] had the Company been compelled, in the licence conditions, to make relevant information regarding the landfill available to the public in an easily accessible manner, as a condition of operating, this would have

[271] The National Nuclear Regulator Act (NNRA 47 of 1999) requires that licence holders establish a public safety information forum for those living in the municipal area affected (s. 26). These requirements are unique to this legislation

[272] QT Nguyen and VW Maclaren "Community Concerns about landfills A case study of Hanoi Vietnam." (2005) 48(6) *Journal of Environmental Planning and Management* 812

[273] See, in the environmental context, *Arcellor Mittal v VEJA case* (2015) 1 All SA 261 (SCA)

gone a long way to building an open, transparent and trusting relationship with the community. Surveys and studies commissioned and made available by the Company, only in times of crisis, will always be viewed with mistrust, for the following reasons; firstly there are no grounds for comparison and secondly specialists and consultants are never completely independent. The proponent pays the consultant and the consultant pays the specialist. The consultants mandate being, to pursue the outcome that is sought by the developer or proponent. There is currently no requirement for audit reports and specialist reports to be peer reviewed, this would add a measure of integrity to the findings.

# CHAPTER 5

## COMPARATIVE LAW REVIEW – NSW, AUSTRALIA

A review of the legislative requirements for public participation and access to information (in the on-going management of unpopular land uses) in New South Wales (NSW), Australia will be used in comparison with the provisions for public participation in South Africa. Australia was chosen for comparative purposes in order to gain a picture of the situation in both a developed nation and a developing nation and the review will compare and contrast the differences between the countries' environmental legislation as it relates to public participation.

Controversies around waste management facilities are not unique to South Africa. A number of case studies have explored the nature of community concerns about landfills and ways to mitigate these concerns.[274] There are a number of common factors that contribute to the opposition by local communities, such as concerns about environmental and health risks, a lack of public involvement in facility control and -operation (post-authorisation), negative impacts on property prices impacts and the decline in public trust in government, landfill managers and the companies that they represent.[275] Odour was the impact identified most frequently in a survey of members residing in close proximity to a landfill.[276]

The Environmental Protection Agency is the primary environmental regulating authority in New South Wales, Australia. Landfills are subject to two stages of regulation in Australia – planning and operation. New or expanded landfills require development consent or approval at the planning stage under the Environmental Planning and Assessment Act 1979 No 203 (EP&A Act) and the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). Regulation at the operational stage of waste management and landfill disposal and provision for

[274] AB Wanxin Li, LC Jieyan and D Duoduo "Getting their voices heard: Three cases of public participation in environmental protection in China" (2012) 98 *Journal of Environmental Management* 69(refers to the Liu Li Tun garbage incinerator plant); QT Nguyen & VW Maclaren (2005) "Community Concerns about landfills A case study of Hanoi Vietnam" (2005) 48(6) *Journal of Environmental Planning and Management* 809; T Yao (ed.) "Municipal Solid Waste Management with Citizen Participation: An Alternative Solution to Waste Problems in Jakarta, Indonesia" (2011) Zero-Carbon Energy Kyoto 2010, *Green Energy and Technology*, 56 DOI 10.1007/978-4-431-53910-0_7

[275] QT Nguyen and VW Maclaren "Community Concerns about landfills : A case study of Hanoi Vietnam." (2005) 48(6) *Journal of Environmental Planning and Management* 828

[276] QT Nguyen and VW Maclaren (see note 275; 821)

Environment Protection Licences are set down in the Protection of the Environment Operations Act 1997.

## 5.1 LEGAL PROVISIONS FOR PUBLIC PARTICIPATION AT THE PLANNING PHASE

The objectives of the EP&A Act and EP&A Regulation are many, but in terms of public participation s1.3 (j) provides, "to provide increased opportunity for community participation in environmental planning and assessment."

