Planning law as a source of environmental legislative power for local government

By

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DECLARATION OF ORIGINALITY

I, Mandisa Pride Poswa (Mgobozi) do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.'

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CHAPTER 1: LOCAL GOVERNMENT AND THE REALIZATION OF THE ENVIRONMENTAL RIGHT

1. Introduction

South Africa is recognized internationally as one of the most biologically diverse countries in the world due to its high species diversity, rate of endemism and diverse ecosystems.[1] However, there also is recognition that there is a need to make more effort towards the protection of the environment.[2] Our biodiversity has been noted to be a national asset.[3] Its conservation places responsibility on different spheres of government and stakeholders; but the question is whether local government has legislative power to also heed to the call?

Local government has constitutional power to legislate in respect of various competencies[4] but there is no explicit legislative power in relation to the 'environment'. The case of *Le Sueur v eThekwini Municipality*[5] has considered whether local government has authority to legislate on environmental conservation despite the absence of explicit constitutional power to this effect. This dissertation considers this judgment, and the considerable scholarly comment on the case, within the context of the relevant constitutional and legislative provisions, exploring the allocation of powers from various sources.

It is apparent from *Le Sueur* that municipal planning, which is explicitly provided as a municipal legislative competence in terms of the Constitution,[6] provides an avenue for the legislative competence of local government in relation to environmental conservation.[7] In light of this, the dissertation also considers whether the Spatial Planning and Land Use Management Act[8] (SPLUMA) is a source of environmental legislative power for local government which was not considered in the *Le Sueur* judgment as SPLUMA was not yet in effect.

The aim of this thesis is to answer based on the *Le Sueur* judgement is: What is the source of local legislative environmental authority?

2. The duty to legislate for environmental protection

The Constitution provides in section 24 for the environmental right

> Everyone has the right to:

[1] Convention on Biological Diversity South Africa Biodiversity Facts https://www.cbd.int/countries/profile/default.shtml?country=za#facts (accessed 30/11/2016).
[2] National Development Plan 2030 'Our Future Make it Work'.
[3] *Ibid* NDP.
[4] Allocation of powers dealt with under chapter 2 of this dissertation '*Allocation of Legislative and Executive Authority*'.
[5] *Le Sueur v eThekwini Municipality* (9714-11) [2013] ZAKZPHC 6 (30 January 2013) - will be referred as *Le Sueur* for the rest of the dissertation.
[6] *Ibid Le Sueur* para 21.
[7] See discussion in Chapter 4 of this thesis.
[8] Spatial Planning and Land Use Management Act 16 of 2013 (for the rest of this dissertation will be referred to as SPLUMA).

(a) an environment which is not harmful to their health or well-being; and
(b) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that:
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.[9]

The obligation to ensure that the environmental right is realised is placed on all spheres of government. Hence, local government as part of the state has an obligation to ensure that constitutional rights are realized. Section 7 on the Bill of Rights subsection 2 specifies that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.[10] This provision also places a duty on local government to respect and uphold the Constitution in order to ensure that all rights within the Constitution are realized including the environmental right.

Section 8(1) on the application of the Bill of Rights includes local government as legislature, executive and as an organ of state.[11] As such s 7(2) can be invoked against any local government that fails to respect, protect, promote and fulfil the rights in the Bill of Rights.[12]

> This then indicates that the failure by the municipality in enforcing environmental law where necessary, may result in that municipality held accountable under the national legislations to have breached the legal duty it has on the enforcement of environmental law. [13]

Local government is the closest sphere of the government to the people and it thus makes sense that this sphere deals with localised environmental issues.[14] In order to ensure that the environmental right is realized the environmental framework was enacted as the National Environmental Management Act No 107 of 1998 (NEMA).[15] Essentially, NEMA places an obligation on *all organs* of the state for the realization of the environmental right. NEMA defines the environment as

> **'environment'** means 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[16]

Based on the above definition of the environment in NEMA it is clear that the environment includes both biotic and abiotic factors as well as may other factors that need to be considered in the protection of the environment. NEMA principles in section 2, place a duty on all spheres

[9] Constitution of the Republic of South Africa, 1996 Section 24.
[10] *Ibid* RSA Constitution Section 7 Bill of Rights.
[11] *Ibid* RSA Constitution.
[12] *Ibid* RSA Constitution.
[13] Mathebula MT 2011 The Legal Duty of Municipalities to Enforce Environmental Law *LLM Thesis University of Limpompo*, page 1 - 49 at 7.
[14] Du Plessis A 2015 *Environmental Law And Local Government In South Africa*, Chapter 6 'Environmental rights protected in the Constitution of the Republic of South Africa, at page 219.
[15] National Environmental Management Act, 107 of 1998 (for the rest of this dissertation will be referred to as NEMA).
[16] *Ibid* NEMA Section 1 Definitions.

of government, including local government that may significantly affect the environment to be cognisant in their actions to ensure that there is minimal impact on the environment and that the environment is protected.[17] Du Plessis discusses NEMA principles and their applicability to local government extensively.[18] Many of the NEMA principles seem to be integrated into land use management and these are further discussed as part of chapter 5.[19]

