

**WORKPLACE PROTECTION FOR INFORMAL
WORKERS WITH REFERENCE TO WASTE PICKERS
IN THE DURBAN METRO AREA: AN EXPLORATION
OF SECTION 24 OF THE SOUTH AFRICAN
CONSTITUTION OF 1996.**

Thesis submitted for the fulfillment of the requirement of the degree
of Master of Laws at the University of KwaZulu-Natal – College of
Law and Management Studies

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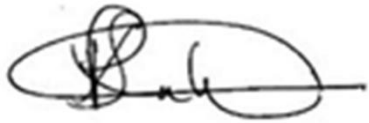
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DECLARATION

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A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a small flourish.

Signature

SUMMARY

This thesis explores the extent to which the environmental rights contained in section 24 of the South African Constitution of 1996 are potentially applicable to people who work informally in public spaces, in particular, waste pickers in the Durban Metro area. The extent to which environmental rights may be applicable to these workers is measured by first reviewing the current conditions under which waste pickers in Durban work. The study then argues that, in accordance with section 24(a), all human beings have a fundamental right to an environment that is safe and does not threaten their health or well-being. It concludes that waste pickers ought to enjoy protection in their work environment. The research further highlights deficiencies in waste pickers' entitlement to have their work environment protected through legislative and other measures as provided for by section 24(b), by reviewing the extent in which current legislation and other measures provide for workplace protection for informal workers; who are the working poor. Finally, it gives recommendations on how these deficiencies could be addressed drawing lessons from foreign case law and international experiences which can be adapted to the South African context.

KEYWORDS

Informal economy - informal workers - waste pickers - public spaces - urban management - solid waste management – environmental rights – Constitution – Occupational Health and Safety - social protection – work environment – informal workplaces – labour laws - sustainable development – environmental law

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Above all, I would like to thank God for the incredible strength to get this masters' thesis completed.

DEDICATIONS

I dedicate this masters thesis to my parents Robert and Thandiwe Xulu. I thank them and my whole family for their support and love.

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LIST OF ABBREVIATIONS AND ACRONYMS

<i>AJLS</i>	<i>African Journal of Legal Studies</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
AIAS	American Institute of Architecture Students
BCEA	Basic Conditions of Employment Act
BoR	Bill of Rights
<i>CILSA</i>	<i>The Comparative and International Law Journal of Southern Africa</i>
Constitution	The South African Constitution of 1996
CREED	Collaborative Research in the Economics of Environment and Development
CSIR	Council for Scientific and Industrial Research
COGTA	Department of Co-operative Governance and Traditional Affairs
DEAT	Department of Environmental Affairs and Tourism
DSW	Durban Solid Waste Cleansing and Solid Waste Unit
FBRR	Free Basic Refuse Removal
GDP	Gross Domestic Product
ICLS	International Conference of Labour Statisticians
<i>JSAL</i>	<i>Journal of South Asian Linguistics</i>
IEMS	Informal Economy Monitoring Study
IIED	International Institute for Environment and Development
ILO	International Labour Organization
<i>LDD</i>	<i>Law, Democracy & Development Journal</i>
LRA	Labour Relations Act
MRF	Materials Recovery Facilities
MSU-DCL	Michigan State University-Detroit College of Law
NEMA	National Environment Management Act
OHS	Occupational Health and Safety
OHSA	Occupational Health and Safety Act
OUP	Oxford University Press
PAJA	Promotion of Administrative Justice Act
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
PPE	Personal Protective Equipment

QLFS	Quarterly Labour Force Surveys
SALGA	South African Local Government Association
<i>SAJELP</i>	<i>South African Journal of Environmental Law and Policy</i>
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SAYIL</i>	<i>South African Yearbook of International Law</i>
StatsSA	Statistics South Africa
TAC	Treatment Action Campaign
<i>THRHR</i>	<i>Tydskrif vir hedendaagse Romeins-Hollandse Reg</i>
<i>TSAR</i>	<i>Journal of South African Law</i>
UAESP	Unidad Administrativa Especial de Servicios Públicos
UN	United Nations
UNEP	United Nations Environment Programme
WIEGO	Women in Informal Employment: Globalizing and Organizing
WHO	World Health Organization
WP	Working paper

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND AND PROBLEM STATEMENT

1.1.1 Introduction

Globalization has introduced extensive changes in the structure of labour markets. As a result, there has been a decline in secure jobs with work-related social benefits together with a rise in precarious and unprotected work.¹ Although these changes have been evident in the developed world, they have been even more pronounced in developing countries. For many poor people, these labour changes and the deteriorating nature of work, mean that employment is not only unable to get them out of poverty, but it further contributes to their existing state of vulnerability, which affects their health and safety.² There is a fundamental relationship between employment and well-being. However, there is little protection given to different types of work poor people engage in. The different types of work poor people engage in are found mainly in the informal economy.³ The informal economy has a role in addressing poverty reduction. However, the different types of work found in this sector fall outside the regulatory domain of labour laws and remain largely unprotected by legislation.⁴ The exclusion of the informal economy from labour laws further perpetuates the challenges which workers face in their quest to escape poverty. These challenges affect their state of well-being as workers in the informal economy.

The Constitution of the Republic of South Africa⁵ (the Constitution) gives all the inhabitants of South Africa the right to an environment that is not harmful to health and wellbeing. This right is set out in section 24. This thesis seeks to determine whether or not section 24 can be used to demand improved working conditions for informal workers. The research relates particularly to waste pickers in the Durban Metro area.

The thesis will first, review existing literature on the informal economy and data on waste pickers in the Durban Metro area. This will be followed by a look at the deficiencies in the application of current labour and occupational health and safety (OHS) laws to protect these waste pickers, and then a review of case law and how they can address the deficiencies of existing laws. The thesis will then argue for the establishment of legislative and other measures to protect the work environment for waste pickers.

¹ F Lund & A Marriot *Occupational Health and Safety and the Poorest* (2011) 10.

² Lund & Marriot (note 1 above) 10.

³ Lund & Marriot (note 1 above) 10.

⁴ M Altman 'What are the policy implications of the informal sector becoming the informal economy?' Concept paper prepared for *IZA/World Bank Conference on Employment & Development* (2007) 6-10.

⁵ of 1996.

Lastly, the thesis examines the obligations of section 24 of the Constitution to protect the work environment of waste pickers. The following section discusses why the informal economy matters.

1.1.2 Why the informal economy matters?

In most developing countries including South Africa promoting the informal economy forms an essential component of strategies to address unemployment and poverty. It also supports the creation of sustainable livelihoods.⁶ According to the International Labour Organization (ILO), an informal economy is broadly defined as: ‘All economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements.’⁷

This broad definition includes two main categories of workers: first, those who are self-employed in small unregistered enterprises and second, those who are wage workers in unprotected jobs.⁸ The category of self-employed in small unregistered enterprises includes employers who hire others, ‘own-account’ operators who do not employ others and unpaid but contributing family workers.⁹ The category of wage workers in unprotected jobs includes employees holding informal jobs in formal or informal enterprises, or paid domestic workers employed by households.¹⁰ For the purposes of this thesis, ‘informal workers’ refers to all workers mentioned in these two categories. The reason for this is that the definition of informal employment in labour surveys encompasses workers from both of these categories.¹¹

The informal economy comprises 50 to 70 per cent of the non-agricultural workforce in developing countries, especially in Sub-Saharan African and South Asian countries.¹² In countries like Kenya and India, 90 per cent of employment has been ascribed to the informal economy. Statistics South Africa’s Labour Force Survey Quarter 4¹³ reported that 2.8 million people are active in the informal economy. This number excluded those people working in the agricultural sector. The survey further reported that 37 per cent of these 2.8 million people were women.¹⁴ The most visible of informal workers are those working on the streets or in open public spaces.¹⁵ The least visible informal workers are home-based

⁶ J Hovsha & A Meyer ‘The Informal Economy and Sustainable Livelihoods’ *Journal of the Helen Suzman Foundation* (2015) 34 – 35

⁷ ILO ‘Effect to be given to resolutions’ *90th international labour conference* (2002) a.

⁸ C Bonner & D Spooner *The Only School We Have: Learning from Organizing Experiences Across the Informal Economy* (2012) 6.

⁹ Bonner (note 8 above) 6 - 7.

¹⁰ ILO ‘Decent work and the informal economy’ *70th international conference of labour statistics* (2003) 50 – 51.

¹¹ ILO (note 7 above) 50 – 51.

¹² Bonner (note 8 above) 7.

¹³ of 2018.

¹⁴ StatsSA *Labour Force Survey Quarter 2* (2018) 19.

¹⁵ Bonner (note 8 above) 6.

workers, the majority of whom are women.¹⁶ The main thing that these informal workers have in common is the lack of legal and social protection.¹⁷

Waste pickers have been chosen as the subjects for this study because, through waste picking, they offer a public service with positive economic, social and environmental benefits for their communities. Despite the benefits they bring, these workers are not given any recognition and are not considered to be part of the solid waste management programs.¹⁸ Waste pickers make their living by collecting, sorting, recycling and selling waste materials. They often collect these waste materials from landfills, garbage bags, and bins on streets or dumpsters. Sometimes they have arrangements with businesses and have access to material which has been specially set aside. A report compiled in 2009 estimated the number of waste pickers in South Africa's informal economy was between 45 000 and 85 000. This number has increased significantly over the years.¹⁹ Waste pickers face serious risks and challenges arising out of the conditions in which they work. These risks and challenges often threaten their livelihoods. Chapter 2 will discuss these risks and challenges in detail. The following section gives an overview of the work environment of waste pickers.

1.1.3 The work environment of waste pickers

The environment in which waste pickers conduct their businesses and work is reported to be hazardous and dangerous to their health and safety.²⁰ The biggest challenges that waste pickers face are harassment, removal or arrest by local municipal officials.²¹ Often, they are treated as nuisances by local municipal officials and therefore susceptible to violence directed at them by the police.²² Furthermore, waste pickers sell their collected materials to middle agents who often intimidate and exploit them.²³ These challenges create an insecure and precarious working environment for these workers. Over and above these challenges, waste pickers face occupational hazards. Many of them lift and haul heavy loads, and work with machinery and equipment, which causes harm to their bodies.²⁴ The health risks they face include contact with fecal matter, paper saturated with toxic materials, bottles and containers with chemical residues, dirty needles and heavy metals from batteries.²⁵ The long work hours add to the health risks these workers face, as many of them work over 48 hours per week which

¹⁶ Bonner (note 8 above) 6.

¹⁷ Bonner (note 8 above) 6.

¹⁸ WIEGO 'Waste Pickers: The Right to Be Recognized as Workers' Position paper presented at the *102nd session of the International Labour Conference* (2013) 1.

¹⁹ G Wills 'South Africa's Informal Economy: A Statistical Profile' in *Urban Policies Research Report No. 7* (2009) 47.

²⁰ Bonner (note 8 above) 6.

²¹ Wills (note 19 above) 43.

²² Wills (note 19 above) 67.

²³ Wills (note 19 above) 67.

²⁴ Wills (note 19 above) 42.

²⁵ Wills (note 19 above) 67.

is above the 45 hours allowed in a week for formal sector workers.²⁶ Waste pickers conduct their work in workplaces that often lack appropriate infrastructure and basic facilities like running water, toilets, and solid waste removal. Additionally, these spaces are often without shelter, which exposes these workers to bad weather.²⁷

In most countries, national legislation regulates the manner in which a workplace should provide protection for its workers. Such legislation is concerned with the health, safety, and the well-being of people engaged in work or employment. These are often referred to as occupational health and safety (OHS) laws or regulations and aim to protect not only the workers but their co-workers, their employers, their customers, family members and anyone else who might be affected by the working environment.²⁸ Labour laws regulate the conditions of work for people in formal employment. These laws are concerned with workers' rights at work and with setting up employment standards. A good example is the Labour Relations Act²⁹ (LRA). Unfortunately, in most countries, labour laws do not explicitly cover informal workers. National policies or laws that protect, regulate and promote the employment of informal workers are non-existent.³⁰ In the case of waste pickers in South Africa, municipal by-laws and ordinances, which regulate waste collection in most cities, are often outdated and inappropriate for the needs of these workers.³¹ Chapter 3 of this thesis looks at the inability of current labour and OHS laws to protect waste pickers. It also examines how case law can be used to address these gaps in the law. The following section discusses constitutional protection of workers.

1.1.4 Constitutional protection afforded to workers in their work environment

Although the national labour legislation is inadequate for protecting the rights of informal workers, various provisions in the Constitution provide for socio-economic rights. These rights are based on the right to equality³² and human dignity³³ and may, perhaps be used to protect the work environment for waste pickers and other informal workers.³⁴ In many instances the Constitution imposes an obligation to enact legislation to ensure the protection of the rights concerned. The Constitution is the supreme law in South Africa. The law or conduct inconsistent with it is invalid, and the obligations imposed by

²⁶ K Tijdens, J Besamusca, & M van Klaveren 'Workers and labour market outcomes of informal jobs in formal employment: A job-based informality index for nine sub-Saharan African countries' in *AIAS WP* 140 (2014) 26.

²⁷ Bonner (note 8 above) 42.

²⁸ See the preamble of the Occupational Health and Safety Act of 1993.

²⁹ 66 of 1995.

³⁰ N Smit & ES Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' *TSAR* (2009) 531.

³¹ Bonner (note 8 above) 43.

³² Section 9(1) of the South African Constitution of 1996, which provides that 'Everyone is equal before the law and has the right to equal protection'.

³³ Section 10 of the South African Constitution of 1996, which provides that 'Everyone has inherent dignity and the right to have their dignity respected and protected'.

³⁴ S Khoza (Ed) *Socio-economic rights in South Africa: A resource book* 2ed (2007) 27.

it must be fulfilled.³⁵ For example, section 9(4) of the Constitution obliges the national legislature to enact legislation to prevent or prohibit unfair discrimination. As a result, the Promotion of Equality and Prevention of Unfair Discrimination Act³⁶ was enacted in order to comply with the constitutional obligations in this section. There are other examples which show that legislation has been enacted following a constitutional obligation or permissive constitutional authorization, e.g., the Promotion of Administrative Justice Act³⁷ (PAJA) was enacted to comply with the constitutional obligations in section 33(3).³⁸

In the absence of specific legislation giving concrete effect to the rights in the Constitution, we must rely on the Constitution itself.³⁹ Section 24 of the Constitution provides for the right to a healthy environment as well as the right to have the environment protected.

The environmental rights contained in section 24 fall under the category of socio-economic rights. Socio-economic rights are defined as those rights that give people access to specific ‘basic needs necessary for human beings to lead a dignified life’.⁴⁰

Socio-economic rights are particularly relevant to vulnerable and disadvantaged groups in society that often experience social exclusion and unfair discrimination. International studies have shown that there is a high correlation between poverty and participation in the informal economy.⁴¹ Multi-country data confirms this relationship in studies conducted in Latin America, Africa, and Asia.⁴² A study based on the South African Labour Force Statistics in 2002 calculated that the 367 000 households with monthly expenditure of less than R400 per month had 1.37 million people, and approximately 400 000 of those were working in the informal economy.⁴³ This data confirms that there is a correlation between working in the informal economy and being poor. Chapter 4 explores section 24 of the Constitution and examines the obligation to the state to protect the environment for informal workers – and, particularly for this research - waste pickers, who conduct their work informally in public spaces in the Durban Metro area. The section below discusses the purpose of the study.

³⁵ Section 2 of the Constitution.

³⁶ No. 4 of 2000.

³⁷ No. 3 of 2000.

³⁸ Another example is the Promotion of Access to Information Act 2 of 2000 (PAIA) which was enacted as to give effect to the right of access to information entrenched in s 32(1) of the Constitution. See L Du Plessis ‘The status and role of legislation in South Africa as a constitutional democracy: Some exploratory observations’ (2011) *PELJ* 96-351.

³⁹ D Brand & K Van Marle ‘Poverty and the ordinary law: Introduction’ *SAJHR* (2013) 465.

⁴⁰ Khoza (note 34 above) 20.

⁴¹ Skinner C ‘Constraints to Growth and Employment in Durban: Evidence from the Informal Economy’ in *Research Report* No. 65 (2005) 5.

⁴² Skinner (note 41 above) 5.

⁴³ Skinner (note 41 above) 5.

1.2 STATEMENT OF PURPOSE

The purpose of this research is to investigate the extent to which the provisions of section 24 of the South African Constitution of 1996, are applicable to the workplace environments in which waste pickers in the Durban Metro area conduct their work.

1.3 RATIONALE

Section 24 of the Constitution does not define the ‘environment’ it seeks to protect. However, it recognizes that there is a fundamental human right to a healthy environment and imposes an obligation on the state to take positive steps towards the attainment of this right.⁴⁴ A definition of ‘environment’ is provided in the National Environment Management Act⁴⁵ (NEMA). NEMA provides the definition of the word ‘environment’ as follows:⁴⁶

‘environment’ means the surroundings in which humans exist and that are made up of-

- (i) the land, water, and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

The definition provided in NEMA is not adequate because it is narrower than the definition provided by the dictionary.⁴⁷ The Oxford Dictionary defines ‘environment’ ‘as the totality of a being’s surroundings’.⁴⁸ Environmental law scholars view the dictionary definition as wider than the definition provided by NEMA, and they are in agreement that such a definition is in line with the meaning of an environment that encompasses all humankind’s surroundings.⁴⁹ The wider definition would also include the place of humans in the urban environment, that is the built environment and the work environment. The wider definition further includes the socio-economic and cultural dimensions of human life, their natural environment, as well as their relationship with other humans.⁵⁰ This expanded definition allows

⁴⁴ M Kidd *Environmental law* (2011) 2.

⁴⁵ Act 107 of 1998.

⁴⁶ Section 1 (1) of NEMA (see note 45 above) under definitions.

⁴⁷ J Glazewski *Environmental Law in South Africa* 2ed (2005) 9 also argues that the definition of the ‘environment’ would be helpful to identify the legal ambit of the subject.

⁴⁸ OUP *Oxford Popular School Dictionary* 135.

⁴⁹ Kidd M (note 44 above) 22 and 5-6.

⁵⁰ Glazewski (note 47 above) 9.

protection of the right to a healthy environment to be as generous as possible thereby extending its scope for application.⁵¹ As previously mentioned, this thesis seeks to explore the application of these environmental rights to waste pickers. This will be done by using this wider dictionary definition, to give content and context for extending the application to waste pickers.

1.4 AREA OF FOCUS

1.4.1 Central question

The question that this thesis seeks to answer is: to what extent may the provisions of section 24 of the Constitution be used to protect informal workers from hazardous or dangerous working conditions, with particular reference to waste pickers in the Durban Metro area?

The following sub-questions follow from this central question:

- How should the term ‘environment’ in section 24 of the Constitution be defined? Answering this question will involve examining the guiding principles of statutory interpretation, as well as an examination of the existing case law on the definition of the term ‘environment’, particularly in the areas of labour law and environmental law.
- To what extent may it be possible to extend the meaning of the term ‘environment’ to include the types of areas in which waste pickers operate?
- To what extent are the legal obligations imposed by sections 8(3)(a) and 39 of the Constitution relevant to the promotion of the environmental rights of informal workers?
- Do the rights set out in section 24 of the Constitution link to other rights contained in the Constitution, in a manner that provides workplace protection for waste pickers?
- What does research on the work experiences of waste pickers reveal about the possible infringement of their right to a clean and healthy environment?
- How can the right of waste pickers in the Durban Metro area be protected in the light of international experiences?

1.5 RESEARCH METHODOLOGY

This thesis is based on desktop research. The relevant legal materials reviewed include: local and foreign statutes, international treaties, and international and foreign case law. The thesis further examines discussions and opinions raised in textbooks, journal articles and relevant reports by different

⁵¹ J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4ed (2001) 405 – 406.

authors. The data derived from these sources is used to develop critical arguments and respond to the research questions raised.

The literature reviewed in this thesis includes works on the informal economy, which assists in the understanding of the nature of informal employment, including the social and economic status of informal workers, as well as the challenges and issues faced by such workers when conducting work in public spaces. This thesis makes use of data on the work conditions of waste pickers in the Durban Metro area which were collected from published reports, surveys and newspaper articles. These data sources are used in order to ensure that the research is completely up to date in relation to changes and developments in laws, policy, and regulations affecting the informal economy.

This thesis also conducts a comparative analysis of published reports concerning the conditions of work ‘particularly around OHS’ for waste pickers in Durban and, as well as in other developing countries. A brief analysis of the differences and similarities between the challenges and issues facing waste pickers in different parts of the world is conducted. The ILO reports and South African labour surveys are analyzed to draw out the contribution made by the informal economy both to employment and to the gross domestic product (GDP). Both internet and library resources were used in order to obtain the various materials mentioned above.

1.6 STUDY OUTLINE

The thesis is divided into the following chapters:

1.6.1 Chapter 1: Introduction and problem statement

This chapter firstly provides an introduction and background on the informal economy and the reasons why the informal economy matters. Secondly, it discusses the work environment of waste pickers and highlights the need to have their work environment protected. Thirdly, it provides an outline of the thesis and a brief description of each chapter.

1.6.2 Chapter 2: Informal sector and urban management

This chapter scans the working conditions of informal workers who conduct their work in public spaces. It highlights the challenges, risks, and hazards, which face waste pickers in the Durban metro as they perform their work. It also highlights the contribution of informal workers in providing employment opportunities for themselves and others. It further emphasizes their contribution to the GDP and their role in urban waste management strategies through environmental sustainability and recycling.

1.6.3 Chapter 3: Legislative and other measures protecting and regulating the work environment of waste pickers

This chapter looks at the lack of enforcement of current labour and OHS laws, which are supposed to protect waste pickers. It also looks at the role of case law in addressing these deficiencies. It reviews

relevant cases and develops an argument for the establishment of legislative and other measures designed to protect the work environment of waste pickers.

1.6.4 Chapter 4: Extending the application of section 24 of the Constitution

This chapter explores section 24 of the Constitution and discusses whether or not the scope of this section may be expansively interpreted so that its provisions are considered to be applicable to the work environments of waste pickers. It examines the definition of the term ‘environment’, in light of the guiding principles used by South African courts to define the words used in legislation. It then highlights the obligations imposed by the Constitution on the courts through sections 8(3) (a) and 39 to promote a wider definition of the term environment in order to protect the environmental rights of waste pickers. This is followed by an examination of how environmental rights may, perhaps, link with other rights in a manner that provides workplace protection for waste pickers. By so doing, it provides the content and the context for the extension of environmental rights to protect informal workers and their workplaces. Lastly, it argues that the obligation to regulate the work environment of waste pickers must be placed in the regulatory domain established by environmental law.

1.6.5 Chapter 5: Conclusion and recommendations

This chapter concludes with recommendations based on the manner in which other cities and countries have integrated informal waste pickers into their waste management programs to offer work security and decent work conditions to waste pickers.

CHAPTER 2: THE INFORMAL ECONOMY AND URBAN MANAGEMENT

2.1 INTRODUCTION

There has been a change in recognition of the informal economy and its role in providing a source of income to the urban poor in recent years. The shift has included a move from thinking the informal economy is temporary and that the informal economy will integrate into the formal economy as the industry grows. Some writers argue that the emergence of data indicates that the informal economy may be becoming an integrated part of the overall economy and the informal economy will increase with modern industrial growth.⁵² The increase is despite threats and factors that negatively affect the sustainable growth and development of the informal sector. Other writers maintain that the informal economy creates a parallel economic world to that of the formal sector, particularly in developing countries.⁵³ One thing is clear, though, the informal sector is here to stay. This chapter provides an overview of literature and data on the informal economy, urban management, and service delivery. It then discusses urban waste management and recycling as urban management processes which address social, economic and environmental sustainability issues. Lastly, it highlights the role of waste pickers and their contribution to environmental sustainability, as well as the challenges, risks, and hazards, which they face as they conduct their work.

2.2 CONCEPTUALISING THE URBAN INFORMAL ECONOMY

2.2.1 *What is the informal economy?*

The informal economy is broadly defined as all economic activities that are carried out by the poor which are not recognized, regulated or protected by the public authorities.⁵⁴ The people working in the informal economy are those who are self-employed in small unregistered businesses or employed by owners of these businesses. Some people are working under contract to large companies, and others are paid domestic workers employed by households.⁵⁵ The informal economy is referred to in colloquial terms as the ‘informal sector’. The informal sector is defined as consisting of those businesses that are not registered in any way.⁵⁶ These businesses are small, and most of them do not operate from business premises but from homes, street pavements or other informal areas.⁵⁷ The ILO has argued in favour of the term ‘informal economy’, as opposed to the term ‘informal sector’, because it has been found that

⁵² T van der Heijden ‘Making the informal economy visible: Guidelines for municipalities in respect of adopting a more developmental approach towards the informal economy’ *SALGA report* (2012) 4.

⁵³ Smit & Fourie (note 30 above) 44.

⁵⁴ N Smit & LG Mpedi ‘Social protecting for developing counties; Can social insurance be more relevant for those working in the informal economy?’ *Law, Democracy & Development Journal* (2010) 4.

⁵⁵ F Lund, J Nicholson & C Skinner *Street Trading* (2000) 5.

⁵⁶ StatsSA *Labour Force Survey Quarter 4* (2004) 15.

⁵⁷ StatsSA *Labour Force Survey Quarter 4* (2004) 15.

the term ‘informal sector’ is inadequate or misleading, in that it does not reflect the dynamic, heterogeneous, and complex aspects of the specific economic activities carried out by various informal groups.⁵⁸ The term ‘informal economy’ better describes an expanding and increasingly diverse group of workers and enterprises operating informally in both urban and rural areas.⁵⁹ The type of workers in the informal economy include the following:⁶⁰

- ‘Own account’ workers in survival-type activities;
- Paid domestic workers employed by households;
- Home-based workers;
- Self-employed workers in micro-enterprises operating on their own or with employees or family members;
- Those working informally in formal enterprises.

The needs and challenges faced by these workers differ and this must be considered when attending to their issues. For example, the ‘own account’ workers in survival-type activities and those who are self-employed in micro-enterprises face various barriers and constraints when either conducting their work or trying to set up and operate formal enterprises. Home-based workers and paid domestic workers often find themselves in relationships with their employers which are not legally recognized or protected.⁶¹ These different groups of workers are termed ‘informal’ because they share one crucial characteristic. This is described by the ILO as follows: ‘They are not recognized or protected under the legal and regulatory frameworks. However, this is not the only defining feature of informality. Informal workers and entrepreneurs are characterized by a high degree of vulnerability’.⁶²

The fact that the economic activities of workers in the informal economy are not recognized and protected by the law means that informal workers are outside the formal reach of the law and that their work is not regulated. Because of this, informal economic activities are often confused with criminal activities such as drug trafficking, people smuggling, money laundering, bribery, stealing of state property and deliberate tax evasion.⁶³ Even though informal economic activities are not registered or even regulated, the majority of informal workers produce goods and services that are legal. This

⁵⁸ ILO (note 7 above) 2.

⁵⁹ ILO (note 7 above) 2.

⁶⁰ ILO (note 10 above) 3.

⁶¹ ILO (note 10 above) 3.

⁶² ILO (note 10 above) 3.

⁶³ ILO (note 7 above) 3.

thesis focuses on ‘own account’ workers in survival-type activities, which include street vendors and waste pickers. These workers are most visible in urban public spaces.

2.2.2 *How big is the informal economy in South Africa?*

According to the literature details of the exact size and composition of the informal economy are difficult to determine consistently and accurately.⁶⁴ The different ways in which the terms ‘informal economy’ and ‘informal sector’ are defined in various countries, and in different labour surveys and statistical reports, make it difficult to determine conclusively which specific groups of workers form part of the informal economy or sector. To solve this problem, the International Conference of Labour Statisticians (ICLS) has set international definitional norms to which most countries, including South Africa, adhere. There are two sets of reports from which the size of the informal economy in South Africa can be deduced. The first one is South Africa’s *Quarterly Labour Force Survey* (QLFS) and the second one is the report compiled by Statistics South Africa (StatsSA). The QLFS identifies workers in ‘precarious’ employment situations irrespective of whether or not they are in the formal or informal economy.⁶⁵ StatsSA recognizes workers who are ‘own account’ workers or employers in unregistered small enterprises who do not deduct and pay tax from their income nor charge tax on the goods or services that they sell.⁶⁶ For the purposes of this study, both reports are used to analyze and discuss data on the informal economy.

South African data indicates that 2.7 million people (excluding those working in the agricultural sector) were located in the informal economy in 2017.⁶⁷ This number increased to 2.8 million in 2018, which amounted to an increase of 11 per cent.⁶⁸ The number of people working in the formal economy (excluding the agricultural sector) was reported to be 11.1 million in 2017. The number of people working in the formal economy increased to 11.3 million people in 2018, which amounted to an increase of 1.8 per cent.⁶⁹ The number of women working in the informal economy was 1 026 000 in 2014 which rose to 1 042 000 in 2015.⁷⁰ The number of men working in the informal economy was 1 734 000 in 2017, which rose to 1 786 000 in 2018.⁷¹ This means that in 2018 the informal economy was made up of 37 per cent women and 63 per cent men.