This legislation would be comparable with the South African Environmental Impact Assessment Regulations,[277] which requires an Environmental Authorisation for specific activities and developments. And whereas in NSW, a landfill would be a development that would need planning consent, and would require both planning approval and an Environmental Protection Licence, in South Africa only the Waste Management Licence would be required to develop and operate a landfill site. And while the process to obtain a WML is for either a basic assessment or full scoping and environment impact report to be undertaken, (in accordance with the EIA Regulations[278]) an Environmental Authorisation is not a requirement.

The EP&A Act and EP&A Regulations largely resemble the EIA Regulations[279] with regards to the many opportunities to involve the public in the planning process of a development. There are however, no post authorisation provisions in this Act and its Regulations and they will therefore not be discussed in any further detail.

## 5.2 LEGAL PROVISIONS FOR PUBLIC PARTICIPATION IN THE OPERATIONAL PHASE

The other statute to be considered is the Protection of the Environment Operations Act 1997 No. 156 (hereafter referred to as POEO Act) which provides for Environment Protection Licences. This federal statute deals with, *inter alia*, water pollution, air pollution, noise pollution, land pollution and waste.

The objectives of the POEO Act which are relevant to public participation and access to information are, *inter alia*, 3(b) to provide increased opportunities for public

[277] EIA Regulations, 2014 Government Notice R982 in Government Gazette 38282 dated 4 December 2014
[278] *Op cit*
[279] *Op cit*

involvement and participation in environmental protection and (c) to ensure that the community (not referred to as interested and affected parties) has access to relevant and meaningful information about pollution.

The POEO Act provides for the issuing of Environmental Protection Licences, and waste facilities must be licensed under this Act. Part 3.3 deals with the issue, transfer and variation of licences, neither the issue nor the transfer of a licence invite public participation. However, a variation to a licence, if it will authorise a significant increase in the environmental impact or the activity has been subject to an environmental assessment and public consultation process, must invite and consider public submissions. This must be done by the appropriate regulatory authority.[280] This is an important aspect of post authorisation monitoring and is no different to the South African legislative provisions for varying authorisations or licences.[281]

A licence is issued subject to conditions or unconditionally, the Act provides for particular licence conditions which may include monitoring, certification (by a person approved by the authority), the use of information (even if is self-incriminating) and the publication of monitoring results. [282] Section 6 is significant in terms of access to information and is worth repeating:

> (6) Publication of results of monitoring
>
> The holder of a licence subject to a condition referred to in subsection (1) (a) must, within 14 days of obtaining monitoring data as referred to in that subsection:
>
> (a) if the holder maintains a website that relates to the business or activity the subject of the licence—make any of the monitoring data that relates to pollution, and the licensee's name, publicly and prominently available on that website in accordance with any requirements issued in writing by the EPA, or
>
> (b) if the holder does not maintain such a website—provide a copy of any of the monitoring data that relates to pollution, to any person who requests a copy of the data, at no charge and in accordance with any requirements issued in writing by the EPA

The EIA Regulations[283] make a similar provision to the POEO Act as it relates to accessing information, but unfortunately the NEMWA does not.

[280] NSW, Protection of the Environment Operations Act 1997, no. 156 section 58(6)(a) and (b).
[281] EIA Regulations, 2014 Regulation 27, Part 2 and NEMWA, s54 Variation of WML
[282] NSW, PEOE Act 1997, no. 156, Part 3.5 s66
[283] EIA Regulations, 2014 Regulation 10 Competent authorities' right of access to information

Section 77 deals with the duration of a licence and provides that "licences have no expiry date however Licences must be reviewed every 5 years and the public must be given notice and is subject to public participation. The application for review must be published on the EPA's website."

The NSW EPA website states the following with regards to licences up for review, "The community has the opportunity to contribute to the process of reviewing conditions contained in environment protection licences. We welcome submissions regarding licence reviews from the public at any time."[284] It was observed that a number of licence reviews were published on the NSW EPA website as is required by legislation.[285] The EPA facilitate the public participation for licence reviews.

Whereas NEMWA provides for the review and the renewal of a Waste Management Licence, (Waste Management Licences are typically reviewed every 5 years and renewed every 10 years), the review process does not attract a consultation process, only the 10 year renewal does. The consultation process must be conducted by the applicant (not the authority), and is only necessary "if the environment or the rights or interest of other parties are likely to be adversely affected" and must be appropriate in the circumstances.[286]

An important provision in the POEO Act as it relates to post authorisation monitoring is Part 9.3C Environmental monitoring, 295Y. Environmental monitoring programs. Whereby the EPA would initiate an investigation into the need for an environmental monitoring program to monitor pollution and health impacts of activities or works authorised or controlled by licences. However it is mandatory for the licence holder to contribute to a monitoring levy[287] as well a monitoring fund[288] to fund the above programmes.

The monitoring fund set up by the EPA, is an excellent provision to promote integrity and impartiality when it comes to the use of consultants and specialists. This would assure communities that any monitoring undertaken has been done so independently

[284] https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/licensing-under-poeo-act-1997/review-of-licences
[285] Visited https://www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/licensing-under-poeo-act-1997/review-of-licences - Accessed: 15 Sept 2018
[286] Act 59 of 2008; s55(4)
[287] POEO Act 1997, No. 156, Part 9.3C Environmental Monitoring, s 295Z
[288] POEO Act 1997, No. 156, s 295ZA

and free from bias. The monitoring is undertaken by the EPA but the licence holder's pay for it via the monitoring fund. There is no such monitoring fund provided for in the NEMWA and results of studies undertaken by the licence holder, certainly in the case study example, are often mistrusted.

In terms of access to information, the last section of the POEO Act to be considered is Part 9.5 regarding the Public Register. This provision requires that the regulatory authority keep and make available to the public a significant volume of information relating to licenced or controlled activities. The list is so comprehensive and provides so completely for access to information it warrants repeating in full:

> 308 Public Register (2) The regulatory authority must record in the register such of the following matters as are applicable to the regulatory authority:
>
> (a) details of each licence application made to that authority,
>
> (b) details of each decision of that authority made in respect of any such licence application,
>
> (c) details of each licence issued by that authority,
>
> (d) details of each variation of the conditions of any such licence,
>
> (d1) details of each mandatory environmental audit under Part 6.2 undertaken in relation to a licence issued by that authority,
>
> (d2) details of each pollution study required by a condition of a licence issued by that authority,
>
> (d3) details of each pollution reduction program required by a condition of a licence issued by that authority,
>
> (e) details of each decision of that authority to suspend, revoke or approve the surrender of any such licence (including details of any conditions to which it is subject),
>
> (f) details of each certificate supplied in accordance with a condition of any such licence certifying compliance with the conditions of the licence,
>
> (g) the date of completion of each review of any such licence by that authority under section 78,
>
> (g1) in the case of the EPA—the date of each notice of review of a licence published in accordance with section 78 (2),
>
> (h) details of each environment protection notice or noise control notice issued by that authority,
>
> (h1) in the case of the EPA—details of each order published under section 133,
>
> (i) in the case of the EPA—details of any exemption granted under Part 9.1,
>
> (j) details of convictions in prosecutions under this Act instituted by that authority,
>
> (j1) details of each penalty notice issued by that authority,
>
> (k) the results of civil proceedings before the Land and Environment Court under this Act by or against that authority,
>
> (l) a summary of the conclusions of any audit report in connection with a mandatory environmental audit under Part 6.2 that is supplied to that authority,
>
> (m) details of such other matters as are prescribed by the regulations (relating to licences or other matters under or relevant to this Act).

A verification of the availability of this information on the NSW Public Register was conducted. [289] All of the above information such as environmental protection measures and regulatory action. Licences, compliance notices, Environmental Management Plans, for any waste management facility was available.