⁶⁴ Van der Heijden (note 52 above) 6.

⁶⁵ StatsSA *QLFS Additional aspects of the labour market in South Africa: Informal employment; Underemployment and underutilised labour; Unemployment* (2008) 5.

⁶⁶ StatsSA (note 65 above) 5.

⁶⁷ StatsSA (note 14 above) 1.

⁶⁸ StatsSA (note 14 above) 1.

⁶⁹ StatsSA (note 14 above) 1.

⁷⁰ StatsSA (note 14 above) 19.

⁷¹ StatsSA (note 14 above) 19.

Regarding employment in South Africa, data indicates that employment in the informal economy accounted for 18 per cent of total employment in 2018, which was up from 16 per cent the previous year.⁷² The province of Limpopo was reported to have the largest number of people employed in the informal sector – around 29 per cent of total employment in that province in 2018 could be attributed to the informal sector, compared to 21 per cent in the Eastern Cape followed by 20 per cent in Mpumalanga, and 19 per cent in KwaZulu-Natal.⁷³ These percentages correlate to some extent with the unemployment rate, which supports the idea that many people in South Africa are having to enter the informal economy as an alternative to securing formal employment.⁷⁴ Even though informal economic activities are not recorded and are therefore difficult to measure, the total economic value of the informal sector is estimated at around 28 per cent of South Africa's GDP.⁷⁵ This means that the size of the informal economy in South Africa is valued at approximately R160 billion, which makes it 2.5 times larger than the agricultural sector and approximately 70 per cent of the size of the mining industry.⁷⁶ This data shows that the state of the informal economy has significant implications for public policy, whether from the social or labour market perspective or from the perspective of public finance and law. It is imperative that there is proper alignment between the resources that are allocated to the informal sector and the relative contribution of this sector to overall economic activity, employment and poverty reduction. The following section discusses the informal economy and urban waste management in South Africa with particular reference to the Durban metro area also known as eThekweni municipality.

2.3 THE INFORMAL SECTOR AND URBAN MANAGEMENT IN SOUTH AFRICA

2.3.1 What is urban management?

Urban management is often defined as a set of instruments, activities, tasks, and functions that ensure that a city is able to operate.⁷⁷ It usually takes the form of policies, plans, programs, and practices aimed at ensuring that local government develops infrastructure that matches population growth.⁷⁸ The function of urban management is the provision of essential services like water, roads, transport, maintenance of infrastructure and access to land for various activities critical to its residents. An urban management system basically operates to ensure that the resources and public investments generated from the city are efficiently used for its further development.⁷⁹ However, the nature of cities is such that

⁷² StatsSA (note 14 above) 1 – 2.

⁷³ StatsSA (note 14 above) 1 – 2.

⁷⁴ Van der Heijden (note 52 above) 7.

⁷⁵ Van der Heijden (note 52 above) 7.

⁷⁶ Van der Heijden (note 52 above) 7.

⁷⁷ C. Acioly, 'Note on Governance and Urban Management in Brazil', in Hartkoorn (ed) *Cities Made by People* Vol II of A (2000) 59-72.

⁷⁸ KJ Davey, 'Elements of Urban Management' in *the World Bank Report* No. 12503 (1993) 2-3.

⁷⁹ Acioly (note 77 above) 8.

the residents and businesses do not often share the same interests. Therefore, it is vital that urban management ensures that basic services are provided for all the city's residents and businesses equally and that it resolves any conflicts that might arise between them as they demand space in the city. The following section discusses the history of urbanization in South Africa

2.3.2 The history of urbanization in South Africa

The discovery of diamonds and gold from 1886 accelerated the process of urbanization which was associated with industrialization.⁸⁰ The rate of urbanization in different cities varied based on their economic activities. Whereas diamonds and gold were discovered in Northern Cape and Gauteng areas, KwaZulu Natal farmed sugar cane and was big on agriculture whilst Durban's economy thrived based on transport, manufacturing, financial services, and tourism. Durban eventually became the city with largest trans-shipment point for exports and imports.⁸¹ The main reason the process of urbanization continued to accelerate in other major cities was because of the growing mining industry and its demands for human resources which encouraged rural migration to the cities particularly by black people. But in Durban, workers were needed to work in the harbour and in other industries servicing the port.

When the Afrikaner National Party was elected in 1948, it championed the policy of apartheid which was a system of institutionalized racial segregation and discrimination. Part of the grand apartheid plan was a system of 'influx control' which limited and controlled the movement of black people into and in the cities.⁸² The apartheid system not only limited the number of black people who could access the urban areas, but it also created poor living conditions for black people and restricted their access to employment opportunities, education, housing and other essential services such as water, electricity, and transport.⁸³ The result was that most black people in urban areas lived in poverty because they were unemployed, uneducated and congregated in informal settlements or in under-serviced townships, which were separate from the well-serviced and secure white residential areas.⁸⁴

Until the early 1990s, the South African apartheid government interfered extensively in urbanization.⁸⁵ At first, the apartheid government influenced rural-urban migration but later restricted the movement of black people into the cities. The apartheid government used racist laws and policies designed to separate citizens according to their racial classification to deny the opportunity for black people to settle

⁸⁰ I Turok, 'Urbanization and Development in South Africa: Economic Imperatives, Spatial Distortions and Strategic Responses' in *Urbanization and emerging population issues* WP 8 (2012) 4.

⁸¹ Turok (note 80 above) 6 - 11.

⁸² Turok (note 80 above) 6 - 11.

⁸³ Turok (note 80 above) 6 - 11.

⁸⁴ Turok (note 80 above) 5.

⁸⁵ Turok (note 80 above.) 4.

wherever they wished, own land, and access quality education. The training system was designed only for white people.⁸⁶

The democratic elections in 1994⁸⁷ established a government that was based on broadly accepted global principles of constitutional democracy. From the old apartheid order which was based on parliamentary sovereignty, the new democratic order moved to a system based on the sovereignty of the Constitution.⁸⁸ The principles and values set out in the Constitution were, henceforth, to be superior even to the will of the democratically elected majority in Parliament. The Constitution made provision for the establishment of the three ‘distinctive, interdependent and interrelated’ spheres of government.⁸⁹ The three spheres of government are the national, provincial and local governments.⁹⁰ Each sphere is accorded legislative and executive authority to implement the values and spirit of the Constitution.⁹¹ Schedules 4B and 5B of the Constitution list the functional areas where a municipality (local government) has executive authority and powers of administration. The management of public spaces, street trading, refuse removal, refuse dumps and solid waste disposal falls under Schedules 4B and 5B of the Constitution. These schedules list trading regulations in the competency of the municipalities. These functional areas are critical for effective management of the informal economy, particularly street vendors and waste pickers in an urban management context. The following section discusses the size of the urban populations.

2.3.3 The size of the urban populations

StatsSA Census 2011 reported that South Africa had a population of 51.8 million which was an increase from 44.8 million reported in the 2001 census.⁹² Gauteng province had the most population at 12.3 million, followed by KwaZulu-Natal province with a population of 10.3 million. The proportion of people living in the urban areas was reported to be 62 per cent in 2011 which increased from the 57.5 per cent reported in the 2001 census.⁹³ The main reason cited for the influx into the cities has been to access employment opportunities.⁹⁴ Due to the significant investments that have been allocated exclusively to the urban areas over the years, the cities have a higher economic employment growth

⁸⁶ Turok (note 80 above).

⁸⁷ General elections were held in South Africa on 27 April 1994. The elections were the first in which citizens of all races could take part and a democratic government was elected.

⁸⁸ See section 2 of the Constitution.

⁸⁹ See section 40 of the Constitution.

⁹⁰ See section 40 (1) of the Constitution.

⁹¹ Values enshrined in the Constitution: Human dignity, the achievement of equality and the advancement of human rights and freedoms. Non-racialism and non-sexism. Supremacy of the constitution and the rule of law.

⁹² StatsSA *Census 2011 Report* (2012) 14.

⁹³ StatsSA *Census 2001: Investigation into appropriate definitions of urban and rural areas for South Africa: Discussion document* (2012) 71.

⁹⁴ Turok (note 80 above) 15 - 20.

compared to non-urban areas. However, cities have not been able to match the growing urban population with the provision of infrastructure, housing, employment and essential services like water, electricity, sanitation, and roads.⁹⁵ The rate of unemployment increased to 29.8 per cent in 2011 compared to 25.4 per cent in 2001.⁹⁶ The number of people residing in informal settlements was reported to be 13.6 per cent in 2011 compared to 16.3 per cent in 2001.⁹⁷ The lack of access to essential services has caused much political and social discontent in the urban populations, and this has made cities more vulnerable to social unrest, environmental hazards, and economic disturbances.⁹⁸ The following section discusses data on access to services by urban population.

2.3.4 Access to services by the urban population

The delivery of services has been an issue which has been met with major service-delivery protests across South Africa during the period between 2004 and 2010.⁹⁹ The service-delivery protests increased from 10 in 2004 to 111 in 2010, with Johannesburg leading with 46 protests followed by Cape Town with 34 protests and Durban 11 protests.¹⁰⁰ The 2011 Census indicated that 22.2 per cent of households in Eastern Cape Province did not have access to piped water. This was followed by KwaZulu-Natal with 14.1 per cent, while the national average was 8.8 per cent. One of the responsibilities of urban management by cities is to improve sanitation for its residents.¹⁰¹ The 2011 census report shows that 5.2 per cent of households did not have access to toilet facilities. However, this was an improvement from the 13.6 per cent reported in the 2001 census. Regarding access to electricity, the 2011 report shows that 3 per cent of households reported using paraffin and 11.4 per cent used candles for lighting while the use of electricity for lighting increased from 69.7 per cent in 2001 to 84.7 per cent in 2011. Whereas 8.5 per cent of households used paraffin, 12.5 per cent used wood, and 0.7 per cent used coal for cooking in 2011, the use of electricity for cooking increased from 52.2 per cent in 2001 to 73.9 per cent in 2011. The number of households that reported not having access to rubbish disposal services was 5.4 per cent in 2011, which was an improvement from the 8.5 per cent reported in 2001 census.

Even though the above data shows that there has been an improvement in access to basic services over time, a significant number of households still do not have access to these services. This creates poor living conditions for them and affects their environmental and health standards. Lack of access to such essential services perpetuates the state of poverty for many people, and together with unemployment on the rise, requires cities to ensure that urban management processes deal with these issues and invest in strategies that will create employment opportunities while addressing service delivery. The informal

⁹⁵ Turok (note 80 above) 15 – 20.

⁹⁶ StatsSA (note 92 above) 49.

⁹⁷ StatsSA (note 92 above) 57.

⁹⁸ Turok (note 80 above) 37 – 41.

⁹⁹ Turok (note 80 above) 37 – 41.

¹⁰⁰ Turok (note 80 above) 37 – 41.

¹⁰¹ StatsSA (note 92 above) 59 – 60.

economy has been shown to give poor urban populations an opportunity for employment, and this challenges cities not only to include such an economy in their urban management planning but to protect and promote it. Urban waste management is one process that can provide such an opportunity for cities to promote environmental sustainability through recycling. The process of recycling is discussed in the following section.

2.4 URBAN WASTE MANAGEMENT: RECYCLING

2.4.1 *Promoting environmental sustainability through recycling*

The exponential growth of the world populations has raised concerns over the availability and use of natural resources.¹⁰² This has been followed by a review of the environmental consequences of resource exploitation and the relationship between the environment, poverty and economic changes.¹⁰³ This review has required a new approach to environmental development, which balances human needs with the ability of the environment to cope with the consequences of the economic system, and promotes sustainable development. Sustainable development has been defined as a development that can meet the needs of the present generation without compromising the needs and the capacity of the future generation to meet their needs.¹⁰⁴ It promotes development without destruction by reinforcing the careful use of natural resources, thereby ensuring that there is always a balance between the levels of development and the demand for natural resources.

Waste recycling has been used by many cities to fulfill some of the implied demands of sustainable development, thereby slowing down the rate at which natural resources are used. It is defined as the ‘external recovery, re-use and or reprocessing of post-consumer and post-production waste’.¹⁰⁵ The primary objective of recycling is to reduce the amount of waste deposited in landfills which saves resources and reduces the environmental impact of waste.¹⁰⁶ Waste recycling forms part of an integrated waste management system which requires the implementation of a hierarchical approach to waste management.¹⁰⁷ The hierarchy approach is a sequential waste management process which starts with the application of waste prevention or minimization strategies, followed by recycling and re-use, waste treatment and ultimately waste disposal.¹⁰⁸ Recycling has the potential for creating decent job opportunities by encouraging entrepreneurs to establish community collection systems and recycling

¹⁰² T Adewole ‘Waste management towards sustainable development in Nigeria: A case study of Lagos State’ (2009) *International NGO Journal* 171 – 174.

¹⁰³ Adewole (note 102 above) 171 – 174.

¹⁰⁴ R Platt, R Rowntree & M Pamela (Eds) *The Ecological City* (1994) 10.

¹⁰⁵ DEAT *National Waste Management Strategy Implementation South Africa: Recycling. Annexure A: Waste Streams Analysis and Prioritization for recycling* (2005) 8-10.

¹⁰⁶ DEAT (note 105) 8-10.

¹⁰⁷ DEAT (note 105) 8-10.

¹⁰⁸ DEAT (note 105) 8-10.

centres, thereby presenting a viable alternative to informal salvaging at landfills.¹⁰⁹ Recycling is the most important part of the waste management systems and should be supported by policy and other measures.¹¹⁰

The recycling strategies used by cities in developed countries differ from those in developing countries.¹¹¹ Even though both developed and developing countries use the waste management hierarchy system, the primary concern for cities in developed countries is waste prevention because they face high consumption levels.¹¹² Where there is less consumption, as in most cities in developing countries, the focus tends to be on recycling as the primary driver in waste management.¹¹³ Informal waste collection is often found in cities in developing countries, and it exists parallel to the formal, municipal waste and disposal systems.¹¹⁴ Informal waste collection is carried out by poor and marginalized communities and individuals who choose waste as a form of livelihood and income generation.¹¹⁵ These communities and individuals often belong to minorities such as immigrants and those who are uneducated and unskilled.¹¹⁶ The informal waste collection is often regarded as undesirable by cities, which treat informal waste recyclers as ‘illegal’, even though they contribute to the reduction of waste, become part of ‘the waste hierarchy’, and fulfill the desire for sustainable development.¹¹⁷ The following section discusses informal waste recycling in waste management systems in developing countries.

2.4.2 Informal waste recycling in developing countries

A 2009 report estimated that fifteen million people are involved in informal waste recycling in developing countries.¹¹⁸ It is said that about ‘two per cent of the population in Asian and Latin American cities depend on waste picking to earn their livelihood’.¹¹⁹ Waste pickers collect recyclable materials in four different ways. These ways are as follows:

- a) Itinerant waste buying: Itinerant waste buying happens when waste pickers collect sorted and dry waste from the door-to-door in domestic and industrial areas. Usually, they buy the

¹⁰⁹ DEAT (note 105) 8-10.

¹¹⁰ DC Wilson, C Velis & C Cheeseman ‘Role of Informal sector recycling in waste management in developing countries’ in *Habitat International* Volume 30 Issue 4 (2006) 798 – 799.

¹¹¹ P van Beukering at al ‘The Informal Sector and Waste Paper Recovery in Bombay’ *CREED Working Paper* Series No. 5 (1996) 2 – 5.

¹¹² van Beukering (note 111 above) 2 - 5.

¹¹³ van Beukering (note 111 above) 2 - 5.

¹¹⁴ Wilson, (note 110 above) 798 – 799.

¹¹⁵ Wilson (note 110 above) 798 - 799.

¹¹⁶ Wilson (note 110 above) 798 - 799.

¹¹⁷ Wilson (note 110 above) 798 - 799.

¹¹⁸ Wilson (note 110 above) 798 - 799.

¹¹⁹ Wilson (note 110 above) 798 - 799.

waste from the producers or have made other arrangements for allowing them to collect it. They then transport recyclable materials to a place where they will sell them. They often use trolleys or bicycles or load it onto their heads.¹²⁰

b) Street waste picking: Here recyclable materials are collected from mixed waste that is thrown on the streets and in waste bins. This waste is usually gathered by municipal waste collectors.¹²¹

c) Municipal waste collection crew: In this instance, the recyclable materials are recovered from municipal trucks transporting waste to landfills. Pickers often stand by the entrances of landfills and jump into moving vehicles to recover waste before it goes into the landfills.¹²²

d) Waste picking from dumps: These recyclables materials are those that can be re-used that are retrieved from the waste dumped at landfills before it is covered.¹²³

The recyclable materials that are collected through informal waste recycling are often sold to middle agents who in turn sell them to local industries and other manufacturers internationally. Informal recyclers collect any material they can sell for recycling. These materials include: cardboard boxes, plastic and glass bottles, white paper, tins, cans, aluminum, steel, iron, brass, copper, scrap metal, plastic, newspapers, magazines, old stoves, old kettle, wardrobes, washing machines, TVs, and computers.¹²⁴ Informal waste recyclers form a vital link in the recycling trade. The sequence of disposal is illustrated in Figure 1 which shows that a chain of middle agents exists between the informal recyclers and the end users.

The chain of middle agents that exists between the informal recyclers and the end users may include both the formal and informal sector activities, for example, 'junk' shops, waste processors, brokers and wholesalers. The value of recycled materials increases as they are traded across the recycling network chain (Table 1). The informal recyclers are at the bottom of the waste recycling trade hierarchy. As a result, they have reduced income potential because recycled materials are sold by then at significantly low prices. A study conducted in Delhi (India) revealed that the recycled materials were sold at an average of 203 per cent more at the highest hierarchy level compared to the bottom level (Table 2).¹²⁵

¹²⁰ Wilson (note 110 above) 798 - 799.

¹²¹ Wilson (note 110 above) 798 - 799.

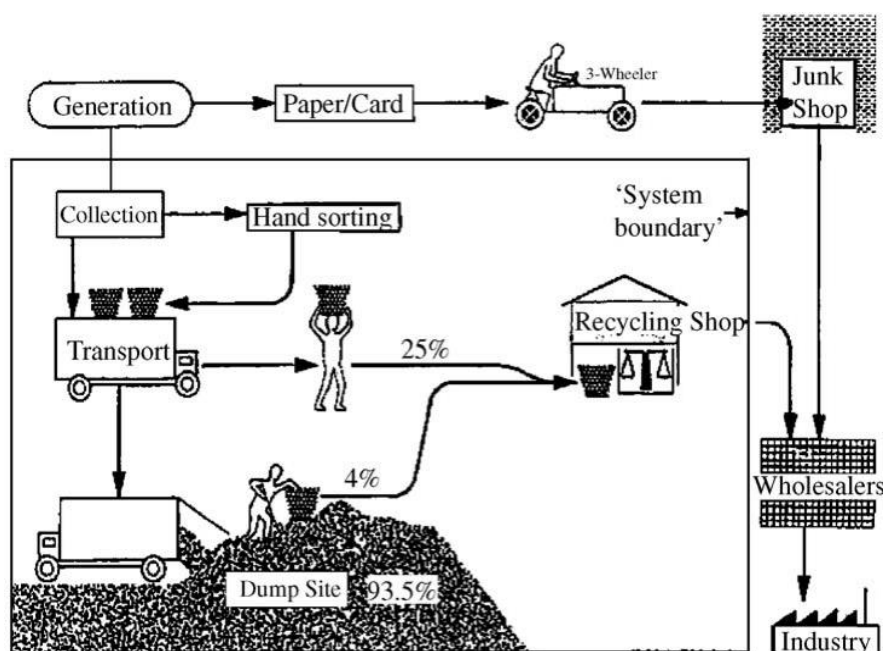
¹²² Wilson (note 110 above) 798 - 799.

¹²³ Wilson (note 110 above) 798 - 799.

¹²⁴ D Mamphitha *The role played by subsistence waste pickers in recycling* (2011) 52 – 81.

¹²⁵ Y Hayami, AK Dikshit & SN Mishra 'Waste Pickers and Collectors in Delhi: Poverty and Environment in an Urban Informal Sector' *Journal of Development Studies* (2006) 42-43.


Figure 1. Flow chart depicting an informal recycling system



Source: Wilson (2006).

Table 2 shows the level of inconsistency in the selling price when comparing the prices of recyclable materials sold at different levels in the recycling trade chain. The level of inconsistency was calculated as one per cent at the lower level when comparing the price received by the waste producer with that

Table 1. Hierarchy in informal waste sector

<p>Highest value</p>  <p>Lowest value</p>	Manufacturing industries
	Brokers, wholesalers and other processors
	Craftsmen, middlemen
	Recycling MSEs and scavenger co-operatives
	Family type units involved in waste collection or scavenging/picking
	Individual waste scavengers/pickers

Source: Wilson (2006).

Table 2. Average prices of different types of waste at different levels of the hierarchy

	Waste producer PR	Collector		Dealer		Wholesaler		Recycling plant PP
		PP	PR	PP	PR	PP	PR	
Plastic	5.43	5.82	7.01	6.87	8.62	7.53	8.50	13.00
Paper	4.05	3.92	4.05	4.23	5.07	5.16	5.18	6.00
Rubber	–	0.45	1.20	1.25	–	1.75	–	2.75
Broken glass	0.54	0.49	0.98	0.99	1.42	1.55	2.35	3.00
Bottles	1.23	0.89	1.86	1.86	1.92	2.12	2.95	3.28
Metal	5.99	5.34	6.28	5.64	7.38	6.81	7.11	11.00
ARI (%)	1.0		0.6		0.2		26.8	

Note:

PR = price received.

PP = price paid.

ARI = average rate of inconsistency = $(PP-PR)/(PP+PR/2) \times 100$.

Source: Hayami (2006).

paid by collectors and 26.8 per cent at the highest level comparing the price received by a waste producer and the price paid by the recycling plant to the wholesaler.¹²⁶

Another study conducted in Gauteng on waste pickers revealed that informal recyclers provide at least ‘84 per cent of all recyclable materials to middle agents, recyclers, and manufacturers in Johannesburg alone’.¹²⁷ Though it has been difficult to quantify the total contribution of informal recyclers to urban waste management globally, studies from other cities in developing countries reveal that the contribution is significant and it has been increasing over time.¹²⁸ Data shows that in ‘Mexico waste pickers are estimated to remove ten per cent of municipal waste’.¹²⁹ In Bangalore (India) ‘the waste pickers claimed to prevent 15 per cent of the municipal waste from going to the dumpsite, and in Karachi (Pakistan) the informal sector reduces municipal waste collection by 10 per cent’.¹³⁰ The Council for Scientific and Industrial Research (CSIR) report reveals that in South Africa ‘informal waste pickers are estimated to have saved municipalities an amount between R309.2 – R748.8 million in landfill airspace in the year 2014, at little to no cost, by diverting recyclables away from landfill’.¹³¹ The recyclables are calculated at \pm 16-24 tonnes per picker per annum.¹³² Thus the role of informal waste recycling is significant as it brings considerable socio-economic benefits to developing countries through employment opportunities, higher incomes, the reduction of waste management costs and the promotion of sustainable development. Informal waste recycling, however, has a number of safety and

¹²⁶ Hayami (note 125 above) 42 – 43.

¹²⁷ Mamphitha (note 124 above) 52 – 81.

¹²⁸ van Beukering (note 111 above) 4 – 5.

¹²⁹ van Beukering (note 111 above) 4 – 5.

¹³⁰ van Beukering (note 111 above) 4 – 5.

¹³¹ L Godfrey, W Strydom and R Phukubye ‘Integrating the informal sector into the South African waste and recycling economy in the context of extended producer responsibility’ in *CSIR briefing* (2016) 5.

¹³² Godfrey (note 131 above) 5.

health risks associated with it. The following section discusses the health and safety risks of informal recycling.

2.4.3 Health and safety risks of informal recycling

There are two types of health and safety risks associated with informal recycling. The first is the occupational health hazards posed to the informal waste pickers, and the second is the community health hazard posed to communities or the general public exposed to the waste.¹³³ In particular, waste picking in landfills is considered the most detrimental to health. This is because its exposure to hazardous waste is much higher due to healthcare waste, abattoir waste and poisonous industrial waste illegally dumped in landfills.¹³⁴ Other origins of health and safety risks are listed in Table 3 which summarizes the waste-related factors that may pose these risks.¹³⁵

The work environment in which the informal waste pickers conduct their work requires that they adhere to strict occupational health and safety principles to limit the associated risks. Hunt provides a list of occupational health hazards that come from manual handling of mixed waste.¹³⁶ These are the following:

- a) Waste contaminated with fecal material: Often this waste carries pathogens such as parasites and bacteria which cause diseases of the gastrointestinal tract. These pathogens can be passed from hand to the mouth;¹³⁷
- b) Hospital waste: This waste carries biological and chemical contaminated hospital equipment such as used syringes, dressings, discarded medicines and dead bodies. Contact with this type of waste might lead to the spread of infectious diseases;¹³⁸

Table 3. Risk factors related to solid waste: Origin and examples

Origin of risk factor	Examples of source of possible risk
Composition of waste	Toxic, allergenic and infectious components including gases, dust, leachate, sharps, broken glass
Nature of organic decomposing waste	Gaseous emissions, bioaerosols, dust, leachate, and fine particle sizes; and their change in ability to cause a toxic, allergenic or infectious health response
Handling of waste	Working in traffic, shovelling, lifting, equipment vibrations, accidents
Processing of waste	Odour, noise, vibration, accidents, air and water emissions, residuals, explosions, fires
Disposal of wastes	Odour, noise, vibration, stability of waste piles, air and water emissions, explosions, fires

Source: Wilson (2006)

¹³³ Wilson (note 110 above) 803.

¹³⁴ Wilson (note 110 above) 803.

¹³⁵ Wilson (note 110 above) 803.

¹³⁶ C Hunt 'Child waste pickers in India: the occupation and its health risks' in *Environment and Urbanization* Vol. 8 No. 2 (1996) 111-112.

¹³⁷ Hunt (note 136 above) 111-112

¹³⁸ Hunt (note 136 above) 111-112

- c) Industrial waste: This type of waste includes toxic materials such as heavy metals like arsenic, lead, cadmium, chromium, and mercury. Exposure to these metals even at low concentrations may cause neurotoxicity and cancer;¹³⁹
- d) Direct contact with broken glass: Sharp objects can cause skin cuts and open wounds which may lead to tetanus and other infections.¹⁴⁰

Furthermore, when working with waste or in an environment where there is waste, there are a number of direct environmental hazards informal waste pickers are exposed to:

- (i) Carrying heavy loads of materials: Informal waste pickers may have to carry collected recyclable and reusable materials over long distances, which may result in muscular and skeletal problems;¹⁴¹
- (ii) Exposure to disease vectors: Waste provides an ideal habitat for disease-carrying and disease spreading insects and animals like flies, mosquitoes, and rats;¹⁴²
- (iii) Fires: Fires are often lit to burn the materials collected to reduce their volume and, they sometimes occur spontaneously because of the presence of methane and other combustible gases.¹⁴³

In addition to the above environmental hazards, there are indirect environmental dangers that informal waste pickers are exposed to which may affect their health and well-being:

- (a) Weather conditions: Extreme weather patterns can lead to health problems for informal waste pickers. Floods mix waste as the floods wash waste away or high temperatures result in fires because decomposing waste in landfills produce gas, which is a mixture methane and carbon dioxide;¹⁴⁴
- (b) Harassment: Informal waste pickers often experience harassment by police, residents and other waste pickers as they compete for the recyclable materials. There may also be sexual harassment of females by males.¹⁴⁵

Community health risks of informal recycling pose great dangers to communities who are living near where waste is collected, stored or dumped. These health risks are often reported in communities who

¹³⁹ Hunt (note 136 above) 111-112

¹⁴⁰ Hunt (note 136 above) 111-112

¹⁴¹ Hunt (note 136 above) 111-112

¹⁴² Hunt (note 136 above) 111-112

¹⁴³ Hunt (note 136 above) 111-112.

¹⁴⁴ Hunt (note 136 above) 111-112.

¹⁴⁵ Hunt (note 136 above) 111-112.

live in informal settlements or near landfills. These areas have little sanitation and poor or inadequate infrastructure. People residing in these spaces have poor personal hygiene and have difficulties accessing health care services.¹⁴⁶ The exposure to the list of hazards mentioned above by these communities is quite high, and disease-carrying insects and animals spread diseases, and the children in these communities are the most vulnerable. Though studies have not produced sufficient data on the long-term health effects and the risks associated with informal waste collection, some have shown that ‘respiratory, dermatological, eye infections and low life expectancy are common’.¹⁴⁷ This provides proof that the environment in which the informal waste pickers conduct their work and where they live harms and or threatens to harm their health and well-being. The role of cities in urban management is critical in protecting vulnerable workers handling waste and of communities exposed to it, by putting in place an inclusive, integrated waste management system that recognizes the role of informal waste pickers and supports the work that they do. The following section discusses the solid waste management system in the city of Durban, the chosen location for this study. It is followed by the characteristics of waste pickers in this City and the challenges that they face.