The South African Waste Information System (SAWIC) records all Waste Management Licences issued, is the only publicly available database, and it is not without its limitations. The National Environmental Authorisation System (NEAS) for Environmental Authorisations, the Atmospheric Licence Database (AEL) for Atmospheric Emissions Licences, the Water Use Authorisation Registration Management System (WARMS) are all not available to the public. The various departments have cited capacity constraints associated with uploading documents together with concerns around confidentiality of industrial processes as limitations to providing access to the public.[290] And since all access to information provisions in the environmental legislation were repealed after the promulgation of PAIA, it is upon these provisions that the public must now rely to access even the most basic of environmental information. This reliance on PAIA amounts to requesting the information, waiting for a response to the request, and if no response is received taking legal action through the Courts.

Interestingly, there are no legal provisions in the POEO Act for the licence holder to undertake post authorisation monitoring, however the EPA has established a guideline for solid waste landfills, in which as part of the EPA has specified the requirements for every landfill site to develop a Landfill Environmental Management Plan (LEMP) and it is a condition of the LEMP to establish a community forum.[291]

A review of the LEMP for the Woodlawn Bioreactor,[292] a waste management facility owned by an Australian company called Veolia, revealed that despite there being no legal requirement to do so, a condition to establish a community liaison committee was included in the conditions of compliance detailed in the LEMP. The Woodlawn

[289] https://www.epa.nsw.gov.au/licensing-and-regulation/public-registers
[290] CER. *Turn on the Floodlights*.(2013) 3 https://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf (Accessed 15 Sept 2018)
[291] Environment Protection Agency, NSW Environmental Guidelines: Solid Waste Landfills Second Edition, 2016. www.epa.nsw.gov.au
[292] Woodlawn Bioreactor LEMP available on https://www.veolia.com/sites/g/files/dvc2011/files/document/2018/11/Woodlawn_Landfill_Environmental_Management_Plan_August_2018.pdf (Accessed: 1 Sept. 2018)

Bioreactor LEMP provided the following evidence that this is an accepted practice and that it has been implemented:

> "Veolia formed a Community Liaison Committee (CLC) in 2004, which acts as an open forum to interface between the residents of Tarago and Veolia to proactively resolve issues that impact on local amenity potentially from operations at the Bioreactor. The CLC is made up of representatives from Veolia, the local community and Goulburn Mulwaree Council. The CLC's meeting schedule is on a quarterly basis and its minutes are available to members of the public."[293]

Minutes of these meetings were accessible on the Company's website.[294] The requirement to consult with the community is not unlike that provided in guidelines in South Africa, however the fact that this requirement is made implicit in the Waste Management Licence condition means that it is legally binding. It does not appear that the same applies in NSW, and looks to be more of an accepted best practice than a legal mandate.

A review of current media reports in NSW, Australia revealed little evidence of any meaningful community discontent with regards to landfills. A Community Liaison Committee was formed in response 700 complaints[295] about local air quality being received by the EPA between 2008 and 2015, the complaints being attributed to the Rutherford Industrial Estate. The Rutherford Air Quality Liaison Committee was established in 2011, and was represented by members of the community, local business, industry, health, government and technical and regulatory experts. It has since disbanded in 2014, having fulfilled its terms of reference. Odour complaints to the EPA fell significantly from winter 2015 to June 2016, indicating these measures were effective in reducing odours experienced in the residential community.[296] The matter did not escalate.

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[293] Veolia, 2016.04.14 LEMP Woodlawn Bioreactor, Table 2.1 Schedule 7 and LEMP paragraph 4.3.2.1 https://www.veolia.com/sites/g/files/dvc2011/files/document/2018/11/Woodlawn_Landfill_Environmental_Management_Plan_August_2018.pdf (Accessed: 1 Sept. 2018)

[294] https://www.veolia.com/anz/our-services/our-facilities/landfills/woodlawn-bioreactor-facility (Accessed on the 30 Oct 2018)

[295] Stark contrast to the 153 000 complaints received regarding Shongweni Landfill site.