2.5 THE SOLID WASTE MANAGEMENT SYSTEM IN THE CITY OF DURBAN

2.5.1 The Durban context

Durban is one of South Africa’s metropolitan cities located on the coast in the KwaZulu-Natal province. It is the third largest city in South Africa by population, and covers an area of approximately 2 297km².¹⁴⁸ Durban’s settlement characteristics are about 45 per cent rural, 30 per cent peri-urban and 25 per cent urban areas.¹⁴⁹ In the year 2000, the municipality of Durban was renamed eThekweni Municipality and is the largest municipality in the province of KwaZulu-Natal with a 3.4 million population.¹⁵⁰ Durban is known as the commercial and transport hub of the region and has the busiest port in Africa, handling about 31.4 million tons of cargo each year.¹⁵¹ It also has the second largest manufacturing base in the country.¹⁵²

The legacy of apartheid is that Durban like many other South African cities, inherited local economies with the highest levels of inequality in the world as many of its citizens live in poverty. The eThekweni Municipality *Economic Review Report*¹⁵³ shows that in 2011, only one in three financially active people

¹⁴⁶ Wilson (note 110 above) 803

¹⁴⁷ Wilson (note 110 above) 803.

¹⁴⁸ Bosch Munitech *eThekweni Municipality Integrated Waste Management Plan 2016 – 2021* (2016) 12.

¹⁴⁹ Bosch Munitech (note 148 above) 12.

¹⁵⁰ Urban-Econ *Economic Review for the eThekweni Municipality region 2010/2011* (2012) 6-7.

¹⁵¹ eThekweni Municipality *Spatial Development Framework: Review 2015-2016* (2015) 92.

¹⁵² M Rogan ‘Profile of street vendors and waste pickers in Durban, South Africa’ in *IEMS City Report* (2012) 5-6.

¹⁵³ See note 150 above.

were in formal employment and 20 per cent (262 758) were informally employed.¹⁵⁴ The Report further indicated that in 2011 the annual economic growth was 3.4 per cent while the unemployment rate was reduced from 22.0 per cent in 2010 to 20.4 per cent in 2011.¹⁵⁵ The number of people living in poverty was reported to be 31.3 per cent in 2011, which was an improvement from 32.6 per cent in 2010.¹⁵⁶ Regarding earnings, 2011 Census indicated that the majority of Durban's population (53.8 per cent) earned below R800 per month; 9.2 per cent of the population earned above R6 400 and 41.3 per cent of the population did not receive an income.¹⁵⁷

Durban is known for its progressive inclusion of the informal economy into its economic development policies, urban management plans, urban design, and urban landscapes. In the early 1990's the city took the lead in recognizing the role of the informal economy and responded favourably to its needs and challenges.¹⁵⁸ The result was the development of the Durban's Informal Economy Policy adopted in late 2001, which aimed amongst other things 'to grapple with the dual challenge of governing the city as well as supporting enterprise development'.¹⁵⁹ Durban's policy approach to the informal economy is of particular importance to this thesis because it used a developmental approach to deal with the informal sector. Section 3 of the Policy recognizes the following principles:

- a) A significant challenge to local government is to enable the creation of as many opportunities for work as possible in its support for economic development, at different points along the continuum, while guaranteeing health and safety, orderly planning and management;¹⁶⁰
- b) All work, whether in the more formal or informal ends of the continuum, is to be valued, especially when unemployment is so high, and when there is a strong link between unemployment and crime.¹⁶¹

It further acknowledges that the Policy must be based on the following realities:

¹⁵⁴ Urban-Econ (see note 150 above) 6.

¹⁵⁵ S Mkhize, G Dube, & T Quazi *Informal Economy Monitoring Study: Waste Pickers in Durban, South Africa* Report (2014) 8-9.

¹⁵⁶ Mkhize (note 155 above) 8-9.

¹⁵⁷ StatsSA (note 92 above) 43.

¹⁵⁸ Skinner (note 41 above) 6-7.

¹⁵⁹ Skinner (note 41 above) 6-7.

¹⁶⁰ eThekweni Municipality *Durban's Informal Economy Policy* (2001) section 3.

¹⁶¹ eThekweni Municipality (note 160 above) (2001) section 3.

- (a) The informal economy offers diverse opportunities for absorbing those who have lost their jobs, and for new entrants into the economy. The informal sector is here to stay, not only in Durban but internationally;¹⁶²
- (b) Both the informal and formal parts of the economy are mutually interdependent. The good health of one depends on the good health of the other;¹⁶³
- (c) With the growing importance of home-based and outdoors informal work, and changes in the uses of public and private spaces, the local government must revise its role and responsibilities;¹⁶⁴
- (d) Private training and support providers in the city and region are nearly uniformly missing the poorer operators and survivalists;¹⁶⁵
- (e) There will always be a tension, for local government, in reconciling its formality, and rule-bound procedures, with the fluidity and change of the informal economy;¹⁶⁶
- (f) Local government has to balance the need for job creation, in both formal and informal parts of the economy, with the need for orderly management of the city and of residential areas.¹⁶⁷

These progressive policy ideas, realities, and approach are evident in the development of the Durban's Long-Term Development Plan (LTDP). The Durban's 2010 LTDP recognized the role policies have in enhancing livelihood choices and prospects of citizens, especially the poor. In its vision and action strategies, section 3A in the LTDP states that 'behaviour and policies that pose obstacles should be adjusted to diverse livelihood and employment options'.¹⁶⁸ An example given as an action to support this vision is that the 'household behaviour should be adjusted to improve livelihood opportunities for others, e.g., support waste collection by recyclers'.¹⁶⁹ In this way, the city identified the informal economy as economically important and recognized its role in promoting sustainable livelihood. The following section discusses the Durban's solid waste management and recycling system.

¹⁶² eThekweni Municipality (note 160 above) (2001) Section 3.1.

¹⁶³ eThekweni Municipality (note 160 above) (2001) Section 3.2.

¹⁶⁴ eThekweni Municipality (note 160 above) (2001) Section 3.3.

¹⁶⁵ eThekweni Municipality (note 160 above) (2001) Section 3.4.

¹⁶⁶ eThekweni Municipality (note 160 above) (2001) Section 3.4.

¹⁶⁷ eThekweni Municipality (note 160 above) (2001) Section 3.6.

¹⁶⁸ *eThekweni Municipality Long Term Development Plan* (2010) 14-16.

¹⁶⁹ *eThekweni Municipality Long Term Development Plan* (2010) 14-16.

Figure 2. Waste transfer stations and landfill sites located in eThekweni Municipality



Source: eThekweni Municipality Integrated Waste Management Plan (IWMP) 2016 – 2021

2.5.2 Durban solid waste management and recycling

2.5.2.1 Durban solid waste management

Durban solid waste is managed and controlled by the Durban Solid Waste Cleansing and Solid Waste Unit (DSW) in the eThekweni Municipality and is subdivided into three departments: Operations; Strategic and New Developments; and Plant and Engineering.¹⁷⁰ The unit has 3 100 permanent employees.¹⁷¹ The three departments are tasked with the following:

- a) Operations: Domestic refuse removal, street sweeping and litter picking;
- b) Strategic and New Developments: The promotion of educational awareness on proper waste management and responsibility for the implementation of waste avoidance and minimization programs;
- c) Plant and Engineering Department: Managing and maintaining DSW's fleet of vehicles, landfills and transfer stations.¹⁷²

The DSW and its subcontractors collect domestic, commercial and industrial waste (non-hazardous). The estimated average rate of household waste generation across all three income categories (low, middle, and high) was 1.27 kg/person/day in 2015. The future estimated amount of domestic waste generation is calculated at 1.48 million tons in 2016 and up to 1.55 million tons in 2020.¹⁷³

The DSW currently operates four landfill sites. These are in Bisasar Road, Buffelsdraai, Marianhill, and Lovu.¹⁷⁴ The waste that enters these landfills is logged into different categories, which are summarized in Table 4. The waste collected from these landfills in each category was calculated to be 1.27 million tons in 2015 - a decrease from the 1.34 million tons collected in 2014. Individual collections are detailed in Table 5. A total of 1 065 tons of tyres was collected from all four landfills in 2015 - a decrease from 1 600 in 2014. Table 5 also shows the waste disposed of by the DSW to all four landfills which accounted for 48 per cent of the total waste in 2015. The waste disposed of in landfills by private contractors was 11 per cent of the total waste for the same period. To manage operating costs and increase efficiency, DSW uses a network of seven waste transfer stations where waste that is collected is transferred from delivery vehicles into hoppers.¹⁷⁵ The waste is then compacted into 27m³

¹⁷⁰ Bosch Munitech (note 148 above) 121- 125.

¹⁷¹ Bosch Munitech (note 148 above) 121- 125.

¹⁷² Bosch Munitech (note 148 above) 121- 125.

¹⁷³ Bosch Munitech (note 148 above) 41-57.

¹⁷⁴ Bosch Munitech (note 148 above) 41-57.

¹⁷⁵ Bosch Munitech (note 148 above) 66-67.

long haul containers, which are then loaded and driven to landfill by long-haul vehicles.¹⁷⁶ The DSW also has 14 garden refuse transfer stations distributed throughout the Durban area.¹⁷⁷ The transfer stations are used to keep garden waste from households in 5.5m³ and 27m³ open skips until they are full and after that, they are lifted by suitable vehicles and driven to landfills for disposal.¹⁷⁸ Figure 2 gives locations of the waste transfer stations and landfills sites in the Durban area. Some recycling activities reported to be carried out at the transfer stations. These are discussed in the following section on recycling activities in Durban.

2.5.2.2 Durban's recycling activities

Recycling is one of the key strategies of waste minimization being practiced in Durban. The role players in recycling are DSW, private companies, and 'local entrepreneurs'.¹⁷⁹ Interestingly both the Durban's Integrated Waste Management Plan (IWMP) for 2004 and 2016 made no mention of waste pickers, but only of 'local entrepreneurs' and individual collectors as involved in recycling. The recycling projects conducted by the DSW are listed in the eThekweni IWMP 2016 as follows:

Table 4. Waste categories by the Durban Solid Waste Cleansing and Solid Waste Unit

WASTE CATEGORY	DESCRIPTION
DSW	Domestic, commercial and industrial waste (non-hazardous) that is collected by DSW, subcontractors.
GENERAL SOLID WASTE	Domestic, commercial and industrial waste (non-hazardous) that is collected by private contractors.
GARDEN REFUSE	Discarded plant/tree trimmings, grass cuttings, tree branches and trunks.
BUILDERS RUBBLE	Discarded non-hazardous material that originated from building or demolishing projects. Includes fragmented concrete, broken bricks and blocks.
MIXED LOADS	Refers to loads of waste that have mixtures of general solid waste, garden refuse, builder's rubble.
SAND & COVER MATERIAL	Excavated earth that can be used for cover material for the landfill cell.
TYRES	Discarded vehicle tyres.
LIGHT TYPE REFUSE	Includes items such as plastic, polystyrene, insulation material and foam. Refuse that can be windblown easily.
OTHER	Business Waste.
PURCHASE COVER MATERIAL	Cover material that has been purchased by DSW for utilisation at the landfill.
RECYCLABLES	Refers to loads of sorted recyclable material.

Source: eThekweni Municipality Integrated Waste Management Plan (IWMP) 2016 – 2021

¹⁷⁶ Bosch Munitech (note 148 above) 66-67.

¹⁷⁷ Bosch Munitech (note 148 above) 66-67.

¹⁷⁸ Bosch Munitech (note 148 above) 66-67.

¹⁷⁹ Bosch Munitech (note 148 above) 83 - 87.

- (a) Orange bag kerbside collection: Orange bags are supplied to households and are used for collecting recyclable cardboard, paper, and plastic. The collection is run weekly and concurrently on the day that the household's refuse is removed;
- (b) Kerbside collection of glass bottles: Clear bags are supplied to households and are used for collecting glass bottles and cans;
- (c) Drop off centres: These centres are equipped to accept paper, cardboard, glass bottles, and plastics, metal, and used oil. They are used by individuals to drop off their recyclable materials on their cost, and there is no payment for materials dropped off;
- (d) Small-scale recycling initiatives: Operated by a private individual at the Marianhill Landfill Conservancy. Recyclable materials are sourced from individuals that drop their recyclable refuse at this site;
- (e) Buy-back centres: They are used mainly by individuals trying to generate basic income, essentially the waste pickers. Materials brought into these centres are weighed, and payment is given to the person according to the type of recyclable materials and rate per kilo;
- (f) Use-It: Use-It is a program used at the Hammersdale Waste Beneficiation Centre that has been developed by the eThekweni Municipality in partnership with the KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs. It is designed to accommodate recycling of e-waste, glass, and plastic.¹⁸⁰

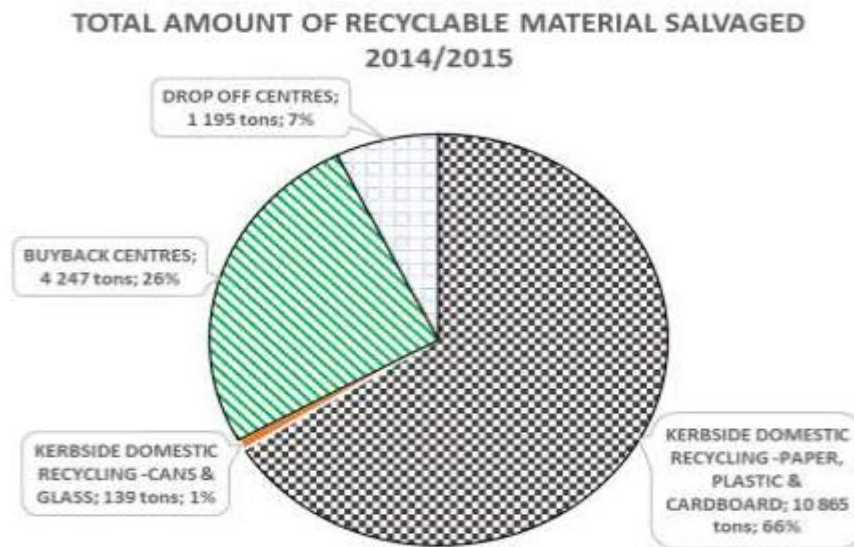
Table 5. Combined landfill quantities

Waste Categories	Waste Quantities [tons]		
	2013	2014	2015
DSW	593 994	565 862	586 045
GENERAL SOLID WASTE	168 357	145 994	143 124
GARDEN REFUSE	43 092	35 666	46 476
BUILDERS RUBBLE	100 330	76 399	99 718
MIXED LOADS	16 707	17 549	19 245
SAND & COVER MATERIAL	482 135	434 464	354 558
TYRES	1 553	1 600	1 065
LIGHT TYPE REFUSE	326	653	1 501
OTHER	28 994	12 194	8 910
PURCHASE COVER MATERIAL	8 795	50 189	11 810
RECYCLABLES	0	13	0
Grand Total	1 444 283	1 340 583	1 272 452

Source: eThekweni Municipality Integrated Waste Management Plan (IWMP) 2016 – 2021

¹⁸⁰ Bosch Munitech (note 148 above) 83 – 87.

Figure 3. The total amount of recycling material collected during the period 2014/2015



Source: eThekweni Municipality Integrated Waste Management Plan (IWMP) 2016 – 2021

There are seven buy-back centres in Durban which are operated by DSW. However, other buy-back centres are privately owned by companies like the Reclamation Group and Mondi.¹⁸¹ The DSW operated buy-back centres act like middle agents because they pay the waste pickers for their collected materials. They then sort them and sell them to private sector recycling companies.¹⁸² The most materials collected and sold at the buy-back centres are cans, cardboard, glass, paper, plastic, and metal. The monthly statistics of recyclable materials collected at the buy-back centres shows that for the period between July 2014 and June 2015, 4 247 tons of these materials were collected.¹⁸³ Cardboard was the most collected recyclable material sold to these buy-back centres, 1 962 tons was collected for the same period.¹⁸⁴ The establishment of buy-back centres where waste pickers could sell their collected recyclable materials resulted in 4 247 tons of recyclable materials being diverted from landfills for the period between July 2014 and June 2015. Comparing the number of recyclable materials collected from other recycling projects, the collection of kerbside domestic recycling paper, plastic and cardboard was reported to be 10 865 tons for the period between July 2015 and June 2015. The collection of recyclable materials at drop-off centres were said to be 1 195.2 tons for the same period. The collection of kerbside domestic recycling cans and glass amounted to 138.7 tons (Figure 3). The total of recyclable materials

¹⁸¹ K Ralfe *The waste pickers in Durban: A case study of the three buy-back centres* (Unpublished master's thesis) (2007) 73-74.

¹⁸² Ralfe (note 181 above) 73-74.

¹⁸³ Bosch Munitech (note 148 above) 95 - 98.

¹⁸⁴ Bosch Munitech (note 148 above) 95 - 98.

Table 6. Assessment of Durban Solid Waste Cleansing and Solid Waste Unit' buy-back centres

DSW BUYBACK CENTRES			
NAME OF FACILITY	MATERIAL COLLECTED	NUMBER OF WASTE RECEPICALS	GENERAL COMMENTS
BROOK STREET	Paper, plastic, cardboard, cans	1 ton bulk bags for plastics and glass. 27m ³ skip used by Mpact to remove recyclable material	Site has no toilets, electricity and water. Informal structure used as site office.
ESCOM ROAD	Paper, plastic, glass bottles, cardboard, metal	2 x Cages for cardboard, 1 ton bulk bags for plastics and glass	Site is very poorly maintained, possible fire hazard. No electricity on site, toilets very bad condition
KWAMASHU	Paper, plastic, glass, cardboard, oil, cans	1 ton bulk bags for plastics and glass, Closed container for oil collection	This site is excellently operated, it has bailing facilities and all recyclable materials are stored neatly. The site has excellent infrastructure.
LORNE STREET	Paper, plastic, cardboard, cans	1 ton bulk bags for plastics and glass. 27m ³ skip used by Mpact to remove recyclable material	Site has no toilets, electricity and water. Informal structure used as site office.
NORTH COAST ROAD	Paper, plastic, glass, cardboard	5 x cages, 15 skips and 1 ton bulk bags for plastic and glass	Site is poorly maintained, recyclable material is scattered across the site. Fire hazard.
QUEENSBURGH	Metal	20 skips	Site is a scrapyard that only accepts all forms of metal.
WESTMEAD	Paper, plastic, glass bottles, cardboard, metal	5 x cages, 10 skips and 1 ton bulk bags for plastic and glass	Site is well maintained, has bailing equipment.

Source: eThekweni Municipality Integrated Waste Management Plan (IWMP) 2016 – 2021

that were diverted from landfills through these projects amounted to 16 446.2 tons in one year. The waste pickers contributed 26 per cent (4 276 tons) of these recyclable materials. The following section discusses the health and safety management at the DSW waste disposal and recycling facilities.

2.5.2.3 Health and safety management at the DSW waste disposal and recycling facilities¹⁸⁵

Health and safety in waste management are legislated, and there are regulations in place to ensure that there is adherence to the rules. The legislative framework for environmental and waste management will be discussed in more detail in Chapter 3. This section discusses the current state of waste disposal and recycling facilities in Durban, and what is in place to address health and safety in these centres together with the challenges that they face.

The eThekweni Municipality's IWMP 2016 reported that all DSW waste disposal facilities have fire extinguishers and sand stockpile extinguishers in case of any fires. Landfills have odour management

¹⁸⁵ Data taken from the *eThekweni Municipality Integrated Waste Management Plan 2016 – 2021* see Bosch Munitech (note 148 above) 63 - 98.

systems in place except for the Buffelsdraai Landfill. All four have vermin control measures in place. Landfills and transfer stations are fenced off and have 24-hour guards patrolling the facilities. DSW does not conduct any waste treatment processes before landfilling, except for the sharps sourced from medical waste.¹⁸⁶ None of the four landfills have waste pickers or scavengers on site. However, in Bisasar Road landfill due to its proximity to informal settlements, numerous break-ins and illegal scavenging of waste on the site have been reported.¹⁸⁷ Only the Marianhill landfill has a small-scale private recycling operation allowed on site, collecting recyclable materials like plastics, glass, paper, and cardboard.¹⁸⁸

Eleven stations allow private recycling programmes to take place on site, to collect used oil, plastics, and cans.¹⁸⁹ Glass banks are also present. The seven buy-back centres in Durban are used mainly by waste pickers for employment opportunities and for providing them with income.¹⁹⁰ However, some of the buy-back centres face a lot of health and safety issues. Lack of appropriate infrastructure, access to water and toilets are the health and safety challenges found in some of these facilities.¹⁹¹ Table 6 assesses these buy-back centres with general comments on the health and safety concerns at each facility.

2.6 WASTE PICKERS IN DURBAN

2.6.1 Background

In reviewing the data on waste pickers in Durban, two studies will be used. The first one is ‘The Waste Pickers of Durban: A case study of three buy-back centres’ by Katherine Ralfe conducted in 2007.¹⁹² The second is the ‘Informal Economy Monitoring Study (IEMS study): Waste Pickers in Durban, South Africa’ report by Mkhize, Dube, & Quazi, conducted in 2012.¹⁹³ The first survey aimed to understand ‘the socio-economic situation of waste pickers in Durban and shed some light on a group of people who are often marginalized and looked down upon by society because of the nature of their work’.¹⁹⁴ It surveyed 60 waste-pickers across three buy-back centres.¹⁹⁵ The second study aimed ‘to provide reliable, grounded evidence of the variety of driving forces, that are positive and negative that affect

¹⁸⁶ Bosch Munitech (note 148 above) 63 - 98

¹⁸⁷ Bosch Munitech (note 148 above) 63 - 98

¹⁸⁸ Bosch Munitech (note 148 above) 63 - 98

¹⁸⁹ Bosch Munitech (note 148 above) 63 - 98

¹⁹⁰ Ralfe (see note 181 above) 2.

¹⁹¹ Bosch Munitech (note 148 above) 63 - 98

¹⁹² Ralfe (see note 181 above) 2.

¹⁹³ Mkhize (note 155 above) III.

¹⁹⁴ Ralfe (see note 181 above) 2.

¹⁹⁵ Ralfe (see note 181 above) 2.

the conditions of work in the informal economy over time in 10 cities'.¹⁹⁶ The IEMS study surveyed a total of 152 waste pickers, and almost half (75) of all the waste pickers surveyed also participated in focus groups discussions.¹⁹⁷ The waste pickers surveyed comprised of women and men from two location variables: Those who collected recyclable materials from one point and those who collected recyclable materials from multi-points.¹⁹⁸ The reason for using data from both studies is to give a comparative analysis of socio-economic characteristics of waste pickers in Durban and the work challenges they faced between the periods of the two studies (2007 – 2012).

The limited number of studies conducted on waste pickers in Durban has made it difficult to ascertain an overall number of waste pickers in the city. Even though the overall number of waste pickers in Durban is unclear and difficult to ascertain, there is information available on where waste pickers sell their collected recyclable materials.¹⁹⁹ As it has been discussed above, waste pickers sell their recyclable materials in buy-back centres, either to those that are run by the municipality or to those that are run by private agents. Ralfe chose two city buy-back centres (Brook Street and Eskom) and one private buy-back center operated by Reclamation to conduct the study, and the IEMS study sampled participants according to the study variables mentioned above. Both these studies dealt with data on waste pickers who collect recyclable materials in landfills, on the streets, curbside, and in bins. They gather these materials in residential and industrial/ business areas.

2.6.2 Characteristics of Durban waste pickers and their households

2.6.2.1 Gender

Both studies reported having sampled more male waste pickers than female waste pickers. Ralfe said that in a final sample of 60 respondents, 57 per cent of the sample were male, and 43 per cent were female.²⁰⁰ The IEMS study noted that in a final sample of 152 respondents, 59 per cent were male, and 41 per cent were female.²⁰¹ Ralfe observed that the gender divide seemed more in different buy-back centres and this was due to the type of materials they were selling at these locations. The IEMS study reported that men collected and recycled metals more than women who collected recyclable materials like cardboard, paper, plastic, and glass. The IEMS study data showed that 52 per cent of the respondents (n=110) who sold cardboard were female and that 72 per cent of the respondents (n=87) who sold aluminum were male. Figure 4 shows the materials collected and recycled according to gender from the IEMS study. Data from Ralfe's study also revealed that more men were involved in metal

¹⁹⁶ Mkhize (note 155 above) 1.

¹⁹⁷ Mkhize (note 155 above) 1.

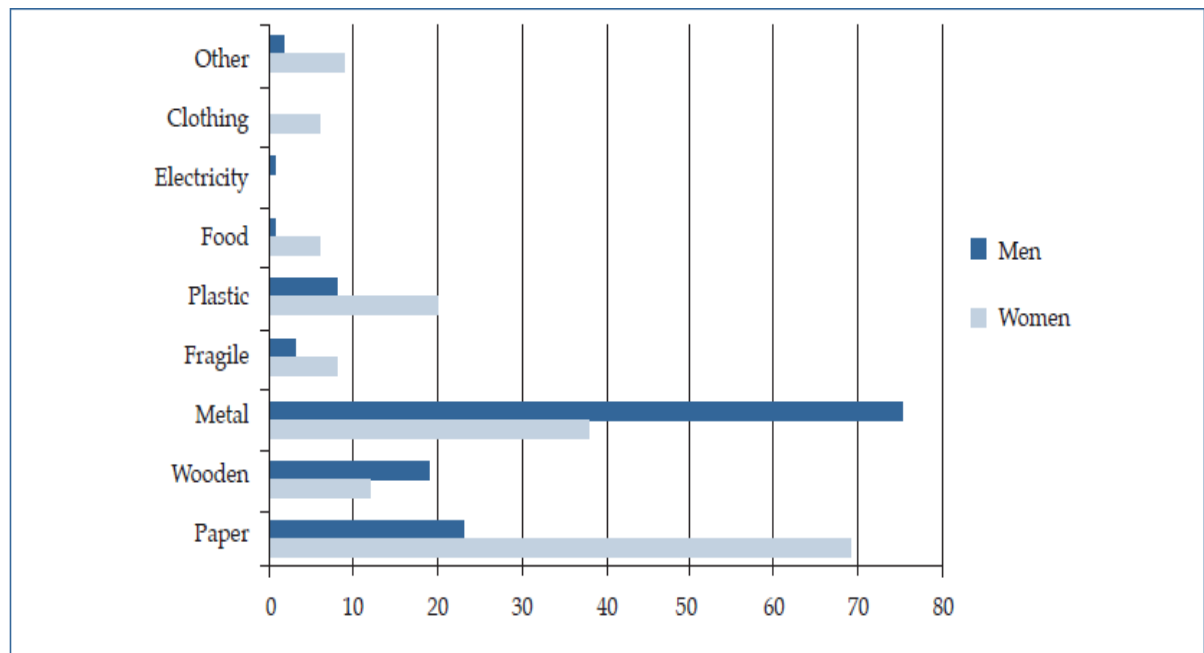
¹⁹⁸ Mkhize (note 155 above) 1.

¹⁹⁹ Ralfe (note 181 above) 84.

²⁰⁰ Ralfe (note 181 above) 90.

²⁰¹ Mkhize (note 155 above) 8.

Figure 4. Materials collected and recycled according to gender.



Source: Informal Economy Monitoring Study (IEMS study): Waste Pickers in Durban, South Africa (2014)

collection than women and that women specialized mostly in collecting and recycling plastics or cardboard. Therefore, both studies showed that women predominately collected and recycled paper and cardboard, and men collected and recycled various types of metals. Regarding which gender dominated informal waste picking, both studies were not able to give conclusive data.

Ralfe acknowledged other studies such as Birkbeck (1979),²⁰² Hayami (2006),²⁰³ and Medina (2001).²⁰⁴ These studies found that more men were working as waste pickers compared to women. However, studies by Tevera (1994)²⁰⁵ and Walters (2002)²⁰⁶ showed the opposite – that there were more women waste pickers compared to men.²⁰⁷ These studies show that there has not been a consensus on which gender dominates the informal waste pickers sector. However, the conclusion is that more women are collecting less heavy materials than men and that men dominate collecting heavy materials like metals.

²⁰² C Birkbeck 'Garbage, Industry, and the 'Vultures' of call, Colombia' in R Bromley and C Gerry (eds) *Casual Work and Poverty in Third World Cities* (1979) 161-183.

²⁰³ Hayami (note 125 above) 41 – 69.

²⁰⁴ M Medina 'Border scavenging: a case of aluminium recycling in Lerado, TX and Nuevo, Mexico' (1998) *Resources, Conservation and Recycling* 23 107 – 126.

²⁰⁵ D Tevera 'Dump scavenging in Gaborone, Botswana: Anachronism or Refuge Occupation of the Poor?' *Geografiska Annaler, Series B, Human Geography* 76(1) 21- 32.

²⁰⁶ J Walters 'Landfill Picking: A partnership to reduce vulnerability?' Unpublished paper mentioned by Ralfe (note 181 above) 91.

²⁰⁷ Ralfe (note 181 above) 90- 91.