[296] https://www.epa.nsw.gov.au/working-together/community-engagement/community-news/rutherford-index. (Accessed 15 Sept 2018)

## 5.3 SUMMARY

It is evident from the above review that the Australian EPA plays a more meaningful role in post-authorisation monitoring, in terms of implementing monitoring programmes, inviting comment on amendments and reviews of licences, informing the public, making information available to the public and reacting to complaints than the licensing or competent authority does in South Africa. This would in all likelihood be due to the fact that South African government departments are under-resourced, lack the technical skills and critical funding to play a more active role in post-authorisation monitoring.

A mandatory monitoring fund as provided for in Australian legislation is a provision that South Africa would more than likely benefit from, as this type of fund would promote transparency and would eliminate the questions around the integrity of consultants and specialists employed by the licence holder and the independence of the monitoring results. It would also ensure that monitoring went ahead.

South Africa needs to strive towards making relevant environmental information available to the public.

# CHAPTER 6

# CONCLUSION AND RECOMMENDATIONS

## 6.1 CONCLUSION

Central tenets of environmental justice such as, the Latin phrase *Nihil de nobis, sine nobis* (nothing about us without us), "We speak for ourselves", and the established common law rule of *audi alteram partem* (to listen to the other side), are becoming all too familiar concepts as the public become more aware of their rights to participate and to be informed about matters which impact their daily lives. By whatever name it is called (public participation, community involvement, stakeholder engagement) the consensus is that more informed decisions are made when the public have been consulted. There is also a better chance of those decisions being supported, if the community were involved. It is evident that access to information as an allied right to public participation is critical in realising this right, with battles being fought over a lack of transparency.

The South African environmental legislative framework provides adequately for public participation in the planning stage of most developments, but could improve on provisions for post-authorisation monitoring. "Consultation should not stop at consultation events, public participation must move from a once-off event to an on-going process of engagement."[297] It is clear that the public participation provisions are uncoordinated and misaligned across the various statutes and regulations. Government departments are also under-resourced, which impacts significantly on the implementation of the existing legislation, adding to the problem. This has resulted in the Competent Authority leaving environmental regulation to fewer and fewer government officials, which has in turn made self-regulation more attractive to the Competent Authority and of course to industry. And in this case study it is indicative that it has not worked. DEA have to have a more hands on approach when dealing with waste management facilities.

It was evident from the case study review that the legal mechanism for the post authorisation monitoring of the landfill was not working. The Shongweni Landfill Site Monitoring Committee failed to meet a number of critical objectives for public

[297] R Midgely (2005) "Environmental Monitoring Committees"(2005) 12 *SAJELP* 38

participation. Monitoring Committees should actively pursue potential interested and affected parties and encourage their involvement in the process, they should act as a conduit for the flow of information between the landfill operator, the regulator and the jurisdictions that are represented and also disseminate relevant information regarding the site operations and monitoring committee proceedings to all interested and affected parties in order to promote more meaningful participation.[298] Another factor was that there did not appear to be any on-going environmental education and awareness taking place within the surrounding communities.

Access to information is also a major problem, if the public do not have access to the records of the monitoring committee and monitoring data, then it just becomes another discussion behind closed doors, if you were not present, you remain unaware and uninformed.

The breakdown in trust weighed heavily against the Company and addressing the "environmental-phobia' about the perceived risks from the facility became next to impossible.[299] Beierle recognises that "Even when we realize that there are various useful and legitimate mechanisms for involving the public, we find that some very important goals--such as rebuilding trust--are very difficult to achieve."[300]

The review of the federal statutes from New South Wales, Australia, in Chapter 5, revealed that the number of opportunities provided for the public to participate in the Australian legislation was comparable to those provided in South African legislation, less so for access to information. The biggest problem with the South African model is that the system lacks implementation with lack of resources seeming to be the most common problem. The most significant difference in the two jurisdictions was that of access to information, the volume and substance of information published on both the authorities and company websites was substantial, showing a level of transparency that is not yet evident in South Africa.