2.6.2.2 Age and education levels

The IEMS study surveyed informal workers that were between the ages of 15 years and 69 years and had a mean age of 34 and a median age of 30.²⁰⁸ In Ralfe's sample, the average age of respondents was 42 years, and that of all respondents between 17 and 85 years of age, with the range in age being 68 years.²⁰⁹ Data from Ralfe's study revealed that 95 per cent of the sample fell into the group of economically active people. Those of ages between 15 and 65 years - and that 96 per cent of the IEMS study respondents fell in this category.²¹⁰ The IEMS study further reveals that 55 per cent of the respondents were below 35 years. The average age differences between the two studies show that there were more youth involved in waste pickers in the IEMS study. These results suggest that these young people were forced to choose to work as waste pickers because waste picking was their only available option due to lack of availability of other employment opportunities. The *Quarter Labour Force Surveys (QLFS)* for the period between Quarter 2: 2008 and Quarter 2:2018 reported that the total number of employed youth aged 15 to 34 years declined and the most significant decrease being observed among youth aged 20 to 24 years.²¹¹ During this period the youth unemployment rate increased by 16 per cent.²¹² The *QLFS* reported in Quarter 2: 2007 survey that 75 per cent of youth were unemployed²¹³ and in Quarter 2: 2012 survey that 72 per cent youth were unemployed.²¹⁴ The *QLFS* Quarter 2:2018 survey reported that the unemployment youth were 65 per cent of the total number of unemployed people in the working age of 15–64 years.²¹⁵ This data showed that there is high unemployment amongst the youth even though the numbers have been decreasing over the years, they are still significantly high.

Regarding the education levels, both studies show that the education levels for waste pickers were low. Ralfe study found that the average education reached by the respondents was between grade 4 and grade 7, with 34 per cent reported to have completed primary school, while 33 per cent claimed to have some high school education, and eight per cent said they had completed grade 12.²¹⁶ The IEMS study findings on education levels for waste pickers suggested that the average education levels reached by the respondents were lower than the national average.²¹⁷ It reported that eight per cent of the interviewees had no schooling, five per cent had completed primary school, nine per cent had completed secondary

²⁰⁸ Mkhize (note 155 above) 14.

²⁰⁹ Ralfe (note 181 above) 94.

²¹⁰ Ralfe (note 181 above) 94 and Mkhize (note 155 above) 14.

²¹¹ StatsSA *Quarter 2 Labour Force Surveys* (2018) 19.

²¹² StatsSA *Quarter 2 Labour Force Surveys* (2016) xvi.

²¹³ StatsSA *Quarter 2 Labour Force Survey* (2007) 39.

²¹⁴ StatsSA *Quarter 2 Labour Force Survey* (2012) 36.

²¹⁵ StatsSA *Quarter 2 Labour Force Survey* (2018) 19.

²¹⁶ Ralfe (note 181 above) 91.

²¹⁷ Mkhize (note 155 above) 15.

school, and only one per cent had completed tertiary education.²¹⁸ The national education levels reported in *QLFS* Quarter 2:2012 survey showed that 2.5 per cent of employed South Africans had no schooling²¹⁹ and that 1.5 per cent of those unemployed had no schooling.²²⁰ The report further revealed that 4.5 per cent of those employed had completed primary school compared to 4.3 per cent of those unemployed; 30.4 per cent of those employed had completed secondary compared to 33.6 per cent of those unemployed; and 19.9 per cent of those employed completed tertiary education compared to 6.2 per cent of those unemployed.²²¹ Both studies support a notion that there is a relationship between low levels of education and working in the informal economy. Ralfe relied on data that waste pickers have low education levels from the studies by Birkbeck (1979),²²² Tevera (1994)²²³ and Medina (1998).²²⁴

2.6.2.3 Household characteristics of waste pickers in Durban

The IEMS study indicated that the average household size²²⁵ of waste pickers was 2.59 for men and 3.61 for women and most of them were the heads of their families.²²⁶ In the Ralfe's study, 93 per cent of respondents indicated that they were sole breadwinners for their households.²²⁷ The IEMS study reported that 61 per cent of the respondent's household primary income was through waste picking. In the Ralfe study, this was higher at 75 per cent.²²⁸ Average household size reported in both studies was 4.1 and 3.6 in the Ralfe and IEMS studies respectively.²²⁹ The total income earned by waste pickers was also low in both studies. Ralfe reported average monthly earnings for waste pickers as R1 500 per month which is similar to the IEMS study findings that the average monthly turnover for the waste pickers was R1 565.50 per month. Both studies reported that men earned more income than to women. The difference in incomes is attributed to the types of materials that they sell and the transportation tools that they use to carry their collected materials. The use of trolleys and barrows was made more by men than women who mostly carried loads on their head. The mode of transportation used helped men collect more heavy and lucrative materials like metals, whereas women without access to more efficient means of transport collected less heavy materials like paper and cardboard which produces less turnover.

²¹⁸ Mkhize (note 155 above) 15.

²¹⁹ StatsSA *Quarter 2 Labour Force Survey* (2012) 37.

²²⁰ StatsSA *Quarter 2 Labour Force Survey* (2012) 36.

²²¹ StatsSA *Quarter 2 Labour Force Survey* (2012) 36 – 37.

²²² Birkbeck (note 202 above) as mentioned in Ralfe (note 181 above) 93.

²²³ Tevera (note 205 above) as mentioned in Ralfe (note 181 above) 93.

²²⁴ Medina (note 204 above) as mentioned by Ralfe (note 181 above) 93.

²²⁵ Average household size is a measure obtained by dividing the number of people in households by the number of households.

²²⁶ Mkhize (note 155 above) 15.

²²⁷ Ralfe (note 181 above) 152.

²²⁸ Mkhize (note 155 above) 16.

²²⁹ Mkhize (note 155 above) 15 and Ralfe (note 181 above) 152.

There has been a consensus that there is a link between waste picking and being poor.²³⁰ Waste picking is often carried by the poor and the marginalized social groups in developing countries.²³¹ Some authors have argued that poverty has been the driving force in people taking up waste picking as a form of employment and a means of survival.²³² Ralfe's study revealed that 62 per cent of respondents lived in households where each member of the household survived on only R94 a week. Ralfe noted that since most of the waste pickers are living below the survival level set by the eThekweni Municipality (R2 187 per month needed to sustain a household size of three), they are considered poor.²³³ Both studies have revealed that most of the households were dependent on state grants as a form of income, particularly women. The IEMS study reported that a third of the female respondents mentioned that they relied on social assistance from the state with pensions and grants as a primary source of household income.²³⁴ The dependence on social grants as a major source coupled with little earnings as waste pickers means that they live in a state of poverty and vulnerability. The following section discusses the work conditions of the waste pickers, particularly those that may affect their health and wellbeing.

2.6.3 Work conditions of waste pickers in Durban

Both the IEMS and Ralfe studies reported that waste pickers worked long hours. The average hours worked in a week by respondents to the IEMS study was 40 hours per week. The Ralfe study reported the average hours of work in a week was 45 hours - with the average weekly working period being five days. The IEMS study noted that women worked fewer hours compared to men - 44 hours per week for men and 34 hours per week for women - and this was due to household responsibilities undertaken by the women. The earnings they made changed over the 12 months period. The IEMS study reported that 64 per cent of respondents reported that their incomes had decreased in the previous 12-month period. The studies also revealed that waste pickers received no support when they were unable to work for whatever reason. The IEMS study reported that 93 per cent of respondents received no support when they were unable to work. The respondents were not able to earn an income during this time. Though some respondents in the IEMS study reported having at least one assistant, fewer women respondents reported having assistants compared to men. Due to the type of materials and the larger quantity of materials collected by men, they earned more income than women. The gender imbalances between men and women are clear in this sector.

²³⁰ Wilson (note 110 above) 803 and Ralfe (note 181 above) 154.

²³¹ Wilson (note 110 above) 803 and Ralfe (note 181 above) 154.

²³² N Nkosi & E Muzenda 'Waste Management Participants: A South African Perspective' Paper presented at the *3rd International Conference on Medical Sciences and Chemical Engineering* (2013) 42.

²³³ Urban-Econ (see note 150 above) section 7 128.

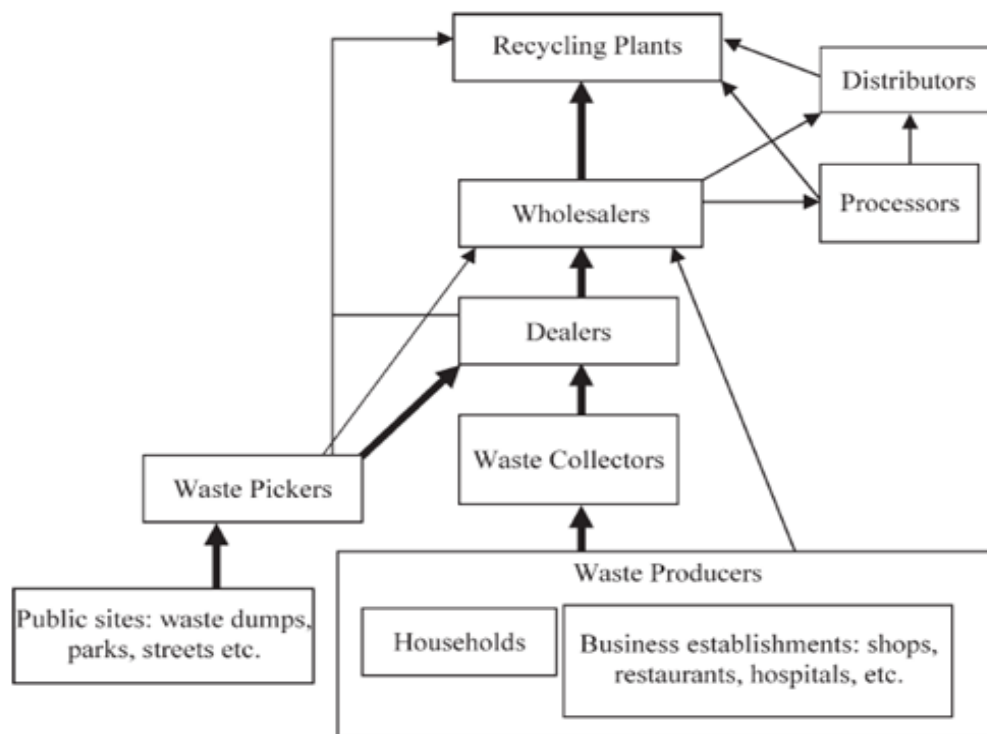
²³⁴ Mkhize (note 155 above) 16.

Both studies revealed that the conditions of work for the waste pickers were precarious. Informal waste picking is illegal in Durban. Waste pickers are not allowed to collect waste either from single or multi-collection points. In the IEMS study, 73 per cent respondents reported that they did not have permission to collect waste. In the Ralfe study, 18 per cent of the respondents mentioned that the police sometimes gave them trouble.²³⁵ The IEMS study reported that in seven focus group discussions out of the 15 mentioned police harassment was a problem. Also, 78 per cent of respondents cited the restrictions enforced by the city authorities on the collection of waste from homes, streets, and landfills were negatively hindering the ability of waste pickers to earn more income and exposed them to working in a harsh environment. Crime was also reported to be a major problem for waste pickers in Durban. The IEMS study reported that eight focus group discussions out of 15 listed crime as the most significant problem that they faced. Working with waste was cited by 6 per cent of the respondents in the Ralfe study as affecting their health. In the IEMS study, 78 per cent of the respondents cited that working with waste affected their health as they were exposed to occupational hazards. The health hazards related to waste collection that were mentioned were unsafe roads, handling of materials with poisonous substances, the quality of air near where they collect materials (landfills) and the carrying of heavy loads. One of the health problems experienced by waste pickers mentioned by respondents in the IEMS study was chest problems while in Ralfe study it was physical injuries.

In the IEMS study access to basic infrastructure like toilets, water, shelter, and storage was cited as a major factor that hindered their work and caused them a great deal of stress leading to health problems. Lack of access to facilities like toilets and water was reported by the waste pickers to affect their incomes negatively, as they would have to walk long distances to access public toilets and drinking water - thereby losing work time. They also reported that this exposed them to germs resulting in contracting various diseases because of unhygienic workplace conditions. These findings were consistent with the assessment of the DSW's buy-back centres report by eThekweni's IWMP 2016 which indicated that three of seven buy-back centres have no toilets, electricity and water (see Table 6). The lack of access to shelter and storage was also reported to affect their incomes negatively. In the IEMS study, 78 per cent of the respondents reported that lack of access to a shelter made it difficult for them to operate as it exposed them to harsh weather conditions, and the fact that they were unable to work on rainy days affected their income. A further 66 per cent of the respondents reported that not having access to storage for their collected materials and work equipment impacted negatively on their

²³⁵ Ralfe (note 181 above) 152.

Figure 5. Linkages between informal and formal waste pickers in Delhi, India



Source : Hayami (2006)

businesses. Waste pickers also mentioned that they needed storage facilities for sorting and storing collected materials. The lack of access to this infrastructure rendered their work challenging and compromised their ability to collect desired volumes of recyclable waste on a particular day.²³⁶ As a result, they worked harder with small margins of income potential.

Both studies agreed that there was a connection between the working conditions of waste pickers and their low incomes. Both studies also showed that these conditions were reported by waste pickers to cause health and safety issues for them. In the Ralfe study, the majority of respondents said that they were involved in waste picking for survival and that they did not enter it by choice. Seven per cent of the respondents in Ralfe study said that the work was hard and tiring and the materials were heavy to carry.

2.6.4 Linkages between the formal and informal recycling industries in Durban

The eThekweni's IWMP 2016 reported that the seven buy-back centres operated by the DSW collected 4 246 tons (See figure 3) of recyclable materials through informal waste pickers contributing 26 per cent of all recycled materials collected by the DSW in the period of 12 months (July 2014 – June 2015). These materials sold by waste pickers to these buy-back centres were further sold to formal recycling

²³⁶ Mkhize (note 155 above) 16.

companies. Therefore, there is a link between the informal waste pickers and the formal recycling companies. Ralfe noted that waste pickers were dependent on the formal recycling sector because they provided the demand for the recyclable materials. Without the formal sector, the waste pickers would not be able to earn an income.²³⁷ Ralfe further notes that it is difficult to measure the extent to which the formal recycling sector is dependent on waste pickers for materials, as these companies rely on other formal sector industries to sell back the materials.²³⁸ In the IEMS study, 88 per cent of respondents reported that they sold their materials to formal recycling companies and 58 per cent reported selling their materials to informal businesses that in turn sold them to formal recycling companies.

In other countries where informal waste recycling is high, the linkages between the informal and the formal recycling are much more extensive. A study conducted on waste pickers and collectors in Delhi, India revealed that waste pickers and waste collectors were the bottom recycling link as they collect waste directly from its origin.²³⁹ They had direct links with waste dealers, wholesalers, and recycling plants. This study further revealed that a transition from a waste picker to a waste dealer was possible, and even to the rank of waste wholesalers, though the great limitation was access to the capital needed to run these operations. Figure 5 above, gives an illustration of the linkages between the informal waste pickers and the formal recyclers, and the marketing channels of recyclable waste in Delhi, India.

2.7. CONCLUSION

Waste picking provides a survivalist strategy and an opportunity to earn an income for those living in poverty - mainly in developing countries. In their efforts to protect the environment many cities have developed urban management plans and strategies that deal with solid waste. These plans and strategies include waste reduction, re-use, and recycling. Solid waste management programs often exclude waste pickers as an integral part of waste recycling. Such exclusion creates an uncertain work environment for waste pickers, which is often not regulated or protected. The hazardous nature of waste picking leaves waste pickers vulnerable and suffering from ill health and well-being issues. They are unable to break the cycle of poverty. Waste picking is the primary source of income for many poor households in Durban and creating an environment where these workers can access waste and be able to trade openly and freely is of utmost importance. Enabling policies and laws which regulate and protect vulnerable workers are crucial in any democratic society. The following chapter looks at the deficiencies in the application of the current labour, OHS, and environmental laws to protect waste pickers, and how these deficiencies can be addressed. The chapter also reviews relevant law cases, to build an argument for the establishment of legislative and other measures to protect the work environment of waste pickers.

²³⁷ Ralfe (note 181 above) 159.

²³⁸ Ralfe (note 181 above) 159.

²³⁹ Hayami (note 125 above) 42-43.

CHAPTER 3: LEGISLATIVE AND OTHER MEASURES PROTECTING AND REGULATING THE WORK ENVIRONMENT OF WASTE PICKERS

3.1 INTRODUCTION

Historically in South Africa, the informal economy has been viewed as a ‘problem’ by both the local government and formal businesses.²⁴⁰ The general attitude towards the informal economy by the government and cities has been to ‘just regulate’ the sector, and this has led to criminalizing the activity in many cities.²⁴¹ Cities have failed to recognize the opportunity to adopt a developmental approach which could create a decent work environment for informal workers. However, since the early 1990’s, there has been a shift in the government’s treatment of the informal economy. The Business Act²⁴² passed in 1991 recognized street vendors as businesses, and later changes that came with the Business Amendment Act²⁴³ empowered local governments to make by-laws to regulate street vending.²⁴⁴ The by-laws that have been developed by the cities are mostly about regulating where and how street vending can take place, what permit a vendor should carry, and the penalties payable should there be a contravention of these by-laws. Most of the cities’ by-laws on informal trading do not cover waste picking and trade in recycled waste. It is submitted that the Business Act has not extended its regulatory framework to the informal trading of recyclable waste since it makes no mention of waste pickers. Therefore, informal waste picking is not seen as a business activity as provided for by the Business Act, and there have been no by-laws developed to regulate waste recycling in South Africa.

Academics and activists have raised the arguments that the informal economy lacks legislative directives that will allow them to bargain collectively to improve their conditions of work. Such legislative directives should also determine the role of the national and local governments in extending the existing labour laws and social protection to people working informally. Smit and Fourie argue that legislation dealing with the informal economy has to be developed and must be innovative and sector-specific to be able to extend such protection.²⁴⁵ They further argue that the role of labour unions could be extended and should not only focus on formal labour issues like wages. It should also address social protection schemes and labour regulations responding to the needs of workers who are working in

²⁴⁰ D Hallowes & M Butler *The Balance of Rights – Constitutional promises and struggles for environmental justice* (2004) 59.

²⁴¹ S David, O Ulrich and N Majoe ‘Local and National responses to the Informal Economy– two case studies from South Africa’ in a report *Managing Informality: Local government practices and approaches towards the informal economy – Learning examples from five African countries* (2012) 59-60.

²⁴² No. 71 of 1991.

²⁴³ No. 186 of 1993.

²⁴⁴ Hallowes (note 240 above) 59.

²⁴⁵ Smit & Fourie (note 30 above) 44.

precarious and informal employment.²⁴⁶ They maintain that there is a need for ‘social and political bargaining with public authorities as well as legislative bodies’ to address this gap.²⁴⁷ The ILO has developed a concept of ‘decent work’ where all workers can have productive work opportunities with an ability to earn a decent income, have security in their place of work and enjoy social protection for their families.²⁴⁸ It can be argued that this concept could be adopted and used to address the position of workers in the informal economy - thus closing the gap that exists between the protection extended to formal workers and that extended to the informal workers.²⁴⁹

This study supports the theory of ‘legal realism’. The legal realism theory is known as an engine of change.²⁵⁰ The theory understands the need to change laws to reflect the realities of evolving situations and is a tool for programmatic changes in our laws and legal system. There is no doubt that the law needs to adapt to the socio-economic changes and needs of poor people to confront poverty and to balance the imbalances of the past. The rights contained in the Constitution are only relevant if they reflect the realities of the social context of the people and subjects they protect.

This chapter discusses the policy and legislative framework for waste pickers in South Africa; the deficiencies in the application of current labour and OHS laws to protect waste pickers; and the role of case law to address these deficiencies. It also reviews relevant cases, which are used to develop an argument for the establishment of legislative and other measures to protect the work and the work environment of waste pickers.

3.2 POLICY AND LEGISLATIVE FRAMEWORK FOR WASTE MANAGEMENT IN SOUTH AFRICA

3.2.1 Policy and regulatory framework for waste management concerning waste picking

Waste picking falls under the ambit of environmental law. All environmental and waste management laws are guided by and must comply with the Constitution. Section 24 of the Constitution provides that everyone in South Africa has the right to an environment that is not harmful to their health or well-being.²⁵¹ It further stipulates that the state must develop legislation and other measures (i.e., policies and programs) - to ensure that the right contained in this section is upheld.

Schedules 4 and 5 of the Constitution give a list of functions that have co-existing national and provincial legislative capability, as well as those which have exclusive provincial legislative

²⁴⁶ Smit & Fourie (note 30 above) 44.

²⁴⁷ Smit & Fourie (note 30 above) 44.

²⁴⁸ ILO (note 10 above) 9.

²⁴⁹ Smit & Fourie (note 30 above) 44.

²⁵⁰ K Mackey ‘The Triumph of Legal Realism’ on line article available at <https://digitalcommons.law.msu.edu/king/50/> (2004) 1.

²⁵¹ Section 24(a) of the Constitution.

jurisdiction. The functional area of environmental matters is listed under Schedule 4A which gives legislative competence to both the national and the provincial legislatures. The national government has powers to develop laws that regulate and protect these environmental issues, and these powers run concurrently with those of the provincial government. The waste management function is delegated to local government as is listed in Schedule 5B of the Constitution. These schedules give the provincial government exclusive power to ensure that local government carries out this function. Because waste picking and recycling fall under waste management, their function is regulated by the municipalities.

As a result of the provisions in section 24, there have been many national policies and statutes developed to effect the environmental rights provided by this section. These laws and policies are also relevant to local government. The following sections discuss those that are most relevant to the waste management waste picking and recycling.

3.2.1.1 Policy framework for waste management

The eThekweni's IWMP 2016 lists five national policy frameworks that are relevant to waste management at the local government level. The policies are listed below:²⁵²

- White Paper on Environmental Management Notice;²⁵³
- White Paper on Integrated Pollution and Waste Management for South Africa;²⁵⁴
- National Policy for the Provision of Basic Refuse Removal Services to Indigent Households;²⁵⁵
- Polokwane Declaration on Waste Management;²⁵⁶ and the
- Framework for Sustainable Post Consumer Recycling in South Africa.²⁵⁷

Three policies are discussed in the following sections because they are most relevant to waste picking and recycling.

3.2.1.1.1 White Paper on Environmental Management Notice²⁵⁸

The White Paper on Environmental Management Notice policy articulates the vision of a society living in harmony with the environment. The policy seeks to bring together the people of South Africa to work towards a society where everyone has sufficient food, water, clean air, green spaces and decent homes in their localities, enabling them to live in physical, cultural and spiritual harmony with their natural surroundings. It maintains that achieving environmentally sustainable development is essential for the

²⁵² Bosch Munitech (note 148 above) 16.

²⁵³ Notice 749 of 1988

²⁵⁴ Notice 227 of 2000.

²⁵⁵ Government Notice 34385 (2011).

²⁵⁶ Adopted at the First National Waste Management Summit 26-28 September 2001.

²⁵⁷ Final Draft published in May 2000.

²⁵⁸ See note 253 above.

government to implement people's environmental rights and to meet their development needs. It states that environmentally sustainable development, and ultimately sustainable living, is the key to human well-being which promotes a good quality of life for all people - now and in the future.

The policy supports a new model of sustainable development based on integrated and coordinated environmental management. It states that the government will allocate functions to different institutions and spheres of government that can help to achieve its vision and objectives. The municipalities are then allocated certain functions, where feasible and appropriate. The provincial governments are given the power to develop their legislation, programs, and strategies to address and fulfill the needs and conditions set by this policy.

The relevance of this policy to waste pickers is that the municipalities have the power to develop strategies and programs which may promote the work of waste pickers as part of ensuring their decent work status. This power gives both the municipalities and waste pickers an opportunity to engage and set up mutually beneficial programs in line with the policy.

*3.2.1.1.2 White Paper on Integrated Pollution and Waste Management for South Africa*²⁵⁹

The White Paper on Integrated Pollution and Waste Management for South Africa (IPWM) policy is driven by a mission to achieve environmentally sustainable economic development. The vision promotes a clean, healthy environment, and a robust and stable economy. It envisages that by preventing, minimizing, controlling and remediating pollution and waste - the environment is protected from degradation. Amongst others, its objective is to develop regulations, (or other appropriate legal instruments), to enforce coordinated and integrated waste management planning. It delegates the responsibility for enforcing the regulations and standards to the appropriate sphere of government. These regulations are aimed at dealing with amongst others, the promotion of more widespread adoption of waste minimization and recycling, and making conditions for the licensing, granting of permits, and environmental impact assessments.

The relevance of these regulations to waste pickers is that their role in waste recycling contributes to what the policy promotes. Such recognition presents an opportunity to negotiate for the inclusion of waste pickers in waste management programs, and to give them permission to access waste for recycling so that they can earn incomes that will strengthen their economic status.

*3.2.1.1.3 National Policy for the Provision of Basic Refuse Removal Services to Indigent Households*²⁶⁰

The National Policy on Free Basic Refuse Removal (FBRR) aims to address the need for free basic refuse removal from impoverished households. Its purpose is to address the challenges experienced by municipalities regarding the delivery of an efficient and sustainable waste service to all homes. Some

²⁵⁹ See note 254 above.

²⁶⁰ See note 255 above.

of the problems currently experienced by municipalities concerning waste management are insufficient budget allocation, lack of equipment and skilled staff, and poor access to service areas.

There are three main objectives of the National Policy on the FBRR. The first is to establish a framework for the development, identification, and management of poor households that can be enrolled for the FBRR service in the municipality. The second is to set broad principles, resulting in the adoption of by-laws for the implementation and enforcement of tariff policies that will support the FBRR service in the concerned municipalities. The last is to educate and raise awareness in municipalities regarding proper handling of domestic waste for the FBRR, and for the need to minimize waste and promote recycling.

The opportunity presented by this policy for waste pickers is that their role as waste pickers and recyclers could be strengthened and used as a service to assist municipalities by giving free services in line with the provisions of the FBRR to areas where this is needed.

3.2.1.2 Legislative framework for waste management

This section discusses government statutes that are relevant to waste management at the local government level. These are listed as follows:

- National Environmental Management Act²⁶¹
- National Environmental Management: Waste Act²⁶²
- Local Government Transition Act²⁶³
- Municipal Demarcation Act²⁶⁴
- Municipal Systems Act²⁶⁵
- National Health Act²⁶⁶

3.2.1.2.1 National Environmental Management Act²⁶⁷

The important function carried by the National Environmental Management Act²⁶⁸ (NEMA) is that it serves as the universal framework in terms of which environmental management and implementation

²⁶¹ No. 107 of 1998.

²⁶² No. 59 of 2008.

²⁶³ No. 97 of 1996.

²⁶⁴ No. 27 of 1998.

²⁶⁵ No. 32 of 2000.

²⁶⁶ No. 61 of 2003.

²⁶⁷ See note 261 above.

²⁶⁸ See note 261 above.

must be formulated. NEMA is an enabling Act which promulgates the regulations that address integrated environmental management.²⁶⁹ The fundamental principles established in NEMA are: ‘accountability, affordability, cradle to grave management, equality, integration, open information, co-operative government, sustainable development, and environmental protection and justice’.²⁷⁰

The most important principle of NEMA relevant to this study supports the idea that environmental management must place people and their needs at the forefront of its concern, and environmental management must serve ‘people’s physical, psychological, developmental, cultural, and social interests equitably’.²⁷¹ NEMA also provides that sustainable development must take into account all relevant factors, including, amongst others:²⁷²

- Equitable access to environmental resources, benefits, and services to meet basic human needs and to ensure human well-being - special measures may be taken to ensure access to it by categories of persons disadvantaged by unfair discrimination;
- Responsibility for ensuring that the environmental health and safety consequences of policies, programs, projects, products, processes, services or activities exist throughout the environment;
- Promotion of the participation of all interested and affected parties in environmental governance providing an opportunity for all people to develop an understanding of the skills and capacity necessary for achieving equitable and efficient participation, - participation by vulnerable and disadvantaged persons must be ensured.

The Act further provides a framework for local government to develop an integrated waste management plan which demonstrates adherence to the principles provided by NEMA.

3.2.1.2.2 National Environmental Management: Waste Act²⁷³

The National Environmental Management: Waste Act²⁷⁴ (Waste Act) was promulgated on the 1 July 2009. The Waste Act serves as a framework for the laws concerning waste management in all spheres of government. It provides that the Minister must establish national and provincial norms and standards that municipalities must adhere to when exercising their executive authority to provide management services.

The most important provision under the Waste Act for municipalities, is the requirement of developing an Integrated Waste Management Plan (IWMP). It requires the IWMP to undertake waste management

²⁶⁹ Bosch Munitech (note 148 above) 17.

²⁷⁰ Bosch Munitech (note 148 above) 17.

²⁷¹ NEMA Section 2(2).

²⁷² NEMA Section 2(4)(d)-(f).

²⁷³ See note 263 above.

²⁷⁴ See note 263 above.

measures that are listed in Chapter 4. The measures provided by the Waste Act, amongst others, include those that can be implemented to promote re-use and recycling of waste.

The development of a National Waste Management Strategy (NWMS) is included as a legislative requirement by the Waste Act. The NWMS provides that waste management must be managed in a coordinated, integrated, and holistic manner.

3.2.1.2.3 Local Government Transition Act²⁷⁵

The Local Government Transition Act²⁷⁶ provides a framework for interim measures that can be taken by the local government before final arrangements for restructuring can be implemented. It also sets out the powers that municipalities have regarding waste management. These measures are usually reflected in the municipality's Integrated Development Plan document which is aimed at establishing integrated development as well as management of the area in its jurisdiction.

3.2.1.2.4 Municipal Demarcation Act²⁷⁷

The Municipal Demarcation Act²⁷⁸ provides for the demarcation of municipalities' boundaries using an independent authority. It provides the framework for the demarcation of a municipality boundary.²⁷⁹ The area demarcated must allow the municipality to fulfill its constitutional obligations and provide social services which advance social and economic development, and the promotion of a safe and healthy environment.

3.2.1.2.5 Municipal Systems Act²⁸⁰

The Municipal Systems Act²⁸¹ primarily focuses on the internal systems, and the administration of the municipality. It also describes the core principles, mechanisms, and processes that are necessary for enabling municipalities to progressively provide for the social and economic upliftment of its citizens and to make sure that everyone has access to affordable services. The Act further enables the process of decentralization of power by giving power to municipalities in areas of their general competencies. Municipalities are empowered to develop by-laws, to be regulated in harmony with provincial and national legislation and guided by the Constitution.

Municipalities are to provide policies and regulatory frameworks for the delivery of services to their citizens and must undertake to partner with the private sector where necessary to ensure effective

²⁷⁵ See note 264 above.

²⁷⁶ See note 264 above.

²⁷⁷ See note 265 above.

²⁷⁸ See note 265 above.

²⁷⁹ See the Municipal Demarcation Act's preamble (note 265 above).

²⁸⁰ See note 266 above.

²⁸¹ See note 266 above.

service delivery. This Act provides a framework for the performance systems that the municipalities are required to develop to measure and evaluate performance in priority areas. These evaluations must be performed annually, and the results shared with their citizens as well as other spheres of government.

3.2.1.2.6 National Health Act²⁸²

The National Health Act²⁸³ is the most important Act for the protection of the health of the people. In its preamble, the National Health Act recognizes, amongst others, the rights contained in section 24 (a) of the Constitution that ‘everyone has the right to an environment that is not harmful to their health or well-being’. The National Health Act further provides that the Minister must ‘determine the policies and measures that are necessary to protect, promote, improve, and maintain the health and well-being of the population’.²⁸⁴

3.2.1.3 Durban’s by-laws relating to waste management

eThekweni Municipality has passed numerous by-laws to regulate the services that it provides in its area of jurisdiction. By-laws are adopted by the executive councils of municipalities. There are two eThekweni by-laws that are relevant to waste management. The first one is the eThekweni Municipality Waste Removal By-Laws²⁸⁵ (Waste Removal By-Laws) and the second is the eThekweni Municipality Public Health By-Laws²⁸⁶ (Public Health By-Laws).

The Waste Removal By-Laws provide the regulations imposed in the collection and the removal of waste in residential and industrial areas in the Durban Metro.²⁸⁷ These by-laws criminalize the collection and the removal of waste by persons who are not registered to do so by the municipality. However, they do not give detailed procedures to follow to register to collect and remove waste. The by-laws also do not mention waste collection and removal for any reason other than for disposal.

The Public Health By-Laws²⁸⁸ prohibit trade that is conducted in ‘such a manner as to be a nuisance or likely to be harmful to public health’.²⁸⁹ Waste recycling poses a number of health risks and hazards to people who are exposed to waste for different reasons, for example, those that are handling waste and those who live near where waste is stored or disposed of. However, the by-laws do not give standardized procedures on how to conduct trade in a manner that will not be harmful to public health.

²⁸² See note 270 above.

²⁸³ See note 270 above.

²⁸⁴ National Health Act section 3(1) (c).

²⁸⁵ No. 117 of 2016.

²⁸⁶ No. 225 of 1911.

²⁸⁷ eThekweni Municipality Waste Removal By-Laws (note 303 above) 6.

²⁸⁸ See note 304 above.

²⁸⁹ eThekweni Municipality Public Health By-Laws (note 304 above) section 1(a).

The eThekweni Municipality does not have by-laws dealing precisely with the regulation of waste recycling and waste re-use. For this reason, waste pickers work under unsafe conditions as they operate outside the law resulting in their work being ‘illegal’.

There is no apparent relationship between waste pickers and DSW. Even though the city has developed buy-back centres for ‘individuals’ to sell their recyclable materials, data has shown that these ‘individuals’ are waste pickers who have no connection to the municipality’s recognized workforce or the municipalities’ contractors. There is also little evidence that there is a relationship between the workers employed or contracted by the municipality and the waste pickers even though they are in contact with them in buy-back centres as well in streets and landfills where they collect waste.²⁹⁰ The self-employed waste pickers do not enjoy work protection because they are not recognized as employees of the municipality, even though they render a service that the municipality ought to be doing – collecting re-usable and recyclable waste. The protection and recognition of waste pickers are gaps that must be addressed by either national labour laws and or national or local environmental laws.

National labour laws have been developed to protect the rights of workers, regulate their workplace environment and to offer them social protection and work security. The following section discusses the labour laws and their deficiencies in bridging the gap regarding workplace protection for waste pickers.

3.2.2 National labour laws and their deficiencies in providing workplace protections for waste pickers

South Africa has ten labour laws in place that deal with the protection of workers’ rights. These are the following:

- Labour Relations Act of 1995²⁹¹
- Basic Conditions of Employment Act of 1997²⁹²
- Compensation for Occupational Injuries and Disease Act of 1993²⁹³
- Employment Equity Act of 1998²⁹⁴
- Occupational Health and Safety Act of 1993²⁹⁵

²⁹⁰ J Theron & M Visser ‘Waste management and the workplace’ in D Banik (ed) *The Legal Empowerment Agenda: Poverty, Labour and the Informal Economy in Africa* (2011) 13.

²⁹¹ No. 66 of 1995

²⁹² No.75 of 1997

²⁹³ No. 130 of 1993

²⁹⁴ No. 55 of 1998

²⁹⁵ No. 85 of 1993

- Skills Development Act of 1998²⁹⁶
- Skills Development Levies Act of 1999²⁹⁷
- Unemployment Insurance Fund of 2001²⁹⁸
- Unemployment Insurance Contributions Act of 2002²⁹⁹
- Manpower Training Act of 1981³⁰⁰

The following sections discuss the three labour laws that are most relevant to the regulation and protection of the work and the workplace of workers. They also discuss their purpose and how they offer protection to people working formally and the deficiencies in the laws for extending the same protection to people who are self-employed, and those working informally. These laws are the Labour Relations Act,³⁰¹ the Basic Conditions of Employment Act,³⁰² and the Occupational Health and Safety Act.³⁰³

3.2.2.1 Labour Relations Act³⁰⁴

Section 1 of the Labour Relations Act (LRA) states that its purpose is the following:

To advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are:

- (a) to give effect to, and to regulate, the fundamental rights conferred by section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization;
- (c) to provide a framework in which employees, trade unions, employers and employers' organizations can -
 - (i) collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest; and

²⁹⁶ No. 97 of 1998

²⁹⁷ No. 9 of 1999

²⁹⁸ No. 63 of 2001

²⁹⁹ No. 4 of 2002

³⁰⁰ No. 56 of 1981

³⁰¹ See note 309 above.

³⁰² See note 310 above.

³⁰³ See note 313 above.

³⁰⁴ See note 309 above.

(ii) formulate industrial policy; and

(d) to promote -

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.³⁰⁵

The definition of the ‘workplace’ that the LRA seeks to democratize is essential. The ‘workplace’ is defined in section 213 of the LRA as the ‘place or places where the employees of an employer work’. An employee is defined in section 213 as:

(a) any person, excluding an independent contractor, who works for another person or the State, and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

As a workplace protected by the LRA involves a relationship between an employee and an employer, it excludes a place or places where informal workers conduct their work as waste pickers. The previous sections showed that there is no working relationship between waste pickers and the municipality or municipality contractors working in waste management sector. The waste pickers’ exclusion from these relationships means that this law does not extend protection them or their workplaces, and therefore discriminates against waste pickers.

3.2.2.2 *Basic Conditions of Employment Act*³⁰⁶

In its preamble, the Basic Conditions of Employment Act of 1997 (BCEA) states that it was developed to comply with the obligations of the Republic as a member of the International Labour Organization. Section 2 of the BCEA states its purpose is as follows:

The purpose of this Act is to advance economic development and social justice by

fulfilling the primary objects of this Act which are—

(a) to give effect to and regulate the right to fair labour practices conferred by

section 23(1) of the Constitution—

³⁰⁵ Labour Relations Act sections 1(a)-(d).

³⁰⁶ See note 310 above.

- (i) by establishing and enforcing basic conditions of employment; and
 - (ii) by regulating the variation of basic conditions of employment;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization.

The basic conditions of employment are defined in the BCEA to mean ‘a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment’.³⁰⁷ The BCEA defines ‘an employee’ and ‘employment’ the same way as the LRA. The extension of its regulations is therefore only limited to those who are deemed as employees and in an employment relationship. It excludes those who are not in an employment relationship with employers.

3.2.2.3 Occupational Health and Safety Act³⁰⁸

In its preamble the Occupational Health and Safety Act (OHSA) states that its aims are the following:

- to provide for the health and safety of persons at work and the health and safety of persons in connection with the use of plant and machinery;
- the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work;
- to establish an advisory council for occupational health and safety; and
- to provide for matters connected therewith.

The definition of the ‘employee’ and the ‘employment’ are the same as that provided for by the LRA and the BCEA. The definition of the ‘employer’ is given in the OHSA as ‘any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him or her’.³⁰⁹ The OHSA defines ‘work’ as meaning ‘work as an employee or as a self-employed person’.³¹⁰ An employee is considered to be at work during the time that s/he is in the course of his or her employment. Whereas, a self-employed person is considered to be at work during such time as s/he devotes to work as a self-employed person’.³¹¹ A ‘workplace’ is defined in the OHSA as ‘any premises or place where a person performs work in the course of his or her employment’.³¹²

The OHSA extends its protection to self-employed persons, and this can be interpreted as including self-employed workers in the informal economy. Section 9 (2) of the OHSA states that: ‘Every self-

³⁰⁷ BCEA section 1.

³⁰⁸ See note 313 above.

³⁰⁹ OHSA section 1(1).

³¹⁰ OHSA section 1(1).

³¹¹ OHSA section 1(1).

³¹² OHSA Section 1(1).

employed person shall conduct his or her undertaking in such a manner as to ensure, as far as is reasonably practicable, that s/he and other persons who may be directly affected by his or her activities are not thereby exposed to hazards to their health or safety’.

However, it is argued that when it comes to self-employed workers, although the OHSA regulates their work, it does not extend to the regulation and the protection of their workplace in the manner that applies to employed workers. The OHSA focuses on the employer/ employee relationship and a worker’s right to occupational health and safety.³¹³ The responsibility of the employer is to ensure that the work environment is safe and is without any risk to the health of the employees.³¹⁴ The protection of the workplace, however, is vital to both employed and self-employed workers. The traditional definition of the workplace is often taken to mean fixed premises like a factory, office or shop.³¹⁵ The traditional definition excludes the spaces where most informal workers conduct their work and those spaces that are mostly in public spaces. These spaces have been reported to fall outside the regulatory framework of labour law regulations, and some researchers suggest that this creates a new role for local government to regulate and manage OHS for public spaces where informal workers conduct their work.³¹⁶

There are various agencies and mechanism that are involved in the regulation of OHS. These agencies include the ILO and the WHO. The mechanisms include national policies and other alternative regulatory mechanisms like trade agreements and codes of conduct.³¹⁷ The ILO plays a significant role in promoting uniform labour policies and setting minimum labour standards, globally.³¹⁸ On the other hand, the WHO provides technical guidelines concerning OHS such as ‘the promotion of the medical services, medical examinations and hygiene standards’.³¹⁹ Both the ILO and the WHO have been developing a ‘more nuanced approach to occupational health and safety for application in different settings, however, their effectiveness is dependent on governments adopting the recommendations of this approach’.³²⁰ These approaches are discussed in further detail in Chapter 4 below.

With the regard to the mechanisms that are used in the regulation of OHS, the development of national policies is usually the initial step towards the effective regulation and enforcement of OHS standards.³²¹ These policies are mostly developed to implement the recommendations by the ILO and other

³¹³ Lund and Marriot (note 1 above) 14.

³¹⁴ OHSA Section 8(1) – (2).

³¹⁵ Lund and Marriot (note 1 above) 14.

³¹⁶ Lund and Marriot (note 1 above) 14.

³¹⁷ Lund and Marriot (note 1 above) 14.

³¹⁸ Lund and Marriot (note 1 above) 18.

³¹⁹ Lund and Marriot (note 1 above) 18.

³²⁰ Lund and Marriot (note 1 above) 18.

³²¹ Lund and Marriot (note 1 above) 19.

international agencies like the WHO. Other alternative regulatory mechanisms like trade agreements also play a role in setting standards for OHS regulations. The recommendations by international agencies like the World Trade Organization (WTO) regarding safe labour standards and workplace safety are usually incorporated in the international trade treaties that the countries agree to sign.³²² Due to the inability of traditional forms of state regulation to regulate OHS, there has been increasing emphasis on the setting codes of good conduct to address and regulate OHS.³²³ However, it has been argued that they have had a limited impact on labour standards, and their effectiveness is often associated with strong labour movements.³²⁴

In the light of the above, it is clear, all labour laws to a certain degree do not extend protection to people working informally in public spaces. This omission is due to the limited definition of an ‘employee’ which excludes workers who are outside traditional employment relationships. The deficiencies in the law have been dealt with through policy debates and court decisions. There have been progressive attempts to extend the definition of ‘employee’ in labour laws to include those workers in atypical employment relationships.³²⁵ For example, the South African Labour Court in *State Information Technology Agency (Pty) Ltd v CCMA and Others*³²⁶ used a ‘realistic theory’ to determine whether a person is an employee.³²⁷ Smit summarizes circumstances where the ‘reality theory’ could be used to determine whether there exists an employment relationship by recommending the following:³²⁸

- An employee is under the supervision and control of an employer;
- Whether the employee is an integral part of the employers’ organization;
- The extent to which the employee is economically dependent on the employer.

Smit argues that the last point mentioned above is often the ‘only clear indication of employment status in informal work’.³²⁹ Other court cases have set precedents in addressing these deficiencies and providing protection of human rights and socio-economic rights, inequality, and unfair discrimination. These are discussed in the following section.

³²² Lund and Marriot (note 1 above) 20.

³²³ Lund and Marriot (note 1 above) 21.

³²⁴ Lund and Marriot (note 1 above) 21.

³²⁵ Smit & Fourie (note 30 above) 52.

³²⁶ *State Information Technology Agency (Pty) Ltd v CCMA and Others* (2008) ILJ 2234 (LAC).

³²⁷ Smit & Fourie (note 30 above) 52.

³²⁸ Smit & Fourie (note 30 above) 52.

³²⁹ Smit & Fourie (note 30 above) 52.

3.3 COURT DECISIONS ADDRESSING LAW DEFICIENCIES IN HUMAN RIGHTS PROTECTION

When the law only protects a certain group of people, it can be argued that that law infringes the rights of others to be treated equally and a right to human dignity. These rights form the foundational values entrenched in the Constitution.³³⁰ Section 9 of the Constitution provides that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.³³¹ The Constitution further defines equality to include ‘full and equal enjoyment of all rights and freedoms’.³³² Section 9 also states that in order ‘to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.³³³ Therefore, the full realization of this right will be achieved if the state takes positive steps to ensure that the disadvantaged groups and those who are vulnerable are treated equally.³³⁴

On the other hand, ‘human dignity emphasises that all human being must be treated with dignity’.³³⁵ The Constitution states that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.³³⁶ To show equal respect for human dignity, the state is required to show respect for the equal worth of poor people by using its resources to deal with conditions that perpetuate marginalization.³³⁷

The following section discusses court decisions that have been used as precedents in addressing unequal treatment of people and infringements of their right to dignity.

3.3.1 Court decisions addressing inequality and the right to human dignity

The Constitution is the supreme law of South Africa and the obligations imposed by it must be fulfilled.³³⁸ It places the responsibility squarely on the state to respect, promote and fulfill the rights entrenched in the Bill of Rights.³³⁹ The state is tasked with the duty of ensuring that all persons have full access to their rights, and this duty prevents the state from ‘undermining people’s enjoyment of

³³⁰ Khoza (note 34 above) 27.

³³¹ Section 9(1) of the Constitution.

³³² Section 9(1) of the Constitution.

³³³ Section 9(1) of the Constitution.

³³⁴ Khoza (note 34 above) 27.

³³⁵ Khoza (note 34 above) 27.

³³⁶ Section 10 of the Constitution.

³³⁷ Section 10 of the Constitution.

³³⁸ Section 2 of the Constitution.

³³⁹ Section 7(2) of the Constitution.

their rights'.³⁴⁰ The Constitution also compels the state to put in place measures that will positively protect and promote the realization of people's rights.³⁴¹

The Constitution also directs the courts to intervene where there has been an infringement of rights. This direction is governed by sections 8, 38 and 172.³⁴² Section 8 lists to whom and how the Bill of Rights applies and the instances where courts must develop common law. Section 38 lists the people who may approach the court when they allege that a right has been infringed or threatened. This section also provides that, a court may grant appropriate relief where rights have been threatening or violated.³⁴³ Section 172 of the Constitution allows a court hearing a constitutional matter to 'make any order that is just and equitable'.³⁴⁴

The following section discusses two court decisions that are relevant to developing the law to a group of people that were excluded by legislation. They illustrate how the courts have addressed the deficiencies in the protection of vulnerable groups by these laws. The first is *Khosa and Others v Minister of Social Development and Others* (the *Khosa* case).³⁴⁵ The second is *Minister of Health and Others v Treatment Action Campaign and Others* (the *TAC* case).³⁴⁶

3.3.1.1 *Khosa and Others v Minister of Social Development and Others*³⁴⁷ (the *Khosa* case)

The *Khosa* case was instituted by applicants, who were Mozambican citizens with permanent residence status in South Africa. They challenged the provisions of the Social Assistance Act³⁴⁸ and the Welfare Laws Amendment Act³⁴⁹. These Acts reserved the right to social assistance to South African citizens only. The applicants also included children who, but for their citizenship status, would have qualified for the child-support grant. The provisions challenged by the applicants consisted of the following:

- They restricted access to social assistance to South African citizens only;
- They excluded permanent residents, older adults, and children, who would otherwise have qualified for social grants if there was no requirement of citizenship;
- They excluded primary caregivers from accessing the Child Support Grant for children in their care - especially where these children were South African born.³⁵⁰

³⁴⁰ Khoza (note 34 above) 35.

³⁴¹ Khoza (note 34 above) 35.

³⁴² I Currie and J De Waal *The Bill of Rights Handbook* (2013) 177.

³⁴³ Section 38 of the Constitution lists the persons who may approach court to allege infringement of rights.

³⁴⁴ Currie and De Waal (note 360 above) 178.

³⁴⁵ (2004) 6 BCLR 569 (CC).

³⁴⁶ (2002) 5 SA 721 (CC).

³⁴⁷ (2004) 6 BCLR 569 (CC).

³⁴⁸ No. 59 of 1992

³⁴⁹ No. 106 of 1997

³⁵⁰ Khoza (note 34 above) 33.

The application in the *Khosa* case was based on the exclusion of non-citizens from social grant entitlements and was argued to be unconstitutional based on the following sections of the Constitution that referred to ‘everyone’.

- Section 27 which provides for the right to health care, food, water and social security;
- Section 28 which provides for children’s rights;
- Section 9 which provides for equality;
- Section 10 which provides for human dignity;
- Section 11 provides for a right to life.

Section 27 of the Constitution states the following:

(1) Everyone has the right to have access to —

- (a) healthcare services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

Currie and De Waal note that the specific restriction of certain rights to citizens only implies that all those rights accorded to ‘everyone’ apply to citizens and non-citizens.³⁵¹ Therefore, the right to access social assistance should be extended to those who are non-citizens. The *Khosa* case ‘tested the restriction of social welfare benefits to citizens against the criterion of ‘reasonableness’ which is provided for in section 27(2) of the Constitution’.³⁵² The Constitutional Court held the following:³⁵³

- Permanent residents are a vulnerable group;
- The laws that exclude permanent residents from accessing the benefits of social assistance treat them as inferior to citizens;
- The costs of including permanent residents in the social security scheme would be small;
- Excluding permanent residents from access to social security was not consistent with section 27 of the Constitution;

³⁵¹ Currie and De Waal (note 360 above) 35.

³⁵² Currie and De Waal (note 360 above) 152.

³⁵³ Khoza (note 34 above) 33.

- Excluding children from access to these grants was unfair discrimination on the basis of their parents' nationality and violates their right to social security under section 28(1)(c).

The Court further read in the words 'or permanent residents' after the word 'citizen' in each of the challenged sections. The effect of this case is that the legislation in question has since been repealed and replaced by the Social Assistance Act.³⁵⁴ However, it must be noted that the new Social Assistance Act does not incorporate the Constitutional Court's 'reading in' of permanent residents as was ordered in the *Khosa* case. What is incorporated in the new Act is a Ministerial discretion which may be used to bring permanent residents under the protection of the new Social Assistance Act.

3.3.1.2 *Minister of Health and Others v Treatment Action Campaign and Others*³⁵⁵ (the TAC case)

The TAC, an HIV/AIDS activist organization, launched a constitutional challenge, alleging that the right to access health care services had been infringed. They challenged the 'limited nature of the government measures introduced to prevent mother-to-child transmission of HIV, on two grounds':³⁵⁶

- The government unreasonably prohibited administering the antiretroviral drug, Nevirapine, at public hospitals and clinics - except for a limited number of pilot sites.
- The government had not produced and implemented a comprehensive national programme for the prevention of mother-to-child transmission of HIV.

When considering the judgment, the Constitutional Court considered sections 27 and 28 of the Constitution, which provides that all citizens have a right to public health care and the child's right to be afforded special protection. Section 27(1) (a) provides that, 'everyone has the right to have access to healthcare services, including reproductive health care, Section 27(2) provides that, 'the state must take reasonable legislative and other measures in its available resources, to achieve the progressive realization of each of these rights'. Section 28(1) (c) provides that, 'every child has the right to basic nutrition, shelter, basic health care services and social services.

The Court found that the government had violated section 27(1) in that its program did not comply with the right of access to health care services. The violation was that the government did not make Nevirapine an anti-retroviral drug available to HIV-positive mothers and at-risk newborns even when ordered or prescribed by doctors. The Court further decided that reasonable steps had not been taken to reduce the risk of mother-to-child transmission of HIV at birth thereby violating sections 27(2) and 28(1) (c). The government had not set out a timeframe for creating a national program to prevent

³⁵⁴ No. 13 of 2004.

³⁵⁵ (2002) 5 SA 721 (CC).

³⁵⁶ *Khoza* (note 34 above) 32.

mother-to-child transmission of HIV. The anti-retroviral drug Nevirapine was only available at pilot sites. The Court further ‘developed a new level of reasonableness’ by suggesting that the Government must be transparent in developing and implementing its programs and allow some other stakeholders to participate.³⁵⁷

The above two cases are significant in matters where vulnerable members of the society are excluded from laws and their rights to social protection are threatened. Also, where the State’s measures are inadequate to protect these rights, the Court suggested ways in which these could be achieved, and a process whereby progress for implementation could be monitored.

3.4 CONCLUSION

Waste pickers are vulnerable workers and as such protecting their work environment is key to addressing the risks and hazards that they face as they conduct their work. Legislation and other measures are necessary to extend protection to these workers. The exclusion of vulnerable workers from labour laws contradicts the desire to create ‘decent work’ for the working poor. The definition of ‘employee’ in the labour laws is what limits the extension of labour protection to workers in the informal economy.³⁵⁸ It is important that this issue is addressed to ensure that workers in the informal economy enjoy workers’ rights in the same manner as those in the formal work sector. There is room to widen the scope of the definition of ‘employee’ in the current labour laws in South Africa. For example, sections 198 and 83 of the LRA and BCEA respectively, make ‘provision for ways to include workers under triangular employment relations and so-called ‘deemed’ employees’.³⁵⁹

The absence of adequate protection for informal workers constitutes unequal treatment and infringes their right to dignity. These rights are enshrined in the Constitution, and the state must ensure that they are protected, promoted and fulfilled. The above discussion has shown that no legislation provides effective protection of the rights of informal workers in the Constitution. Therefore, due to the absence of legislation providing effective protection, the reliance for protecting rights of informal workers must be placed on the Constitution itself.³⁶⁰ It is important to identify the rights that protect and promote workers in the informal economy, mainly waste pickers.

The following chapter explores the environmental rights contained in section 24 of the Constitution and how their application could be extended to offer work and workplace protection for waste pickers. The chapter introduces environmental rights and then discusses their application based on the definition of the ‘environment’ and how these may give protection to waste pickers in the workplace.

³⁵⁷ Khoza (note 34 above) 32.

³⁵⁸ Smit & Fourie (note 30 above) 25.

³⁵⁹ Smit & Fourie (note 30 above) 25.

³⁶⁰ D Brand & K Van Marle ‘Poverty and the ordinary law: Introduction’ (2013) 29 *SAJHR* 465.

CHAPTER 4: EXTENDING THE APPLICATION OF SECTION 24 OF THE CONSTITUTION

4.1 INTRODUCTION

Constitutional democracy in South Africa was established after the adoption of the 1993 Interim Constitution and the 1996 Constitution. The 1996 Constitution was declared the supreme law of the land and the new constitutional order was formed. The constitutional order was built upon the following principles; ‘constitutionalism, the rule of law, democracy and accountability; separation of powers, checks and balances, co-operative government, and devolution of power’.³⁶¹ These principles are justiciable in that, where there is any law or conduct that is inconsistent with them, that law or conduct may be declared invalid.³⁶² The role of these principles is that they tie together the provisions of the Constitution and ‘shape them into a framework that defines the constitutional order’.³⁶³

The Constitution contains the Bill of Rights in Chapter 2. The Bill of Rights contains a set of human rights. Section 7 of the Constitution provides that the Bill of Rights is the ‘cornerstone of democracy in South Africa’ and that the Bill of Rights protects the rights of all people in South Africa. The Bill of Rights upholds the democratic values which are human dignity, equality, and freedom. Section 8 provides that the Bill of Rights ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state’. There are two ways in which the Bill of Rights applies to law or a legal dispute. There is direct application and indirect application of the Bill of Rights. Direct application is when the Bill of Rights is applied as a direct law which overrides laws and conduct that is inconsistent with it. The indirect application is when the Bill of Rights sets up a ‘normative value system’ that must be respected whenever a law is interpreted, developed or applied.³⁶⁴

Four elements determine the direct application of the Bill of Rights. Those elements are ‘beneficiaries, duties imposed by the Bill of Rights, time, and limited territorial application’.³⁶⁵ Beneficiaries of the Bill of Rights are both natural and juristic persons. The duties imposed by the Bill of Rights have vertical and horizontal applications. A vertical application is when the Bill of Rights imposes its duties on the relationships between the state and individual. The horizontal application is when the Bill of Rights imposes duties on the relationships between individuals.³⁶⁶ The Constitution became the supreme law of the land, and it invalidated all unconstitutional law on the day it was brought into

³⁶¹ Currie and De Waal (note 360 above) 7.

³⁶² Currie and De Waal (note 360 above) 7.

³⁶³ Currie and De Waal (note 360 above) 7.

³⁶⁴ Currie and De Waal (note 360 above) 31.

³⁶⁵ Currie and De Waal (note 360 above) 34.

³⁶⁶ Currie and De Waal (note 360 above) 41.

effect.³⁶⁷ The Bill of Rights applies to everyone in South Africa (irrespective of their citizenship) but does not have general application beyond the borders of South African.³⁶⁸

The human rights contained in the Bill of Rights are divided into two groups: the first group contains civil and political rights and the second contains socio-economic rights. Civil and political rights include the right to life³⁶⁹, the right to vote³⁷⁰, the right to a fair trial³⁷¹, the right to freedom of speech³⁷², the right to freedom of movement³⁷³, and the right to freedom of assembly.³⁷⁴ Socio-economic rights include the right to have access to adequate housing³⁷⁵, to health care³⁷⁶, to social security,³⁷⁷ and the right to have access to sufficient food and water.³⁷⁸ All the human rights contained in the Bill of Rights are fundamental rights, and each group of rights is interdependent on the other.