[298] R Midgely (2005) "Environmental Monitoring Committees"(2005) 12 *SAJELP* 42
[299] QT Nguyen and VW Maclaren "Community Concerns about landfills. A case study of Hanoi Vietnam." (2005) 48(6) *Journal of Environmental Planning and Management* 828
[300] TC Beierle "Public Participation In Environmental Decisions: An Evaluation Framework Using Social Goals" Discussion Paper 99-06 (1998), *Resources for the Future* 25

## 6.2 RECOMMENDATIONS

Public participation should be a mandatory requirement at all stages of the authorisation process, from scoping to decision-making and community participation in the compliance and monitoring stage of the development. An improvement such as making it mandatory to invite comment for any reviews or amendments to the Waste Management Licence, would provide significantly more opportunities for the public to engage in the activity or development over the life span of the project. Reviews and renewals of licences should be advertised, in both the printed media and on an online portal.

In the absence of a regulating authority who will undertake public participation, the Company should on its own initiative undertake a stakeholder analysis on a regular basis, at least annually. It is important to ensure that relevant publics are sought out on particular issues. This will also improve the integrity of the monitoring committee. Together with the community, a community participation plan could be developed which would provide opportunities over and above the monitoring committee in which to engage with the public. Holding workshops, safety forums, publications in local newspapers are a few examples of what could be implemented. The Company should seek out the public not hide behind the monitoring committee. "The believability of risk information is closely related to institutional credibility and trust."[301] If the Company really does not have anything to hide, they should be providing up to date information on all of their landfill sites not just the one under scrutiny. They could even go so far as to give the public access to their real-time air monitoring results on their website, now that would foster trust.

The Department of Environmental Affairs should play a more active role in the Monitoring Committees, especially those for long term developments or projects. It should be mandatory for the department to approve certain key documents, such as the Terms of Reference, the nominations to the Committee and the appointment of the facilitator and Chairperson. The regulator should be completely impartial and present.

[301] RE Kasperson, D Golding and S Tuler, "Social distrust as a factor in siting hazardous facilities and communicating risks." (1992) 48(4) *Journal of Social Issues*. 163

Mandatory requirements for post authorisation monitoring should be written into the NEMWA or Regulations, otherwise it is left up to the discretion of the licensing authority as to whether to include it as a condition of the licence. Phooko recommends that there should be specific legislation dealing with public participation such as a Public Participation Act, with provisions which define what public participation entails, provisions for allowing the public to seek clarity on why their views are not reflected in the promulgated law and whether their views were considered at all.[302] The Act could provide for an appeals process to deal with all matters relating to public participation.[303]

In terms of PAIA, and access to information, the law should provide for a wider range of information to be collected, maintained and made available to the public. The provisions relating to time periods specified for information requests to be attended to and the capping of fees for information are not well enforced. When it comes to environmental records and information, there is potentially scope for arguing that there should be no rights of refusal, but that is a topic for further research. Ideally Government should work towards a Public Register as contemplated in the New South Wales statute. But in the absence of this, companies that have websites, should be compelled to make all relevant information pertaining to the activity or development accessible to the public on this website.

Waste disposal to land should be taxed, in order to encourage waste minimisation practices. A fund could be set up to provide for monitoring, which would ensure independence, but it could also fund access to technical experts for citizens and citizen organisation in order to level out the playing fields.

There are clearly a number of challenges to be overcome to ensure the effective public participation in post-authorisation monitoring of landfill sites and more research into this fascinating social experiment is required.

[302] MR Phooko "What Should Be The Form Of Public Participation In The Lawmaking Process? An Analysis Of South African Cases" (2014) *Obiter* 58

[303] This recommendation recognises that PAJA does address public participation and contains relevant appeal mechanisms, but the recommendation is aimed at more targeted legal provisions.

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