Environmental rights are contained in section 24 of the Constitution. They are classified as socio-economic rights. There has been some debate about whether socio-economic rights are as fundamental as the civil and political rights. However, there is a consensus amongst scholars that they are justiciable - even though their enforcement is dependent on the availability of resources.³⁷⁹ The provisions of section 24 are summarized as follows:

- (i) Everyone has the right to an environment that is not harmful to their health or well-being;
- (ii) Everyone has the right to have the environment protected through reasonable legislative and other measures.³⁸⁰

This chapter explores these environmental rights and how their application can be extended to protect waste pickers to ensure that they enjoy health and safety protection in their work and workplaces. The chapter firstly discusses the provisions of section 24; the definition of the environment as envisaged by the section; and the guiding principles used by South African courts to define the words used in the Constitution. Secondly, it examines the extent of the application of the rights in section 24 and explores how such application can be extended. Thirdly, it builds a case for extending protection to waste pickers,

³⁶⁷ Section 2 of the Constitution.

³⁶⁸ Currie and De Waal (note 360 above) 56.

³⁶⁹ Section 11 of the Constitution.

³⁷⁰ Section 19 of the Constitution.

³⁷¹ Section 35 of the Constitution.

³⁷² Section 16 of the Constitution.

³⁷³ Section 21 of the Constitution.

³⁷⁴ Section 17 of the Constitution.

³⁷⁵ Section 26 of the Constitution.

³⁷⁶ Section 27(1)(a) of the Constitution.

³⁷⁷ Section 27(1)(c) of the Constitution.

³⁷⁸ Section 27 (1)(b) of the Constitution

³⁷⁹ JC Mubangazi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' *AJLS* (2006) 3.

³⁸⁰ Khoza (note 34 above) 170.

using the obligations imposed by the Constitution by applying sections 8(3)(a) and 39 to these rights. Fourthly, it discusses the other rights that support the environmental rights to strengthen their protection over waste pickers and other vulnerable workers. Lastly, it gives examples of how other local cities and foreign countries have extended rights to waste pickers, supported their work and integrated them to waste management processes.

4.2 ENVIRONMENTAL RIGHTS IN THE CONSTITUTION

4.2.1 *The Provisions of section 24 of the Constitution*

Section 24 of the Constitution provides that:

Everyone has the right-

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

Environmental law scholars identify environmental rights using two approaches. The first approach is the anthropocentric approach which ‘identifies the rights of humans to a safe and healthy environment’.³⁸¹ The second one is the biocentric approach which identifies ‘the rights of the environment itself not to be degraded’.³⁸² There is a little consensus amongst environmentalists which approach is the most appropriate for the protection of the environment. The anthropocentric approach views the subjects holding the rights to be human beings, whereas the biocentric approach has two views. The first biocentric approach view is that ‘the richness and diversity of life have values in themselves’ however, the subjects holding the rights are human beings that have the right to resources for their basic needs.³⁸³ This view rejects the idea that nature will have legal standing and rights attached to it.³⁸⁴ The second biocentric approach view is that nature itself has certain inherent rights. This view

³⁸¹ M Kidd ‘Environment’ in Currie, I & De Waal J *The Bill of Rights Handbook* (2013) 516.

³⁸² Kidd (note 399 above) 516.

³⁸³ Kidd (note 399 above) 516.

³⁸⁴ Kidd (note 399 above) 516.

has been expressed in ‘the Universal Declaration of the Rights of Mother Earth’,³⁸⁵ and some countries have adopted rights of nature in their constitutions.

There are two environmental rights contained in section 24 of the Constitution. The first right is the fundamental human right in paragraph (a). The second right in paragraph (b) provides a ‘directive principle’ which requires that the state takes positive steps in the attainment of the right provided in paragraph (a).³⁸⁶ These two rights are discussed in detail in the section below, followed by the discussion on a definition of the word ‘environment’.

4.2.1.1 Section 24 (a): Right to an environment that is not harmful to health and well-being

Section 24 (a) of the Constitution provides for the right to an environment that is not harmful to health or well-being. This right is extended to ‘everyone’ in South Africa irrespective of their citizenship. To determine the scope of coverage of these rights, the definition of the word ‘environment’ needs to be clear. Defining the word ‘environment’ is the key to determining the extent of the reach of these constitutional environmental rights. However, the word ‘environment’ referred to in section 24 is not defined in the Constitution. Therefore, this leaves it to the legislature to develop its definition when creating laws to promote these rights, and the courts to use the processes contained in section 39 of the Constitution when interpreting the nature and the extent of rights. The definition of the word ‘environment’ as envisaged by the Constitution and the meaning of section 24(b) will be discussed below (see paragraph 4.2.2).

4.2.1.2 Section 24(b): Right to have the environment protected for the benefit of the present and the future generations through reasonable legislative and other measures

Section 24(b) provides a directive to the state for the protection of the environmental rights. In the *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*³⁸⁷, the court held that section 24(b) is more like a directive principle. The right imposes a constitutional imperative on the state to secure the environmental rights through ‘reasonable legislative and other measures.’³⁸⁸ The legislative and other measures must be aimed at achieving the objectives that are listed in sections 24(b) (i)-(iii). In the *Government of Republic of South Africa v Groomboom*³⁸⁹ (hereafter referred to as the *Groomboom* case), the court suggested how the state could meet this type of constitutional obligation, where, Yacoob J stated:³⁹⁰

³⁸⁵ The Universal Declaration of Rights of Mother Earth was adopted during the World People’s Conference on Climate Change and the Rights of Mother Earth held in Cochabamba, Bolivia April 22, 2010. Articles 1 – 2 of the declaration list the inherent rights of Mother Earth.

³⁸⁶ Kidd (note 399 above) 517.

³⁸⁷ 2006 (5) SA 512 (T).

³⁸⁸ 2006 (5) SA 512 (T).

³⁸⁹ 2001 (1) SA 46 (CC).

³⁹⁰ 2001 (1) SA 46 (CC) (42). Another similar discussion regarding this case is in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) per CJ Classen J at 142.

The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. The mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.

The court in the *Groomboom* case further suggested that the policies and programmes set up to support the legislative measures must be balanced and flexible.³⁹¹ Kidd notes that section 24(b) provides the right to 'protect' the environment for the 'benefit of present and future generations'.³⁹² This provision incorporates the notion of inter-generational equality which supports the universal idea that the members of the present generation hold the earth in trust for future generations.³⁹³ Kidd further notes that the reasonableness of the legislation and other measures that must be developed to protect the environmental rights has received a great deal of attention by both the legislature and courts. First, Kidd mentions that 'significant legislative activities in the environmental field since 1994' is a sign that compliance in developing 'legislative measures' has been substantial. Second, the comments by the Constitutional Court in the *Groomboom* case on the 'other measures' indicate that the Courts are also involved in developing other measures.³⁹⁴ Other measures cited by the Court in the *Groomboom* case include not only policies and programmes, but more importantly, the effective implementation of the legislative measures to reach the objectives set by sections 24(b)(i)-(iii).³⁹⁵

The three objectives mentioned in section 24(b) are the following:

- prevent pollution and ecological degradation;
- promote conservation; and
- secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

³⁹¹ See note 407 above (43).

³⁹² Kidd (note 399 above) 523.

³⁹³ Kidd (note 399 above) 523.

³⁹⁴ Kidd (note 399 above) 523.

³⁹⁵ Kidd (note 399 above) 523.

Kidd notes that the first objective requires little discussion because it refers to terms that are well understood. The second objective is incomplete since it does not refer to the object of conservation.³⁹⁶ It is assumed that due to its context, the object of conservation is the conservation of the natural environment and may include the conservation of cultural heritage.³⁹⁷ The third objective is much more specific as it introduces the explicit recognition of the obligation to promote ‘justifiable economic and social development’ while ‘securing ecologically sustainable development and the use of natural resources’.³⁹⁸

The concept of sustainable development has received a great deal of interest over the years in South Africa and many other developing and developed countries. In 2015 the United Nations (UN) adopted the *Sustainable Development Goals* (SDG) which cover a broad range of social and economic development issues.³⁹⁹ Sustainable development has been described as ‘development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs’.⁴⁰⁰ Courts have explored sustainable development as an inclusive term that not only gives effect to the view that priority must be given to the needs of the poor but also ‘captures the limitations to development imposed by the present state of technology and social organization’ on the environment’s ability to meet present and future needs.⁴⁰¹ Feris summarizes the court’s order in the *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*⁴⁰² (hereafter referred to as *BP Southern Africa* case), as follows:

...the department was obliged to develop an integrated environmental management programme, which took cognizance of a wide spectrum of recommendations, including international conventions and approaches because of the broad and extensive definition of the

³⁹⁶ Kidd (note 399 above) 523.

³⁹⁷ Kidd (note 399 above) 523.

³⁹⁸ Kidd (note 399 above) 523.

³⁹⁹ The *Sustainable Development Goals* (SDGs) are defined as a collection of 17 global goals set by the United Nations. The broad goals are interrelated though each has its own targets to achieve. The total number of targets is 169. The SDGs cover a broad range of social and economic development issues. These include poverty, hunger, health, education, climate change, gender equality, water, sanitation, energy, environment and social justice. The SDGs are also known as *Transforming our World: the 2030 Agenda for Sustainable Development* or *Agenda 2030* in short. The goals were developed to replace the *Millennium Development Goals* (MDGs) which ended in 2015. Unlike the MDGs, the SDGs framework does not distinguish between ‘developed’ and ‘developing’ nations. Instead, the goals apply to all countries.

⁴⁰⁰ L Feris ‘Constitutional Environmental Rights: An Underutilized Resource’ *SAJHR* (2008) 40.

⁴⁰¹ Feris (note 418 above) 40.

⁴⁰² 2004 (5) SA 124 (W).

environment in the Environmental Conservation Act⁴⁰³ (ECA) which inter alia, includes the consideration of socio-economic conditions.⁴⁰⁴

The Court's decision in the above case highlights the inter-connected nature of the environment and social and economic considerations in the context of sustainable development.⁴⁰⁵ The significant of the *BP Southern Africa* case is that it recognizes the principle of integration between environmental protection, economic development, and social needs.⁴⁰⁶ Another case that has recognized the role of the Constitution in the promotion of economic and social development in the context of sustainable development is that of *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation, and Environment, Mpumalanga Province, & Others*.⁴⁰⁷ In this case, the Court stated the following:⁴⁰⁸

The Constitution recognizes the interrelationship between the environment and development; indeed, it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.

The duty to balance potentially conflicting principles is placed squarely on those who enforce the Constitution. The balance is based on the proportionality of the principles involved and puts the principle of sustainable development at the center in facilitating the 'achievement of the balance'.⁴⁰⁹ The significance of the case is that the court has clarified that sustainable development requires integrating the demand of three contesting principles: economic development, social development, and environmental protection. However, the question of the definition of terms like the 'environment' and 'sustainable development' becomes significant in addressing the large-scale poverty faced by many in South Africa and in efforts of balancing the imbalances of the past. The following section discusses the definition of the term 'environment' as envisaged by section 24 of the Constitution.

4.2.2 Definition of the word 'environment' as contained in section 24.

The definition of the word 'environment' as contained in section 24 of the Constitution can be narrowly or widely defined. Because the Constitution does not define this term, assistance may be obtained

⁴⁰³ No. 73 of 1989.

⁴⁰⁴ Feris (note 418 above) 41.

⁴⁰⁵ Feris (note 418 above) 41.

⁴⁰⁶ Feris (note 418 above) 40.

⁴⁰⁷ 2007 (6) SA 4 (CC).

⁴⁰⁸ See note 425 above section 45.

⁴⁰⁹ Feris (note 418 above) 41.

from relevant legislation. The National Environmental Management Act (NEMA)⁴¹⁰, is the South African's framework for the environmental legislation. NEMA defines 'environment' as follows:⁴¹¹

- the surroundings within which humans exist and that are made up of—

- (i) the land, water, and atmosphere of the earth;
- (ii) micro-organisms, plant, and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic, and cultural properties and conditions of the foregoing that influence human health and well-being.

Environmental scholars argue that the definition that is provided by NEMA is narrower to that in the dictionary. The Oxford Dictionary defines 'environment' as 'surroundings, especially as they affect people's lives'.⁴¹²

Kidd argues that even though the NEMA's definition of the 'environment' is not wide, it does not take a narrow approach. He states that NEMA's definition is not confined to the physical environment but places humans at the center of the environment. He further observes that the NEMA's definition includes the 'physical environment and the interactions between components of the physical environment and between those components and humans'.⁴¹³ NEMA's definition also includes non-physical elements that are the environment's cultural and aesthetic characteristics.⁴¹⁴ Even with all these components covered by definition in NEMA, there is a broad consensus amongst scholars that confining the definition of 'environment' to the NEMA definition is not appropriate and a wider definition is more acceptable. The wider definition is that obtained from the dictionary.⁴¹⁵

Scholars such as Glazewski and Du Plessis submit that a wider definition of the 'environment' would include the place of humans in the urban environment, in spaces that include built environment and the work environment.⁴¹⁶ Other scholars such as Feris and Kidd support this idea and further add that a broader approach in defining 'environment' would also include socio-economic and cultural

⁴¹⁰ No. 107 of 1998.

⁴¹¹ NEMA section 1.

⁴¹² OUP (note 48 above) 135.

⁴¹³ Kidd (note 399 above) 518.

⁴¹⁴ Kidd (note 399 above) 518.

⁴¹⁵ Kidd (note 399 above) 518.

⁴¹⁶ Glazewski (note 47 above) 76 and AA Du Plessis 'South Africa's constitutional environmental right (generously) interpreted: what is in it for poverty?' *SAJHR* (2011) 292-293.

dimensions of the inter-relationships between humans and the natural environments, as well as those between humans and other humans – for example, the social environment.⁴¹⁷ Kidd further argues that a broader definition which includes the urban, built environment, work, and social environments is a central component of sustainable development as an environmental right and in the context of South Africa's environmental law. Therefore, in the light of the above arguments, the 'environment' in its broad definition includes the work environment. This thesis argues that this broad definition includes the workplace where waste pickers perform their work and the conditions of work that affect their health and wellbeing.

Scholars like Rabie however, disagree with an idea of an all-embracing concept of the environment and argues that it is not feasible.⁴¹⁸ Rabie points out that embracing such a concept would result in all law being regarded as environmental law. He expresses the view that environmental law is a 'potpourri of legal norms encountered in some conventional fields of law, such as medical law and labour law'.⁴¹⁹ The approach adopted by Glazewski in response to Rabie is to regard the environmental law as encompassing the three distinct but inter-related areas of general concern. These are 'land-use planning and development, resource conservation and utilization, and waste management and pollution control'.⁴²⁰

Considering South Africa's fragmented past, the definition of words contained in the Constitution must be guided by the values it enshrines. The reference to the environmental rights results in a set of rights that can be seen to combine natural and social perspectives of the environment.⁴²¹ Therefore adopting an integrated environmental rights approach is essential to balance the imbalances of the past.⁴²²

The definitions of words found in the Constitution have led to debates emanating from interpretations of legislation by court rulings and policy debates. Some scholars agree that words do not have single fixed meanings.⁴²³ Language as the vehicle for ideas is less certain than previously thought as the courts tend to use a purposive or generous approach. The Constitutional Court in *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*⁴²⁴ declared that a purposive interpretation of legislation is required. Various concerns have been raised following this approach on the basis that it

⁴¹⁷ Kidd (note 399 above) 519.

⁴¹⁸ Glazewski (note 47 above) 9.

⁴¹⁹ MA Rabie 'Nature and Scope of Environmental Law' in RF Fuggle & MA Rabie (eds.) *Environmental Management in South Africa* (1992) 32.

⁴²⁰ Glazewski (note 47 above) 9.

⁴²¹ J Dugard & A Alcaro 'Let's Work Together: Environmental and Socio-Economic Rights in the Courts' *SAJHR* (2013) 15.

⁴²² Dugard (note 439 above) 15.

⁴²³ IJ Kroeze 'Power play: a playful theory of interpretation' *JSAL* (2007) 19-20.

⁴²⁴ (CCT 77/08) (2009) ZACC 11; 2010 (2) SA 181 (CC) in paragraph (21) the Court stated, 'Our Constitution requires a purposive approach to statutory interpretation'.

undermines the separation of powers. Some scholars argue that it seems to be undemocratic to allow judges to substitute their interpretations of the Constitution for those of the legislature.⁴²⁵ It is logical therefore that when dealing with interpreting the text in the Constitution, the Constitution itself must be examined for guidance.⁴²⁶ The constitutional principles for interpreting the Bill of Rights and the application of environmental rights will be discussed below.

4.2.3 *The application of environmental rights contained in section 24*

The Constitution provides for the application of Bill of Rights to natural and juristic persons. Section 8(2) of the Constitution states the following: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right’. Kidd argues that even though section 24 applies vertically to bind the state, it can also apply horizontally to bind natural and juristic persons.⁴²⁷ Very often, non-state entities and natural persons act in a way which harmfully affects the environment thereby infringing the environmental rights of others.⁴²⁸ Section 24(a) can be applied both vertically and horizontally to bind the state and non-state bodies respectively. Section 24(b) applies vertically to bind the state as it is the state that has the authority to carry out legislative and other measures. With regards to ‘other measures’, Kidd argues that there is no need to apply it to non-state bodies because section 24(a) would most likely offer a more appropriate remedy.⁴²⁹

Kidd mentions four ways in which environmental rights can apply.⁴³⁰ Firstly, it may be applied as a right to protect the health and well-being of anyone adversely affected by the environment. However, there is an argument that, due to the principle of avoidance, it will be unlikely that this will be used since health and safety are protected by a large body of legislation. The principle of avoidance requires that remedies should be sourced from common law or legislation before resorting to constitutional remedies.⁴³¹ Secondly, environmental rights could be applied as a ‘trigger’ for the *locus standi* (legal standing) clause as provided for by section 38 of the Constitution⁴³² (section 38 is discussed in detail in section 4.4.2 below). However, Kidd notes that it is unlikely this will be used as NEMA provides a

⁴²⁵ P Lenta ‘Judicial restraint and overreach’ *SAJHR* (2004) 546. See further discussion on this in Lenta P ‘Democracy, Rights Disagreement and Judicial Review’ *SAJHR* (2004) 1.

⁴²⁶ C Botha *Statutory Interpretation: An introduction for students* (2010) chapter 5 14.

⁴²⁷ Kidd (note 399 above) 527.

⁴²⁸ Kidd (note 399 above) 527.

⁴²⁹ Kidd (note 399 above) 528.

⁴³⁰ Kidd (note 399 above) 528.

⁴³¹ See Kidd (note 399 above) 528, *PFE International; v International Development Corporation of South Africa Ltd* 2013 (1) SA 7 (CC) (4), and Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) 27.

⁴³² Kidd (note 399 above) 528.

locus standi clause where environmental rights are concerned.⁴³³ Thirdly, environmental rights play a role in influencing ‘government actions, including legislative and executive decisions and policies’.⁴³⁴ Such a role means that environmental rights influence the environment in a wider context. Fourthly, environmental rights operate as a guide to interpreting the common law and legislation using the interpretation principles in section 39.⁴³⁵ Courts have also commented on the significance of environmental rights in that they need to be considered with respect to the administrative processes of the state. In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*⁴³⁶, the Court stated the following:⁴³⁷

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.

The scope of protection imposed by environmental rights imposes both ‘negative’ and ‘positive’ obligations on the state. The negative obligation is imposed by section 24(a) which states that the ‘the state and others must refrain from behavior and actions that could detrimental to the environment, health or well-being of the people’.⁴³⁸ Du Plessis argues that the ‘state must prevent all public and private conduct that could negatively affect the interests protected in section 24’, ranging from issues of health, well-being and the sustainable development.⁴³⁹ The positive obligations imposed by the provisions of section 24(b) oblige the government, private individuals, and businesses to comply with the following:⁴⁴⁰

- The environment must be protected so that it does not pose harm to the health and well-being of all people;
- The environment must be protected to ensure that present and future generations of people can live a healthy life and experience well-being in that environment;

⁴³³ Kidd (note 399 above) 528.

⁴³⁴ Kidd (note 399 above) 528.

⁴³⁵ Kidd (note 399 above) 528 and section 4.3 on the principles for interpretation of the Bill of Rights.

⁴³⁶ 1999 (2) SA 709 (SCA).

⁴³⁷ See note 454 above paragraph 719C-D.

⁴³⁸ AA Du Plessis ‘South Africa's constitutional environmental right (generously) interpreted: what is in it for poverty?’ *SAJHR* (2011) 299.

⁴³⁹ Du Plessis AA (note 456 above) 299.

⁴⁴⁰ Du Plessis AA (note 456 above) 299.

- The protection of the environment must be executed through the adoption and development of reasonable legislation and other measures;
- The ‘reasonable legislation and other measures’ must follow the guidelines and objectives provided by section 24(b)(i)-(iii).⁴⁴¹

The obligation imposed by environmental rights on the state is to put laws and measures in place to secure a safe work environment that is conducive to the health and well-being of all concerned while promoting sustainable development. Extending the application of environmental rights to offer workplace protection in this manner depends on how environmental rights are interpreted. The following section discusses how the constitutional principles are used for interpreting the Bill of Rights.

4.3 CONSTITUTIONAL PRINCIPLES FOR INTERPRETING THE BILL OF RIGHTS

The Constitution itself provides three principles to follow when interpreting the Bill of Rights. These are contained in section 39 of the Constitution, which provides as follows:

(1) when interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;
- (b) must consider international law, and
- (c) may consider foreign law.

The relevance of these principles is discussed in the following sections as they provide guidelines for interpreting the Bill of Rights as well as support the notion of an expanded definition of the word ‘environment’. The following section discusses the first principle.

4.3.1 *Promoting the values that underlie an open and democratic society*

The foundational values underlying an open democratic society entrenched in the Constitution are human dignity, equality, and freedom.⁴⁴² Courts have highlighted the inter-relation between the rights contained the Bill of Rights and the values entrenched in the Constitution. In the *Government of the Republic of South Africa and Others v Grootboom and Others* (2000)⁴⁴³ the court stated the following:

⁴⁴¹ Section 24(b)(i)-(iii) provides guidelines to: prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

⁴⁴² Section 1 (a) of the South African Constitution of 1996 provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

⁴⁴³ (2000) 11 BCLR 1169 (23).

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom, and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people, therefore, enables them to enjoy the other rights enshrined in Chapter 2. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁴⁴⁴

Courts have also stated that human dignity often plays an interpretative role for other rights. The seminal case dealing with human dignity was *S v Makwanyane*.⁴⁴⁵ In this case, with reference to the Interim Constitution, the court stated that:⁴⁴⁶

The right to dignity is enshrined in our Constitution in section 10: ‘Every person shall have the right to respect for and protection of his or her dignity’. The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right, therefore, is the foundation of many of the other rights that are specifically entrenched in chapter 3 [now Chapter 2 of the Constitution].

Human dignity has been at the core of the major human rights instruments, beginning with the two international covenants on human rights, adopted in 1966, viz. the International Covenant on Civil and Political Rights⁴⁴⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁴⁴⁸ (ICECSR). These human rights instruments prohibit degrading treatment and discrimination of all kinds and hold human dignity in the highest regard.⁴⁴⁹ The right to an environment that is not harmful to health or well-being⁴⁵⁰ can be said to be derived from the right to dignity. For example, The Hague Declaration⁴⁵¹ expressly acknowledges ‘the right to live in dignity in a viable global environment’.⁴⁵²

⁴⁴⁴ See note 461 above paragraph 23.

⁴⁴⁵ 1995 (3) SA 391 (CC).

⁴⁴⁶ See note 463 above paragraph 328.

⁴⁴⁷ International Covenant on Civil and Political Rights (1966).

⁴⁴⁸ International Covenant on Civil and Political Rights (1966).

⁴⁴⁹ See also the United Nations Declaration of Human Rights 1948 provides in its preamble that ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...’ African Charter on Human and Peoples’ Rights in its preamble states that ‘Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;...’

⁴⁵⁰ Section 24 (a) of the South African Constitution of 1996.

⁴⁵¹ Hague Declaration on the Environment (1989).

⁴⁵² Hague Declaration on the Environment (note 463 above) 1309.

Similarly, the Stockholm Declaration grants citizens the ‘fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’.⁴⁵³ Belgium’s constitution expressly entwines environmental and dignity rights constitutionally: ‘Everyone has the right to lead a life worthy of human dignity ... (including) the right to enjoy the protection of a healthy environment’.⁴⁵⁴ The courts in South Africa have derived the right to marriage and family life from the right to dignity and given it a supporting interpretative role for other rights.⁴⁵⁵ In *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products & others*⁴⁵⁶, the court declared that the right infringed was not only environmental rights but also the right to dignity. The court stated that ‘One should not be obliged to work in an environment of stench and, in my view, to be in an environment contaminated by H₂S is averse to one’s ‘well-being’ ...’⁴⁵⁷

There is a close link between dignity and equality. Lee points out that case law shows a judicial trend which merges dignity and equality as the pointer of identifying unequal treatment.⁴⁵⁸ Professor Hiroshi argues that the central idea of human dignity should be sought in the equal quality of every individual.⁴⁵⁹ Professor Hiroshi’s argument places human dignity as a core value with equality and freedom as supporting values.⁴⁶⁰ The link between these three values is undeniable, and neither one can exist without the other, and all three are the basis of many other rights. The court in *Ferreira v Levin*⁴⁶¹ stated the following:⁴⁶²

Human dignity cannot be fully valued or respected unless individuals can develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally... [without footnotes]

In conclusion, these values provide an interpretative imperative which forms the basis for establishing a lawful order for a society which looks for a well-balanced allocation of power among relevant groups.

⁴⁵³ United Nations *Environment Programme, Declaration of the United Nations Conference on the Human Environment* (1972).

⁴⁵⁴ Belgium Constitution., Title II, Article 23(4).

⁴⁵⁵ See *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) at 1043.

⁴⁵⁶ 2004 (2) SA 393 (E).

⁴⁵⁷ 2004 (2) SA 393 (E).

⁴⁵⁸ M Lee *Equality Dignity and Same Sex Marriage: A Right Disagreement in Democratic Societies* (2010) 3-8.

⁴⁵⁹ N Hiroshi ‘The significance of constitutional values’ *Potchefstroom Electronic Law Journal* (2001) 7.

⁴⁶⁰ Hiroshi (note 477 above) 2 – 9.

⁴⁶¹ 1996 (1) SA 984 (CC).

⁴⁶² See *Ferreira v Levin* 1996 (1) SA 984 (CC), paragraph 49.

The following section discusses the second principle, the need for the courts to consider international law.

4.3.2 Regard to international law

In the interpretation of the Bill of Rights, the Constitution provides a directive that courts, tribunals, and forums must promote the values of a democratic society and do so with due regard to international law.⁴⁶³ Dugard points out that treaties and customary international law are principal sources of international law, both of which are founded on the consent of the member states.⁴⁶⁴ The African Charter on Human and Peoples' Rights⁴⁶⁵ enumerates the traditional list of civil and political rights,⁴⁶⁶ and includes economic, social and cultural rights⁴⁶⁷ and was the first to include a right to healthy environment⁴⁶⁸. Article 24 of the African Charter Human and Peoples' Rights states that 'All peoples shall have the right to a satisfactory general environment favourable to their development'.

The International Labour Organization (ILO)⁴⁶⁹ and the World Health Organization (WHO)⁴⁷⁰ have established rules, regulations, standards, and procedures to safeguard human health in the workplace environment.⁴⁷¹ The WHO defines health as a 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.⁴⁷² Environmental health is defined as 'those aspects of human health, including quality of life, that are determined by physical, chemical, biological, social, and psychosocial factors in the environment'.⁴⁷³ The strength of international law in interpreting the Bill of Rights is further provided by section 233 of the Constitution which provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is not consistent with international law over any alternative interpretation that is inconsistent with international law.

⁴⁶³ Section 39(1)(b) of the Constitution.

⁴⁶⁴ J Dugard & G Abraham 'Public International Law' *Annual Survey of South African Law* (2002) 166.

⁴⁶⁵ African Charter on Human and Peoples' Rights (1981).

⁴⁶⁶ African Charter on Human and Peoples' Rights (1981) article 3 - article 29.

⁴⁶⁷ African Charter on Human and Peoples' Rights (1981) article 3 - article 29.

⁴⁶⁸ African Charter on Human and Peoples' Rights (1981) article 24.

⁴⁶⁹ The ILO was created in 1919, primarily for adopting international standards to cope with the problem of labour conditions involving 'injustice, hardship and privation'. With the incorporation of the Declaration of Philadelphia into its Constitution in 1944, the Organization's standard setting mandate was broadened to include more general, but related, social policy, human and civil rights matters. International labour standards are essentially expressions of international tripartite agreement on these matters.

⁴⁷⁰ The WHO was established in 1948, as the UN's specialized agency for health. The WHO's objective is the 'attainment by all peoples of the highest possible level of health'.

⁴⁷¹ NA Robinson & L Kurukulasuriya *Training Manual on International Environmental Law* (2006) 2 – 8.

⁴⁷² See the Constitution of the WHO (2006) under principles section on page 1.

⁴⁷³ WHO *Global strategy for Health and Environment* (1993) 23.

Lund and Marriott point out that the ILO has in recent years developed a new and inclusive orientation towards people working in the informal economy.⁴⁷⁴ Under the banner ‘Decent Work for All’, the ILO has raised the need to accommodate new and changing forms of employment arrangements in the concept and measurement of work and the work environment, as many of the ILO conventions apply to the informal economy. Lund and Marriott further point out that the WHO has established task forces that are developing a more distinct approach to the application of occupational health and safety in different settings which include small-scale enterprises and the informal economy.⁴⁷⁵

In 2015 the ILO affirmed that the ‘transition from the informal to the formal economy is essential to achieve inclusive development and to realize decent work for all’ by adopting ‘Recommendation 204 - Transition from the Informal to the Formal Economy Recommendation’,⁴⁷⁶ (hereafter referred to as Recommendation 204). The ILO recognizes that the:⁴⁷⁷

...high incidence of the informal economy in all its aspects is a major challenge for the rights of workers, including the fundamental principles and rights at work, and for social protection, decent working conditions, inclusive development and the rule of law, and has a negative impact on the development of sustainable enterprises, public revenues and governments’ scope of action, particularly with regard to economic, social and environmental policies, the soundness of institutions and fair competition in national and international markets...

Section 1 of the Recommendation 204 recommends that the Member States:

- (a) facilitate the transition of workers and economic units from the informal to the formal economy, while respecting workers’ fundamental rights and ensuring opportunities for income security, livelihoods, and entrepreneurship;
- (b) promote the creation, preservation, and sustainability of enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, social protection and other social policies; and
- (c) prevent the informalization of formal economy jobs.

Recommendation 204 further recommends that the Members States should ‘undertake a proper assessment and diagnosis of factors, characteristics, causes and circumstances of informality in the national context to inform the design and implementation of laws and regulations, policies and other measures aiming to facilitate the transition to the formal economy’.⁴⁷⁸ Section 9 of Recommendation

⁴⁷⁴ Lund and Marriot (note 1 above) 10 – 12.

⁴⁷⁵ Lund and Marriot (note 1 above) 10 – 12.

⁴⁷⁶ ILO Recommendation 204 *Transition from the Informal to the Formal Economy Recommendation* (2015).

⁴⁷⁷ ILO Recommendation 204 (note 492 above) section 3.

⁴⁷⁸ ILO Recommendation 204 (note 492 above) section 8.

204 states that the Member States 'should adopt, review and enforce national laws and regulations or other measures to ensure appropriate coverage and protection of all categories of workers and economic units'. Section 10 goes on to recommend that the Member States should ensure that an integrated policy framework, to enable the transition of the informal economy to the formal economy is included in national development strategies or plans and in poverty reduction strategies and budgets, considering, where appropriate, the role of different levels of government.

To date, South Africa has ratified the following 27 ILO conventions:⁴⁷⁹

- Fundamental Conventions: 8 of 8;
- Governance Conventions (Priority): 2 of 4; and
- Technical Conventions: 17 of 177.

Out of the 27 Conventions ratified by South Africa, of which 24 are in force, 2 instruments have been abrogated and no new conventions have been ratified in the past 12 months.⁴⁸⁰

The labour conventions ratified have resulted in the development of labour laws that have protected workers for many decades. For example, the South African Basic Conditions of Employment Act⁴⁸¹ (BCEA) states in section 2 that the purpose of the Act is to 'advance economic development and social justice by fulfilling the primary objects of this Act'. The objectives of the Act are contained in section 2(b) as 'to give effect to obligations incurred by the Republic as a member state of the International Labour Organization'. Labour rights are often presented as an important part of human rights and at times as a normative system with their roots in the concept of human dignity.⁴⁸² The ILO and other actors characteristically frame the ILO conventions as normative models that all legitimate governments should adopt or at least strive to adopt.⁴⁸³ Therefore, the ratification of ILO conventions is an action that confirms a state's membership in a community of states committed to advancing a concept of social justice.⁴⁸⁴

The Draft Principles on Human Rights and The Environment⁴⁸⁵ developed by the United Nations in 1994 reaffirms 'the universality, indivisibility, and interdependence of all human rights'.⁴⁸⁶ The

⁴⁷⁹ ILO 'Ratifications for South Africa' online article available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888.

⁴⁸⁰ ILO (note 495 above).

⁴⁸¹ No. 75 of 1997

⁴⁸² L Baccini & M Koenig-Archibugi, 'Why do states commit to international labour standards? The importance of rivalry and friendship' *World Politics* (2014) 17.

⁴⁸³ Baccini (note 500 above) 17.

⁴⁸⁴ Baccini (note 500 above) 17.

⁴⁸⁵ E/CN.4/Sub.2/1994/9, Annex I (1994).

⁴⁸⁶ Draft Principles on Human Rights and The Environment Part I (2).

principles listed include the principle that ‘All persons have the right to a safe and healthy working environment’.⁴⁸⁷ The relationship between the environments rights and other rights is discussed in more detail in section 4.4 below, and the following section discusses the third principle of considering the foreign law.

4.3.3 Considering the foreign law

The consideration of foreign law is discretionary for South African courts, tribunals, and forums.⁴⁸⁸ Courts have commented on the meaning of ‘may’ in section 39 (1) (c) of the Constitution in considering the foreign law. Botha argues that before the 1994 Interim Constitution, the South African courts were reluctant to consider foreign law and they restricted their examination to English case law dealing with issues which could be of English law origin - e.g., company law.⁴⁸⁹ Their approach regarding international law was slightly more flexible but subjected it to numerous exceptions and qualifications.⁴⁹⁰

The Colombian case of *Nohra Padilla Herrera vs. Unidad Administrativa Especial de Servicios Públicos*⁴⁹¹ (UAESP) is particularly relevant to this thesis because it involves the recognition of waste pickers rights to access work. The court suspended a directive⁴⁹² that allowed franchises for waste picking and other services to only selected groups of formal enterprises which excluded many informal waste pickers in the city of Bogota. The court held that it had suspended the directive,

to prevent a possible infringement of the fundamental rights of this population as well as the environmental interests of the citizens of Bogota; including the right to a healthy environment and public health and as well as overlooking the orders passed by the undersigned authority.⁴⁹³

Botha argues that although human rights are embodied in the constitution of a country which in strict terms constitutes municipal law, the days of regarding such rights as a purely domestic concern are well

⁴⁸⁷ Draft Principles on Human Rights and The Environment principle 9.

⁴⁸⁸ N Botha ‘International Law and the South African Interim Constitution’ *SA Public Law* (1994) 245 -246.

⁴⁸⁹ Botha N (note 506 above) 245 -246.

⁴⁹⁰ Botha N (note 506 above) 245 -246.

⁴⁹¹ *Nohra Padilla Herrera vs. Unidad Administrativa Especial de Servicios Públicos* (UAESP) Proceedings 183 of 2011 CC. In this case the informal waste pickers in Bogota challenged the Public Bidding No. 001 of 2011 which provided for the... ‘franchise under the modality of Exclusive Service Areas the provision of Household Cleansing Public Service in the City of Bogota, Capital District Colombia, relative to collection, sweeping, cleaning roads and public areas, grass mowing, tree pruning in public areas and removal of waste to the final disposal site, and all the actions involved by the above, including all financial, business, technical, operational, educational, and management activities this involves’. Translated judgement available at <http://wiego.org/sites/wiego.org/files/resources/files/Sept%205%20%20resolucion%20de%20la%20corte%20de%20auto%20183%20de%202011%20%20EN.pdf> accessed on the 28 May 2015.

⁴⁹² Public Bidding No. 001 of 2011.

⁴⁹³ UAESP (note 509 above).

and truly past.⁴⁹⁴ What begins as constitutional rights in one country, may expand to constitutional rights in many countries, and eventually mutate into a universal concept and a staple of international law. The right to a healthy and safe environment is already entrenched in the South African Constitution.⁴⁹⁵ However, its application has not been extended in a way that offers protection to some of the most vulnerable workers in the country. The application of environmental rights has been extended to waste pickers in Columbia by allowing waste pickers in the city of Bogota to be included in the franchise of waste picking and other services, thus improving the work environment for these workers.

Other countries like Peru have recognized the important role of waste pickers in urban waste management systems through its municipal ordinances and laws. An ordinance adopted by the Municipal Council of Los Olivos in June 2016⁴⁹⁶ states that:

...under this framework, Law No. 29419, ... regulates the activity of waste pickers, establishes the regulatory framework for regulating the activities of recycling workers, aimed at protecting, training and promoting social and labour development, promoting their formalization, association and contributing to the improvement in the ecologically efficient management of solid waste in the country; within the framework of the objectives and principles of Law No. 27314 and Solid Waste Law No. 28611 known as General Law of the Environment...⁴⁹⁷

The developments in Colombia and Peru can assist in developing the gradual recognition of waste pickers as workers, whereby their activities are defined to be legal and are authorized.⁴⁹⁸ Because of this recognition, the waste pickers in Peru have access to labour groups and social security through the Universal Access to Health Insurance and disease prevention programmes such as vaccinations.⁴⁹⁹ The inclusion of waste pickers in municipal waste management systems improves their work conditions and creates a decent work environment as envisioned by the ILO.

⁴⁹⁴ Botha (note 506 above) 245.

⁴⁹⁵ Section 24 of the Constitution.

⁴⁹⁶ Municipal No. 439-CDLO.

⁴⁹⁷ Beveridge & Diamond 'Peru Adopts Implementing Regulation to Law of Recyclers' online article available on <http://www.bdlaw.com/news-978.html>.

⁴⁹⁸ PDR Parra 'Labour and Conditions of men and women in the Informal Economy – Analysis and situation of our groups of workers' available online at <http://www.wiego.org/sites/wiego.org/files/reports/files/Peru%20Final%20Report.pdf> (2012) 104.

⁴⁹⁹ Parra (note 516 above) 104.

4.4 OTHER RIGHTS RELATED TO THE ENVIRONMENTAL RIGHTS CONTAINED IN SECTION 24 OF THE CONSTITUTION

4.4.1 Interdependency of human rights

The principle that human rights are interdependent has been recognized and endorsed in various international human rights instruments.⁵⁰⁰ The UN Draft Principles on Human Rights and The Environment⁵⁰¹ document mentions that:

All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.⁵⁰²

Human rights are categorized into three categories: first-generation rights, which include civil and political rights; second-generation rights, which include socio-economic rights; third-generation rights that apply to environmental and cultural rights.⁵⁰³

It has been argued that the interdependency of rights operates in two contexts.⁵⁰⁴ Feris mentions the first one to be the ‘an organic sense where one right forms part of another right’.⁵⁰⁵ The one right is a core right, and other is a derivative right that is incorporated into the core right.⁵⁰⁶ This kind of interdependency was highlighted in *S v Makwanyane*⁵⁰⁷ where Justice O’Regan stated:⁵⁰⁸

The right to life, thus understood, incorporates the right to dignity. So, the rights to human dignity and life are entwined. The right to life is more than existence - it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

The second context for the interdependence of rights is that which Feris refers to ‘related rights or related interdependence’.⁵⁰⁹ The rights in this context are ‘equally dependent but distinct’.⁵¹⁰ The related

⁵⁰⁰ Feris (note 418 above) 45.

⁵⁰¹ See note 501 above.

⁵⁰² UN Draft Principles on Human Rights and The Environment principle 2.

⁵⁰³ Feris (note 418 above) 45-46.

⁵⁰⁴ See Feris (note 418 above) 46 and C Scott ‘The Interdependence and Permeability of Human Right Norms: Towards a Partial Fusion of the International Covenants on Human Rights’ *Osgoode Hall LJ* (1989) 769.

⁵⁰⁵ Feris (note 418 above) 46.

⁵⁰⁶ Feris (note 418 above) 46.

⁵⁰⁷ 1995 (3) SA 391 (CC).

⁵⁰⁸ Feris (note 418 above) 46 and *Ibid* (523).

⁵⁰⁹ Feris (note 418 above) 46.

⁵¹⁰ Feris (note 418 above) 46.

interdependence of rights was recognized in *Khumalo v Holomisa*⁵¹¹ where O' Regan J stated the following:⁵¹²

It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognizes that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas*, and privacy in giving effect to the value of human dignity in our Constitution.

Kidd argues that the term 'well-being' in the context of the environment mentioned in section 24, integrates several dimensions that are addressed by other rights in the Bill of Rights.⁵¹³ These rights include the right to have access to healthcare, food, and water; the right to education; the right not to be subjected to slavery, servitude or forced labour; and the right to have access to housing.⁵¹⁴ All these rights are also related to the right to equality and dignity. The argument raised by Kidd supports the idea by Feris that one right can form part of another. The example used by Kidd is that of access to water which is aimed at addressing people's needs for basic water to drink, to prepare food, washing and general sanitation.⁵¹⁵ Therefore, when people access to water that is polluted, and that is not suitable for drinking and or food preparation, there is a clear connection between the environmental rights in section 24 and the right of access to water contained in section 27.⁵¹⁶

Kidd further argues that the concept of the 'environment' and 'well-being' not only relate to the natural environment, but their scope could be wider.⁵¹⁷ The environmental harm that threatens health and well-being caused by for example – high levels of crime (more than national or local norms) can be said to infringe the environmental rights contained in section 24. However, in this scenario, the individuals or community threatened by high levels of crime could at first instance rely on the right contained in section 12, which is a right to freedom and security of the person. The above example highlights that even though there are interconnections of rights, it will be irregular to exercise exclusive application on a right that offers limited protection.⁵¹⁸

⁵¹¹ 2002 (5) SA 401 (CC).

⁵¹² 2002 (5) SA 401 (CC (27)).

⁵¹³ Kidd (note 399 above) 525.

⁵¹⁴ Kidd (note 399 above) 525.

⁵¹⁵ Kidd (note 399 above) 526.

⁵¹⁶ See Kidd (note 399 above) 526 and Du Plessis AA (note 456 above) 292 -293.

⁵¹⁷ Kidd (note 399 above) 526.

⁵¹⁸ See Kidd (note 399 above) 526 and S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 142.

Courts have been seen to apply the interconnection of rights principle in cases, such as in the *Dawood v Minister of Affairs*⁵¹⁹ where a right to marriage and family life was derived from the right to dignity.⁵²⁰ Also in case, *South African Informal Traders Forum and Others v City of Johannesburg and Others*⁵²¹ the right to trade was derived from the right to dignity. In this case, the court said that the ‘dignity of the traders and their children and had a direct and on-going adverse effect on their rights to basic nutrition, shelter and basic health care services’.⁵²² Kidd suggests that ‘where the detrimental impact of an environment is not covered by another right that is more appropriate to apply in the circumstances, section 24 may be used to ‘fill the gaps’.⁵²³ This use of section 24 as a ‘gap filler’ applies, not only in cases where the harm is done to the natural environment but also where harm is done more widely’.⁵²⁴ In this thesis, it is submitted that where the work environment of waste pickers is not protected by legislation and other measures, section 24 may be relied on to offer protection.

Section 38 provides the list of persons that may approach the court to enforce rights in the Constitution that have been abused. The following section discusses the ‘*locus standi*’ clause as provided for by section 38 and its role in enforcing the rights contained in section 24.

4.4.2 Enforcement of environmental rights through the *locus standi* clause

Section 38 of the Constitution provides for a broad approach to *locus standi* clause as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association is acting in the interest of its members.

⁵¹⁹ 2000 (3) SA 936 (CC).

⁵²⁰ Kidd (note 399 above) 526 and Liebenberg (note 536 above) 142.

⁵²¹ 2014 (8) SA 173 (CC).

⁵²² See (note 539 above) at para 31.

⁵²³ Kidd (note 399 above) 526.

⁵²⁴ Kidd (note 399 above) 526.

Currie and De Waal argue that when a right in the Bill of Rights has been infringed or threatened, those affected may rely directly on section 38 to obtain standing.⁵²⁵ They further say that in cases where the right in Bill of Rights is infringed, the common law standing, and other legislative standing are irrelevant.⁵²⁶ However, Kidd has a different view on this and states that it is unlikely that the section 38 standing clause will be used in conjunction with section 24. This is because NEMA has included a similar standing clause and that it would be appropriate to use it for standing in cases involving the environment and rights contained in section 24.⁵²⁷ The standing clause in NEMA is provided for in section 32(1) and states the following:

Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act. including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources—

- (a) in that person's or group of persons own interest;
- (b) in the interest of, or on behalf of, a person who is for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.

This section explicitly narrows standing for 'any other statutory provision concerned with the protection of the environment or the use of natural resources' to those people listed in its section.⁵²⁸ The definition of the 'environment' must be broader to extend its application to the work environment as well. Therefore, a clause which provides more extensive standing is more appropriate and hence the reliance on section 38 for standing must be considered when dealing with issues pertaining to the work environment.

⁵²⁵ Currie and De Waal (note 360 above) 74.

⁵²⁶ Currie and De Waal (note 360 above) 74.

⁵²⁷ Kidd (note 399 above) 527.

⁵²⁸ Kidd (note 399 above) 527.

4.5 INTERNATIONAL CASE STUDIES RELATED TO THE PROTECTION OF WASTE PICKERS' RIGHTS AND WORK ENVIRONMENT

Besides the countries mentioned in paragraph 4.3.3 above, there are other countries and cities that have developed and adopted laws, inclusive policies and other measures aimed at protecting and improving the well-being of waste pickers. This section discusses case studies from two countries that serve as examples of positive laws, policies, and programmes relating to the protection and promotion of the work and well-being of waste pickers.

4.5.1 *The enabling legal and policy framework for waste pickers in India*

India is known for its progressive laws, policies, and programmes that protect and promote waste pickers across cities.⁵²⁹ India's 2001 Census reported that there were about 593 districts and approximately 5 000 towns in India.⁵³⁰ About 27.8 per cent of India's total population of more than 1 billion people live in urban areas.⁵³¹ Indian cities have increased the quantity of solid waste generated annually from six million tons in 1947 to 48 million tons in 1997 with an annual growth rate of 4.25 per cent.⁵³² India has acknowledged that a large number of its workforce is in the informal economy. The *Second National Labour Commission Report*⁵³³ (the Commission) acknowledged that 'workers in the informal economy do not get social security and other benefits for various reasons and there is hardly any trade union or institutional mechanism to fight for them'.⁵³⁴ The Commission made several recommendations in order to extend social and legal protection to informal workers. The Commission recommended, amongst other things, that the social security measures for informal workers should include the following:

...healthcare, maternity and early child care, provident fund benefits, family benefits, amenities benefits including housing, drinking water, sanitation, compensation or employment injury, retirement and post-retirement benefits, cover in cases of loss of earning or the capacity to earn schemes, either independent or in association with the Government, Welfare Bodies, NGOs and Social Organizations.⁵³⁵

⁵²⁹ R Agarwa, M Chaudhary and J Singh 'Waste Management Initiatives in India for human well-being' *European Scientific Journal* (2015) 111-120.

⁵³⁰ Agarwa (note 529 above) 106.

⁵³¹ Agarwa (note 529 above) 106.

⁵³² Agarwa (note 529 above) 106.

⁵³³ India's *Second National Labour Commission (NCL)* was set up on 15 October 1999. The *Commission* was tasked amongst others with proposing an Umbrella Legislation for workers in the informal economy to ensure at least a minimum protection and welfare to the workers in this sector.

⁵³⁴ *Second National Labour Commission (NCL) Report* (note 547 above) Chapter VII paragraph 7.23 55.

⁵³⁵ *Second National Labour Commission (NCL) Report* (note 547 above) Chapter VII paragraph 7.448 77.

The Commission recognized the useful role waste pickers play in helping recycling activities and in maintaining civic hygiene. The Commission made the following recommendation:⁵³⁶

...waste pickers should be protected from the insecurity of various forms by measures like providing identity cards, receipts for the transaction, minimum wages if employed, health facilities, the creation of welfare funds and prohibition of child labour. The municipal bodies to make appropriate regulations and arrangements.

India has since introduced the Unorganized Sector Social Security Act⁵³⁷ which allows for the introduction of sector-based social security schemes for informal workers. Sections 3(1)(a)–(d) list the social security schemes that the government is required to establish for informal workers as follows:

- (a) Life and disability cover;
- (b) Health and maternity benefits;
- (c) Old age protection;
- (d) Any other benefit as may be determined by the Central Government.

There are several other laws, rules, and guidelines that have been developed to improve the work conditions of waste pickers in India (see Table 7). The following section discusses the Indian law which the waste pickers have used to improve their work conditions.

4.5.1.1. The Maharashtra Non-biodegradable Garbage (Control) Act⁵³⁸

The aim of the Maharashtra Non-biodegradable Garbage (Control) Act⁵³⁹ is to prevent the throwing or depositing of recyclable (non-biodegradable) waste. Section 6(iii) of the Act requires that recyclable and non-recyclable (biodegradable) waste is separated at source. The Act also requires that local authorities provide separate containers for recyclable and non-recyclable waste into which residents and businesses must deposit the waste they produce.⁵⁴⁰ These containers are placed in designated areas to improve waste collection system.⁵⁴¹ It is the duty of local authorities to collect waste from these designated areas. However, the door-to-door (primary) collection of waste is not mandated by the Act. The Act also allows for the engagement of any agency to carry out the waste collection.⁵⁴² After recognizing a gap in the law, waste pickers in Pune organized themselves into a union of informal self-

⁵³⁶ *Second National Labour Commission (NCL) Report* (note 547 above) Chapter VII paragraph 7.135 60.

⁵³⁷ No. 33 of 2008.

⁵³⁸ Maharashtra Non-biodegradable Garbage (Control) Act No. X of 2006.

⁵³⁹ See note 538 above.

⁵⁴⁰ Maharashtra Non-biodegradable Garbage Act (Control) sections 5(a) – (d).

⁵⁴¹ Maharashtra Non-biodegradable Garbage Act (Control) sections 5(a) – (d).

⁵⁴² Maharashtra Non-biodegradable Garbage Act (Control) sections 5(a) – (d).

Table 7. The enabling legal and policy framework for waste pickers in India

<ul style="list-style-type: none"> • The Report of the High-Power Committee on Solid Waste Management in India constituted by the Planning Commission in 1995 calls for integration of waste pickers; formation of cooperatives for door to door collection of waste; waste segregation; ward level recovery centres; incentives for recycling units; composting and other waste treatments; disposal tax on waste creating products and user fees for waste collection. • Report of the Expert Group on solid waste management constituted by the Hon. Supreme Court in 1998 documents the role of waste pickers and echoes many of the recommendations of the 1995 committee. • Maharashtra Government Resolution, Department of Water Supply and Sanitation 1999 suggests photo-identity cards for waste pickers. • Municipal waste (management and handling) Rules, 2000, require urban local bodies to organize for door-to-door collection of waste; promote waste segregation and divert waste away from landfills into processing and recycling. 	<ul style="list-style-type: none"> • Maharashtra Government Resolution, Department of Water Supply and Sanitation 2002 addresses the allocation of work of door to door collection of waste from households, offices and establishments to cooperatives, NGOs and other organizations of waste pickers. • Maharashtra Government Resolution 2006, Urban Development Department on action plan for implementation of MSW Rules, 2000 specifying 2007 as the deadline for 100% door to door collection; preference given to cooperative organization of waste picker women's groups; user fee for door to door collection. • Government of India Urban Development Department guidelines, 2010, address integrating waste pickers; ensure rights to access and sell scrap; provide non-biodegradable waste collection centres.
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Source: Chikarmane (2012)

employed waste pickers called Kagad Kach Patra Kashtakari Panchayat (KKPKP).⁵⁴³ They negotiated with the Pune municipality to allow a waste collection model whereby waste pickers offered a door-to-door waste collection service to individual households and businesses.⁵⁴⁴ Waste generators pay waste pickers directly for the service, and the primary collection service allows waste pickers direct access to segregated waste. By collecting waste from primary sources meant that the waste pickers' place of work is at the waste generation source (household doorstep or business premises) which is safe and less harmful to health and well-being. Waste pickers in Pune have since been integrated into the city's waste management programme, and the model has been adopted by other cities in India.⁵⁴⁵

⁵⁴³ Kagad Kach Patra Kashtakari Panchayat (KKPKP) was formed in 1993. KKPKP advocated for waste pickers, itinerant waste buyers and waste collectors to be recognized as workers.

⁵⁴⁴ P Chikarmane 'Integrating Waste Pickers into Municipal Solid Waste Management in Pune, India' in *WIEGO Policy Brief* (2012) 4.

⁵⁴⁵ Chikarmane (note 562 above) 7.

4.5.2 Integrating waste pickers into solid-waste systems in Brazil

Brazil is known as one of the most progressive countries globally in its inclusive policies regarding waste pickers. In 2002, waste picking was listed as an occupation in the Brazilian Classification of Occupations (CBO 2002). As a result, waste pickers were officially recognized as workers. The CBO 2002 lists waste pickers in category 5192, and it defines waste pickers as ‘those who pick, select and sell recyclable material such as paper, cardboard, glass, ferrous and non-ferrous and other reusable materials, whether working on their own or organized in associations or cooperatives as employees’.⁵⁴⁶ It is estimated that there are between 200 000 to 800 000 waste pickers in Brazil contributing to a thriving recycling trade in the country.⁵⁴⁷ As a result of this listing waste pickers have been included under the waste picker category in all relevant data collection, for example, the National Research by Household Sample (PNAD4)⁵⁴⁸ and Annual Listing of Social Information (RAIS5)⁵⁴⁹ which provide data on their socio-economic status.⁵⁵⁰

In Brazil, solid waste management is the function under the authority of the municipalities, and the federal government is responsible for developing environmental guidelines for all states.⁵⁵¹ Some municipalities in Brazil have developed laws that integrate waste pickers into their waste management systems thereby supporting and promoting their work. Laws that have integrated and supported waste pickers in Brazil are discussed below.

At municipal level:

- (i) Belo Horizonte 1990 Organic Law (the municipal Constitution) article 151, clause VII: This law states that ‘the collection and sale of recyclables would preferably be done through the work of cooperatives (which included those belonging to waste pickers)’.⁵⁵²
- (ii) Porto Alegre 1990 Law Nº 234: This law was passed ‘to institute the Urban Cleansing Code. Article 14. Section 1 of the code states that formally organized waste picker groups

⁵⁴⁶ SM Diaz ‘Statistics on Waste Pickers in Brazil’ in *WIEGO Statistical Brief* No. 2 (2011) 1.

⁵⁴⁷ Globalrec ‘Law Report: Brazil Waste Pickers in Brazil’ online report available on <http://globalrec.org/law-report/brazil/> (2007).

⁵⁴⁸ National Research by Household Sample (PNAD4) is the main source of social and economic data in the Brazil.

⁵⁴⁹ Annual Listing of Social Information (RAIS5) provides data on commercial establishments, including those that employ waste pickers.

⁵⁵⁰ Diaz (note 564 above) 1.

⁵⁵¹ Federal Constitution of the Republic of Brazil. 1988. Art. 30, clause V. It is the municipality’s responsibility to organize and render, directly or under concession or permission, the public services of local interest, including public transportation, which is essential.

⁵⁵² SM Diaz ‘Overview of the Legal Framework for Social Inclusion in Solid Waste Management in Brazil’ Globalrec online article available at <http://globalrec.org/wp-content/uploads/2014/03/OVERVIEW-OF-THE-LEGAL-FRAMEWORK-FOR-SOCIAL-INCLUSION-.pdf> (2007) 1.

that are registered with the Urban Cleansing Department will be the preferred destination for recyclables collected via its municipal recycling scheme'.⁵⁵³

- (iii) Diadema 2000 Law N° 1921/00: This law 'names several organizations, including waste picker organizations, as potential partners in municipal recycling programs and as recipients of any revenue generated'.⁵⁵⁴
- (iv) Diadema 2000 Law N° 1928/00: This law was 'passed authorizing the municipal executive power to enter covenants with waste picker cooperatives'.⁵⁵⁵
- (v) Diadema Law 2004 N° 2.336/04: This law is 'regulated by Decree N° 5.984/05⁵⁵⁶, and it granted the municipality the ability to contract with waste picker cooperatives, allowing for remuneration for services rendered as part of the municipal recycling scheme'.⁵⁵⁷

At a state level (Federal Government):

- (i) Minas Gerais State 2001 COPAM5 Resolution N° 52: This resolution 'determined a six-month deadline for the municipalities of Minas Gerais State to upgrade final destinations of waste materials, and to forbid waste pickers access to dumps'.⁵⁵⁸
- (ii) Minas Gerais State 2003 COPAM5 Resolution N° 67: This resolution was passed 'to postpone the Resolution N° 52 deadline while proposing to provide labour and income alternatives for the barred waste pickers. In December 2008 the Law N° 18031/2008 that institutes the Minas Gerais State Solid Waste Policy was approved and was sanctioned in January 2009'.⁵⁵⁹
- (iii) Federal District of Brasília (DF) 2004 Law N° 3517/04: This law 'recognized organized waste pickers as the beneficiaries of the material generated in state buildings'.⁵⁶⁰
- (iv) Federal District of Brasília (DF) 2006 Law N° 3890: This law determined 'the implementation of selective collection in all the administrative regions of DF and,

⁵⁵³ Diaz SM (note 570 above) 2.

⁵⁵⁴ Diaz SM (note 570 above) 2-3.

⁵⁵⁵ Diaz (note 564 above) 2-3.

⁵⁵⁶ This decree defines the types of organization (cooperatives and associations of waste pickers) that can register to receive recyclables from federal administration entities and gives instructions on requirements a copy is available online at <http://www.planalto.gov.br/>.

⁵⁵⁷ Diaz (note 564 above) 2-3.

⁵⁵⁸ Diaz (note 564 above) 2-3.

⁵⁵⁹ Diaz (note 564 above) 2-3.

⁵⁶⁰ Diaz (note 564 above) 2-3.

following Law N° 3517/04, also identified waste picker cooperatives as the destination for collected materials'.⁵⁶¹

- (v) 2007 Law N° 11.445/07: This law was passed to 'establish the national guidelines for basic sanitation. Article 57 of this Law makes bidding unnecessary for the hiring of membership-based organizations (MBOs) of waste pickers. This means that waste picker associations and cooperatives can be hired directly by municipalities to perform selective waste collection'.⁵⁶²
- (vi) 2010 National Solid Waste Policy: This policy advocates for 'the reverse logistics system, which makes the generator of waste responsible for the return of recyclables to the productive chain after consumption, which, in turn, increases the volume of activity for the waste picker'.⁵⁶³

Work to organize waste pickers in Brazil has been going on for many years. Waste pickers in Brazil have successfully used various public protest activities like demonstrations, marches, and sit-ins together with strategic activism and advocacy in efforts to fight for improving their conditions of work.⁵⁶⁴ This has resulted in inclusive laws and policies that we see today, which have improved their environment.

4.5.3 Organizing for an inclusive waste model for waste recycling in Columbia

Columbia has over the years transformed its regulatory framework to include waste pickers in solid waste management system throughout the country. However, these changes have been a result of the ongoing struggle by organizations representing waste pickers and they have been working to fight for waste pickers' rights for at least two decades.⁵⁶⁵ The Bogota Waste Pickers Association (ARB, Asociación Cooperativa de Recicladores de Bogotá) has a vast experience in organizing waste pickers in Bogota, a capital city of Columbia, and they have had fought several legal battles for the recognition of waste pickers. The experience of ARB is one example of how organizations representing waste pickers can successfully lead campaigns to bring about the necessary changes required by waste pickers' in order to protect and support their work.

⁵⁶¹ Diaz (note 564 above) 2-3.

⁵⁶² Diaz (note 564 above) 3-4.

⁵⁶³ Diaz (note 564 above) 3-4.

⁵⁶⁴ Diaz (note 564 above) 1.

⁵⁶⁵ O Abizaid 'ARB: Fighting for an Inclusive Model for Recycling in Bogotá' WIEGO online article available at <http://www.wiego.org/sites/default/files/resources/files/Abizaid-Bogota-Wastepicker-Recycling-Case-Study.pdf> (2015) 1.

Historically waste management in Colombia has been regarded as a health concern, as a result, many landfill spaces have been closed with no consideration for waste pickers working in these sites.⁵⁶⁶ The legal framework dealing with waste at the national and municipal level has been designed to favour waste disposal rather than the recovery, the reduction and the reuse of waste. In line with this approach, Colombia has had laws like the 1994's Law 142 which stipulate that only registered companies can provide household public services in cities with populations of more than 8,000 inhabitants.⁵⁶⁷ Also, the 2012 National Decree 1713 stated that waste material disposed of in public streets was the property of the government, and collection contracts were only awarded to registered companies.⁵⁶⁸ National Law 1259 made it illegal to sort waste materials deposited in containers in public spaces, to transport waste in vehicles that are not designed for waste transportation, to commercialize waste in conditions that were not appropriate for that purpose.⁵⁶⁹ These three laws are examples of how waste pickers have been excluded and prevented from accessing and processing waste materials.

Waste pickers in Colombia have had to organize and fight these exclusive laws and government practices in order to remain in their occupation and be included in a solid waste management system. Waste pickers have challenged these laws at the Constitutional Court which is the highest court in Colombia. The example is the case of *Nohra Padilla Herrera vs. Unidad Administrativa Especial de Servicios Públicos*⁵⁷⁰ (UAESP) which was brought to the Constitutional Court by the members of the ARB. The ARB challenged the Public Bidding No. 001 of 2011 which allowed franchises for waste picking and other services to only selected groups of formal enterprises which excluded many informal waste pickers in the city of Bogota. Through litigation waste pickers in Colombia have been successful in getting the government to make legislative changes that call for the inclusion of waste pickers into waste management systems and to change its approach to waste management from waste disposal to support the recycle, reduce and reuse waste strategies. To date, the Constitutional Court in Colombia has made a series of pronouncements upholding the waste pickers' rights to:⁵⁷¹

- Participate as independent service providers in the waste management system in the components of recycling and transportation.
- Benefit from affirmative actions to guarantee a level playing field vis-à-vis other tenders for procurement contracts and to be able to integrate more effectively into the waste management system.

⁵⁶⁶ Abizaid (note 583 above) 4.

⁵⁶⁷ Abizaid (note 583 above) 4.

⁵⁶⁸ Abizaid (note 583 above) 4.

⁵⁶⁹ Abizaid (note 583 above) 4.

⁵⁷⁰ *Nohra Padilla Herrera vs. Unidad Administrativa Especial de Servicios Públicos* (UAESP) Proceedings 183 of 2011 CC.

⁵⁷¹ Abizaid (note 583 above) 7.

- Have legislation on waste management that does not affect their right to work and to earn a livelihood.
- Be recognized as public service providers and be compensated for their work, which benefits the city.

The pronunciations made by the Constitutional Court are summarized in Table 8 below. Even though litigation strategies have been mostly successful for waste pickers in Columbia, other strategies like the

Table 8: The pronunciation made by the Constitutional Court in Columbia

<p>C-741 in 2003</p> <p>In response to a challenge of unconstitutionality filed by ARB against the prohibition on the right of waste pickers to work in cities with populations larger than 8,000 inhabitants stated within the Law 142 of 1994 and the regulatory decree 421 of 2000, the Court stated that waste pickers had the right to work in all municipalities, regardless of size, and questioned the concept that linked efficiency with private procurement of services.</p> <p>T-724 in 2003</p> <p>In response to an action of protection filed by ARB against the prohibition from participating in tender calls for public services, the Court recognized waste pickers' right to work and ordered municipal authorities to take affirmative actions to include waste pickers in procurement contracts for public services.</p> <p>C-355 in 2003</p> <p>In response to an action of protection filed by ARB against the prohibition on the use of animal-traction vehicles within the National Transportation Code, the Court ordered a gradual, orderly substitution of those vehicles and ordered that the owners of animal-traction vehicles be compensated in the form of an equivalent working tool.</p> <p>C-793 in 2009</p> <p>In response to an action to demand their rights filed by ARB to challenge the prohibition to sort waste material deposited in containers in public spaces, to transport waste in vehicles not designed for that purpose and commercialize waste in non-apt conditions, the Court ruled the law could not be applied to the detriment of waste pickers.</p> <p>T-291 in 2009</p> <p>In response to an action of protection filed by the Waste Pickers' Association of Cali, the Court ordered the development of a process for social and economic integration of waste pickers.</p> <p>Order 268 in 2010</p> <p>In response to a demand for contempt on the sentence T-724, filed by ARB, the Court ordered the inclusion of a recycling component at disposal sites, and that waste pickers be linked to the company awarded with the contract to manage the site.</p> <p>Order 275 of 2011</p> <p>In response to a demand for contempt on the sentences T-724 and T-291, filed by the ARB, the Court ordered structural inclusion of waste pickers in the recovery process and payment for the recovery services they provide.</p>

Source: Abizaid (2015)

‘social mobilization, documentation, and development of information, and the establishment of alliances with other groups were as equally essential to strengthen waste pickers’ bargaining position in the negotiations that, since 2012, have sought an inclusive waste management model and a payment scheme for waste pickers’.⁵⁷² These strategies have strengthened the inclusion of waste pickers into the public waste management system in Columbia and the introduction of the payments for their service through the Order 275⁵⁷³ are recent events that have had several positive impacts for waste pickers’ livelihoods.

4.6 LESSONS LEARNED FOR SOUTH AFRICA FROM FOREIGN CASE STUDIES

India, Brazil, and Columbia have shown that developing enabling and inclusive policies and laws contribute to changing the lives of waste pickers and in making sure that they receive protection for their work and livelihoods. The work conditions of waste pickers can be hazardous, and it is important that waste picking is regulated to ensure the safety of those conducting this work. The recognition of waste pickers as workers not only allows them to access waste materials but ensures that they receive social protection like any other workers.

The lessons learned are categorized under the following themes:

- **Municipal Regulations** – Waste management falls under the jurisdiction of municipalities in South Africa. Brazil has at least five municipal regulations that ensure that waste pickers are organized into cooperatives, they are recognized as workers, they are contracted by the municipalities and remunerated for their service.⁵⁷⁴ Municipalities in South Africa can start by including waste pickers in their Waste Management Plans and recognize them for their contribution to waste management strategies.
- **Legal Recognition** - Legal status or recognition as ‘workers’ under the law is important in ensuring that workers are protected. Laws and policies provide not only the recognition but access to benefits and social protections which allow decent work status. The Unorganized Sector Social Security Act in India allows for the introduction of sector-based social security schemes for informal. This law ensures that informal workers enjoy life and disability cover, health and maternity benefits, and old age pension.⁵⁷⁵
- **Access to Waste Materials** - One of the struggles that waste pickers face is access to waste as a resource. A related battle is also to ensure a decent price and market for their products which will limit exportation by middle agents. Environmental laws deal with issues of waste because

⁵⁷² Abizaid (note 583 above) 7.

⁵⁷³ of 2011.

⁵⁷⁴ See section 4.5.2 above.

⁵⁷⁵ See section 4.5.1 above.

it affects the environment. The Brazilian 2010 National Solid Waste Policy advocates for separation of waste at source and the generator of waste responsible for the return of recyclables to the productive chain after consumption, which, in turn, increases the volume of activity for the waste pickers in that way the use of natural resources used in a form and manner that ensures sustainable use.⁵⁷⁶ India's Maharashtra Government Resolution, Department of Water Supply and Sanitation 2002 addresses the allocation of work of door to door collection of waste from households, offices, and establishments to cooperatives, NGOs and other organizations of waste pickers. In this way, the access to waste is increased and waste pickers earn income by collecting waste before they even sell all that is recyclable.

- **Social Security Protection** - The demand for social protection both in the policy and legislative domains is critical in ensuring the decent work status for waste pickers. The Indian's Labour Commission made several recommendations in order to extend social and legal protection to informal workers. The result is the development of the Unorganized Sector Social Security Act which has extended social protection to informal workers in India.
- **Regulation of Working Conditions** – Waste pickers are mostly own account workers as such they operate outside the employer-employee relations. However, their work environment is hazardous and faces occupational health challenges. The Peru's Municipal Council of Los Olivos Law No. 29419, regulates the activity of waste pickers, establishes the regulatory framework for regulating the activities of recycling workers, aimed at protecting, training and promoting social and labour development, promoting their formalization, association and contributing to the improvement in the ecologically efficient management of solid waste.⁵⁷⁷ In this way, the conditions of work of waste pickers are improved.
- **Organizing and Litigation for Inclusion** – Organizing is critical in building capacity for waste pickers to influence government policies and practices. Forming alliances with other organizations with expertise that are useful in the protection of rights is important. Waste pickers in Columbia have been organizing for many years. The formation of waste pickers' association like the Bogota Waste Pickers Association (ARB, Asociación Cooperativa de Recicladores de Bogotá) has helped waste pickers in Bogota challenge the exclusive laws using various strategies – which include litigation. The result is that many laws have been changed to include waste pickers in the waste management system and remunerate them for their service.

The South African Constitution is committed to guaranteeing the protection of all rights contained in the Bill of Rights. Chapter 9 of the Constitution sets up the establishment of State bodies that help

⁵⁷⁶ See section 4.5.2 above,

⁵⁷⁷ See section 4.5.3 above.

people protect their rights. Section 181 of the Constitution lists the institutions that strengthen the constitutional democracy in South Africa as follows:

- The Public Protector
- The South African Human Rights Commission
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Commission for Gender Equality
- The Auditor-General
- The Electoral Commission
- The Independent Authority to regulate Broadcasting

The task of these institutions is to promote and protect those rights within the Bill of Rights which fall within their relevant area. The Constitution requires them to be impartial, independent and subject only to the Constitution and the relevant laws made in terms of the Constitution.⁵⁷⁸ They must exercise their powers and perform their functions ‘without fear, favour or prejudice’.⁵⁷⁹ Waste pickers in South Africa can make use of these State bodies to protect their rights. In South Africa, there are also several organizations that provide legal and paralegal assistance to communities or individuals whose rights have been violated or threatened.⁵⁸⁰ Organizations like the Legal Resource Centre, Women’s Legal Centre and the Socio-Economic Rights Institute of South Africa (SERI) are amongst organizations which can assist waste pickets to take up legal action to defend their rights and demand their inclusion.

4.7 CONCLUSION

The application of environmental rights contained in section 24 of the South African Constitution undoubtedly extends to everyone in the context of the environment as defined in NEMA. The definition that NEMA provides does not extend its reach beyond the natural environment and offers a narrow scope for extending the rights to environmental contexts that are not protected by other legislation. The fact that environmental rights are constitutional emphasizes the significance which South Africa places a healthy environment for its people. Even though the Constitution does not define the nature of the environment protected under section 24, it is appropriate that the scope of application is extended and inclusive, considering the historical past of imbalances that have created inequality and prejudices experienced by many poor people.

⁵⁷⁸ Section 181(2) of the Constitution.

⁵⁷⁹ Section 181(2) of the Constitution.

⁵⁸⁰ Khoza (note 34 above) 69.

Waste pickers like many other workers in the informal economy face a harsh work environment that threatens their ability to make a decent living and affects their well-being. The lack of recognition, regulation, and protection of this work is a problem that should be addressed by applying section 24 due to the absence of any other legislation that can address this deficiency. The prevalence of poverty in South Africa should also appropriate the understanding of what it means to protect not just the natural environment but also the work environment as required by section 24. Du Plessis argues that ‘the notion of ‘health’, ‘well-being’, and ‘sustainable environment’ are three strongholds of environmental rights, and should, therefore, be regarded as being at the center of the protection afforded by this right’.⁵⁸¹

Other countries have recognized the role waste pickers play in waste management and have developed laws and policies that protect and promote waste pickers. Most of these laws fall under the domain of environmental ministry and law.

South Africa has institutions set up by the Constitution to support people to protect their human rights. The establishment of these institutions is set in Chapter 9 of the Constitution and their function strengthens the constitutional democracy. Organizing is key in building capacity for waste pickers to influence government policies and practices, and demand inclusion in the waste management system. The following chapter concludes this research and makes recommendations on how to overcome the obstacles faced by waste pickers in Durban.

⁵⁸¹ Du Plessis AA (note 456 above) 305.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The importance of understanding environmental rights to offer protection not only for the natural environment is critical if we are to address the prevailing challenges facing impoverished communities in South Africa. Tackling inequality and unemployment is one way of improving the health and well-being of poor people. Environmental rights under the domain of environmental law must provide appropriate relief to those faced with such challenges. The term ‘environment’ generously interpreted contains the key to unlocking access to all the protection afforded by the environmental rights clause in the Constitution for the benefit of everyone including the urban poor. Data on the informal economy, waste pickers, and urban management have been analyzed to give the content and the context for extending the application of environmental rights to waste pickers. A literature review of environmental law writings has provided arguments and opinions that support the development of environmental law to extend its reach beyond the natural environment to include socio-economic development as part of its regulatory domain. The role of the courts in enforcing environmental rights, interpreting environmental legislation, and developing the common law where necessary, is of critical importance.

The purpose of this chapter is to consolidate the discussions in chapters 2, 3 and 4 and create an argument for extending the application of environmental rights to offer workplace and work environment protection for waste pickers. This chapter firstly gives a summary of the findings of the research. Secondly, it provides recommendations for what the state, cities, and waste pickers themselves could do to improve the work conditions of waste pickers in South Africa. The chapter ends with concluding remarks and recommendations for future research.

5.2 SUMMARY OF THE FINDINGS OF THE RESEARCH

The study explores the application of environmental rights to waste pickers using a broad definition of the ‘environment’ and gives content and context for the significance of extending these rights to them. The central question the research addresses is: To what degree does the reference to the environment in section 24 of the Constitution extend to workers who conduct informal work? The study makes particular reference to waste pickers in the Durban Metro area.⁵⁸² The thesis is directed towards answering the sub-questions that expand the central question to the following areas:

- the work conditions of waste pickers as an indicator of the extent of protection received from environmental rights;

⁵⁸² See section 1.4 above discussing the area of focus for the research.

- the extent to which environmental rights apply to issues about the spaces where waste pickers are operating;
- the definition of the ‘environment’ envisaged by section 24 of the Constitution;
- the guiding principles used by courts in South Africa in defining the words used by the Constitution;
- the significance of national and foreign case law in defining the term ‘environment’;
- the constitutional obligations imposed by sections 8(3) (a) and 39 regarding the protection of the environmental rights of informal workers;
- the interconnection of rights in section 24 and other rights in the Constitution in a manner that provides workplace protection for waste pickers.

The study finds that waste pickers form part of the 2.8 million people working in the informal economy in South Africa, excluding those working in the agricultural sector, in the second quarter of 2018.⁵⁸³ Workers in the informal economy have increased more than those in the formal sector. The size of the informal economy’s contribution to the GDP is 2.5 times that of the agriculture sector and is estimated at 70 per cent that of the mining industry.⁵⁸⁴

There is an increased number of people moving from rural areas to urban areas in search of employment. The rate of unemployment is increasing, especially for youth. Cities have not been able to provide services to its citizen in a manner that adequately addresses the inequalities of the past. Urban management processes have failed to integrate vulnerable workers like waste pickers into their plans to create employment opportunities and a safe work environment for these workers.

Waste recycling is used by cities to fulfill the demands of sustainable development in order to slow down the rate at which natural resources are depleted. It forms part of an integrated waste management system which involves a sequential waste management process. Such a process begins with the application of waste prevention or minimization programmes, followed by recycling and re-use, then waste treatment, and ultimately the waste disposal. It is in waste recycling and re-use programmes where waste pickers have made a significant contribution. However, their contribution is often not recognized because they are excluded from waste management plans and processes.

Informal waste recyclers often face health and safety risks when they collect recyclable materials in various spaces like landfills, street bins, and dumpsters. These workplaces require that the waste pickers adhere to strict occupational health and safety principles to limit the associated risks. Waste pickers are

⁵⁸³ See paragraph 1.1.2 above.

⁵⁸⁴ See paragraph 1.1.2 above.

not recognized as workers, and their workplace is not regulated to offer protection from hazards. Waste recycling poses dangers to the waste pickers themselves and to communities who are living near where waste is collected, stored or dumped.

Durban has been locally and internationally applauded for its progressive inclusion of the informal economy in its economic development programmes, urban management plans, urban design and city landscape. Through its informal trade policy and long-term development plans, Durban supports a developmental approach to the informal economy instead of regulations and policing. However, the implementation of the policy and its principles has not reached the waste picking trade sector. Durban's Integrated Waste Management Plan 2016-2021 makes no mention of waste pickers and how the city aims to support them and to create a decent work environment for them. Waste pickers have not been able to access the developmental support promised in these policies in any significant way.

The work conditions of waste pickers in Durban pose harm to their health and well-being. Studies conducted by Ralfe⁵⁸⁵ and Mkhize⁵⁸⁶ highlighted the challenges faced by waste pickers and the occupational hazards they are confronted with as they conduct their work. Waste pickers are not in the trade by choice but as a means of survival. They collect recyclable materials and transport them long distances to buy-back centres where they sell them to earn an income. They work long hours and receive no support when they are unable to work. Their monthly income is below the subsistence level, and they are categorized as poor. The criminalization of waste picking by individuals in the Durban Metro denies waste pickers access to waste and hinders their ability to earn a decent living. It exposes them to harassment by the police because the trade is not adequately regulated and protected.

The spaces where waste pickers conduct their work exposes them to environmental harm like unsafe roads, exposure to poisonous substances, exposure to polluted air, and contact with fecal matter. These hazards cause health problems like chest infections, cancer, stress leading to high blood pressure, and injuries. Lack of access to basic facilities like toilets, water, shelter, and storage is a significant factor in hindering waste pickers' earning potential and their ability to function optimally in this trade. There are linkages between waste pickers and formal waste recycling companies. The formal waste recycling sector creates the demand for trade in recycled materials and sets the prices for materials. As a result, the waste pickers are exploited because they are at the bottom of the chain.

Most trade sectors in the informal economy lack the legislative directive that will allow them to bargain collectively to improve their conditions of work. As a result, labour laws and the social protection of workers has not been extended to people working informally. South Africa's Business Amendment Act

⁵⁸⁵ Ralfe (note 181 above).

⁵⁸⁶ Mkhize (note 155 above).

⁵⁸⁷ recognizes street vendors as businesses and empowers the local government to make by-laws that regulate street vending. However, the Act does not extend its regulatory framework to include informal waste recycling, and municipal by-laws have not been developed to regulate waste recycling in South African cities.

Waste management falls under the ambit of environmental law. All environmental and waste management laws are guided by and must comply with the Constitution. The eThekweni's Integrated Waste Management Plan 2016-2021 lists nine national policy frameworks and 11 government statutes relevant to waste management at the local government level.⁵⁸⁸ These policies provide the waste pickers with an opportunity to work with municipalities to develop strategies and programs which may promote the work of waste pickers as part of ensuring their decent work status while strengthening their role in waste management service. Statutes developed to fulfill the provisions of section 24(b) are mainly concerned with the protection of the natural environment. They also provide a framework for local governments to develop an integrated waste management plan that adheres to the principles provided by the Constitution.⁵⁸⁹

The eThekweni Municipality's by-laws concerning waste management prohibit the removal of waste by persons who are not registered by the municipality to do so. These by-laws do not provide procedures for the registration to collect and remove waste nor regulate the waste collection and removal for any other reason other than for disposal. Public health by-laws prohibit trade that is conducted in a manner that causes harm to public health. However, standardized procedures with best practices are not provided to ensure that those recycling waste do so in a way that is not harmful to their health and the health of others.

South Africa has ten national labour laws that have been developed to protect the rights of workers, regulate their workplace, and offer workers social protection and work security.⁵⁹⁰ However, these labour laws do not extend protection to people working informally in public spaces. The exclusion is due to the limited definitions of 'employee', 'employer', and 'workplace' provided in these statutes. The definitions of these terms in labour laws are centered on employer-employee arrangements and exclude those who are outside traditional employment relationships. There is room to widen the scope of the definition of the 'employee' in the current labour laws in South Africa to include other workers in the informal economy.

The absence of adequate protection for informal workers constitutes unequal treatment and infringes their right to dignity. When there is no legislation giving effect to the rights contained in the

⁵⁸⁷ No. 186 of 1993.

⁵⁸⁸ See paragraphs 3.2.1.1 and 3.2.1.2 above.

⁵⁸⁹ See paragraph 3.2.1.2 above.

⁵⁹⁰ See paragraph 3.2.2 above.

Constitution, the reliance for protection is placed on the Constitution itself. The Constitution provides environmental rights in section 24. Environmental rights are classified as socio-economic rights, and they are fundamental and justiciable. Section 24 provides two main rights to everyone irrespective of citizenship. These rights are, (a) a right to an environment that is not harmful to health or well-being, and (b) a right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

Even though the environmental rights extend protection to everyone, the application of these rights is dependent on the definition of the 'environment' they protect. The Constitution does not define the 'environment' protected in section 24. However, it does provide the principles the courts are to follow when defining the words contained in it. The definition of the 'environment' provided by environmental legislation is seen as narrower, and a broader definition is more acceptable. The broader definition includes socio-economic and cultural dimensions of the inter-relationships between humans and the natural environment and the social environment. The natural environment includes both the urban and the built environment, while the social environment includes work and workplaces. The latter form part of sustainable development and must be regulated in the domain of environmental law.

Courts in South Africa have highlighted the interconnection between the natural environment and the social environment in the context of sustainable development.⁵⁹¹ There is a link between environmental protection, economic development, and social needs. Courts in countries like Brazil and Peru have used environmental laws and rights to recognize the rights of waste pickers to access work and their role in contributing to the ecologically efficient management of solid waste in their cities. These countries have passed laws that established a framework for regulating the activities of waste pickers which promotes their transition from the informal to the formal sector.

Human rights are interdependent. One right may be a core right and have another right derived from it that is incorporated into it. Other rights are related to each other. In many cases, the rights that are related are equally dependent but distinct. When relying on a certain right for protection, other rights may be invoked in support of the infringed right. There is a clear interdependence between environmental rights and other socio-economic rights such as the right of access to health care, food, and water, the right to access housing and many others. These rights are concerned not only with health but also the well-being of persons in both the natural environment and social environment contexts. Addressing the infringement of environmental rights by those who are affected, is supported by the Constitution and several other laws that detail legal standing and the procedures to follow. The following section discusses the recommendations of this study.

⁵⁹¹ See paragraph 4.2.1.2 above.

5.3 RECOMMENDATIONS

There is a link between being poor and working as a waste picker. The data shows that the waste pickers in Durban are likely to remain poor due to their exclusion from the waste management programmes and continued exploitation by middle agents to whom they sell their recycled materials.⁵⁹² The conditions of work for waste pickers are harmful to their health and well-being. The study suggests two ways with which to address the challenges faced by waste pickers to improve their work environment. First, there is a need to develop legislation that creates a framework for the local government to integrate waste pickers into their municipal urban waste management plans and programmes. Second, there are measures that the local government can develop to ensure that the work environment of waste pickers is protected, supported, and promoted. The following recommendations are made:

1. Environmental law must extend its reach to regulate the social environment where the natural environment is concerned about preventing its degradation, promoting its conservation, securing sustainable development, and promoting socio-economic development. Waste recycling is part of a process in the urban waste management system which promotes environmental sustainability.
2. The nature of the work of waste pickers is such that it exposes them to environmental harm. As a result, strict adherence to safe work processes is essential in addressing some of the hazards. Municipal departments dealing with public health and environmental health must work together with waste pickers to develop a code of conduct and guidelines for waste picking activity that is aimed at creating a safe environment for waste pickers.
3. Waste pickers must recognize the role of the courts and other institutions like the 'Chapter 9 institutions' in enforcing the provisions of the Constitution and protecting them from abuses and infringements of their rights in the Bill of Rights. Waste pickers must know their rights and must be able to assert them. They must be able to organize themselves to challenge the infringements of their rights through the assistance of organizations dealing with public interest law cases like the Legal Resource Centre (LRC), the Socio-Economic Rights Institute of South Africa (SERI), and many others. Rights education is important, and waste pickers must partner with these institutions and human rights organizations in order to obtain training support on the rights available to them and so that they can demand to have these rights protected.

⁵⁹² Ralf (note 181 above) 169.

4. Waste management is a function that falls under the regulatory jurisdiction of the local government. The local government must develop measures to protect the environmental rights of all residents through the development and implementation of integrated waste management programs and other urban management processes.⁵⁹³ Local governments must integrate waste pickers into their management plan and create platforms where waste pickers can have a voice and can access waste in a manner that limits their exposure to work hazards. They must also work with waste pickers to develop waste collection procedures to ensure that waste pickers improve their work processes. Waste education will provide waste pickers with a good understanding of the different kinds of waste and the best way to collect and transport it to the buy-back centres where it is sold. Creating a registration system for all waste pickers in its jurisdiction will ensure that the waste pickers are validated and recognized and will inform the resources needed to support them and promote their work. Promoting the formal incorporation of waste pickers into cooperatives will help organize the sector and create solidarity amongst individual waste pickers. Such formalization will be in line with the ILO Recommendation 204.
5. The provision of infrastructures such as toilets, water, electricity, and storage in places where waste pickers conduct their work is critical in protecting the environmental rights of these workers – as these services will underpin their human health and well-being and strengthen urban community and local economic growth. The functioning of urban management falls in the jurisdiction of local government and cities have a responsibility to ensure that these services reach the communities they serve.
6. Waste pickers make a positive contribution to the sustainability of social and natural environments through waste recycling. Therefore, inclusive policies to protect their health and improve their well-being should be adopted. Countries like India, Brazil, and Columbia have developed positive and enabling policies and laws to protect the work, health, safety, and well-being of waste pickers.

5.4 CONCLUDING REMARKS AND RECOMMENDATIONS FOR FUTURE RESEARCH

The relationship between the social and natural environments must be converted into action if the full meaning of the rights in section 24 of the Constitution is to be realized. Poverty and lack of service delivery affect people's health and well-being. The state has an obligation to address harmful environments through legislative interventions and other measures. The work that waste pickers do has a positive impact on the natural environment but exposes them to environmental hazards which warrants

⁵⁹³ Schedules 4 and 5 of the Constitution.

strict regulation of their activities. This should be done to protect the waste pickers from harm while promoting their livelihood and income generating strategies. A model law for waste pickers in South Africa should be considered. In order to do this, further research which includes statistical data e.g. the number of waste pickers in South Africa and a study of their social geographies (their environment with emphasis on social factors) should be undertaken.

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