3. Local government as a sphere of government

The South African government is made up of three spheres of government namely national government, provincial government and local government. Former Chief Justice Sandile Ngcobo noted that the South African Constitution is based on a model of separation of powers and this model envisages that there is no absolute power.[20] Essentially our Constitution further recognizes the elimination of the hierarchal government division of power within the Republic.[21] The Constitution confers the right to govern to the local government therefore; it can put forward its own initiatives and issues that affect its own communities. These provisions are subject to both provincial and national laws as provided for in the Constitution.[22]

Essentially, the South African model of separation of powers is still evolving and it is one that is 'distinctly' South African.[23] This model however is still being interpreted by the Constitutional Court. The Constitution provides for cooperative governance in section 41, all spheres of government and organs of state must be independent in their powers and functions.[24] The drafters of the Constitution envisioned for some encroachment among the spheres due to the blurring of lines at times, but most importantly it foresaw the need for interaction among different spheres which has been referred to as 'constitutional dialogue'.[25]

Constitutional dialogue requires that there is a common mission for all spheres of government to not compete among themselves but rather each sphere should work independently as well as collectively in upholding the provisions of the Constitution.[26] Therefore, all spheres of government have an obligation to uphold the Constitution and ensure that the rights within the Bill of Rights are realized. The Constitution provides in schedules 4 and 5, competences for each sphere of government. Local government competence is provided for in schedule 4-part B and schedule 5-part B.

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[17] *Ibid* NEMA (see note 15) Section 2 Principles.
[18] Du Plessis (see note 14) at 259.
[19] NEMA (see note 15) Section 2 Principles discussed as part of chapter 5.
[20] Ngcobo S 2011 South Africa's Transformative Constitution: Towards an appropriate Doctrine of the Separation of powers *Stellenbosch Law Review* 1 vol 22 page 37 – 49 at 38.
[21] Nkuna NW and Nemutanzhela TL 2012 Locating The Role of Service Delivery Within Powers and Functions of Local Government in *South Africa Journal of Public Administration* Special Issue 1 Vol 47 page 355 – 368 at 358.
[22] RSA Constitution (see note 9) s 151(3); the oversight of these spheres is further noted in chapter 5 within spatial planning legislative framework.
[23] Ngcobo S (see note 20) at 38.
[24] RSA Constitution (see note 9) s 41.
[25] Ngcobo S (see note 20) at 39.
[26] *Ibid* Ngcobo at 40.

Concurrent powers in terms of the Constitution refers to holding the 'same' powers over the same functional areas, whereas an overlap in functions refers to more than one sphere of government holding authority (legislative/executive/ both) over the same functional area.[27] In terms of the 'environment', it is not a local government legislative competence but a competence of both the national government and the provincial government concurrently.[28]

The recent *RA Le Sueur v eThekwini Municipality* (*Le Sueur*)[29] judgement has brought interest and has drawn attention to the role of local government in protecting the environment. However, if there is an expectation for local government to protect the environment what is the source of the authority? The central legal question in this judgement was whether the power exercised by the eThekwini Metropolitan Municipality was executive or legislative.

Unfortunately, the judgment was not altogether clear in its answer to this question. Although, much critical analysis has been published on this judgment (Freedman [30], du Plessis and van der Berg [31], Bronstein [32], Fuo [33], Muir [34], Humby [35]) the commentators have not reached a consensus. Hence, this research attempts to provide some clarity on the source and character of local government authority in relation to the environment, as provided for by the planning laws in the light of this judgment and analysis thereof.

4. Research methodology

This research was a desktop exercise; the sources are primary and secondary materials. It analysed relevant legislation, cases, literature, books, reports and internet sources. There was no fieldwork. Specific attention was drawn to the *Le Sueur* case[36] in order to provide some clarity in relation to the relevant legislative power of municipalities. Analysis of SPLUMA was carried out in order to ascertain whether the duties/powers conferred on local government by this legislation affect the legal position.

[27] Steytler Nico and Fessha Yonatan Tesfaye 2007 Defining Local Government Powers and Functions *South African Law Journal* Vol 124 Issue 2 pages 320 – 338 at 320.
[28] The allocation of powers as provided for by section 156 of the Constitution, schedule 4A and 4B, schedule 5A and 5B discussed in chapter 2 of this dissertation.
[29] *Le Sueur* (see note 5).
[30] Freedman W 2014The Legislative Authority Of The Local Sphere Of Government To Conserve And Protect The Environment: A Critical Analysis of *Le Sueur v eThekwini Municipality* [2014] PER 62 *PELJ* (17)1. Pages 566 -594.
[31] Du Plessis AA and van der Berg A RA Le Seur v eThekwini Municipality 2013 JDR 0178 (KZP): An environmental law reading *Stellenbosch Law Review* 2013 pages 580 -594.
[32] Bronstein V 2015 Mapping legislative and executive powers over Municipal planning: exploring the boundaries of local, provincial and national control *The South African Law Journal* 132 pages 639 – 663.
[33] Fuo O 2015 Role of courts in interpreting local government's environmental powers in South Africa *Common wealth Journal of Local Governance* issue 18 pages 17 – 35.
[34] Muir A 2015 The Le Sueur Case and a Local Government's Constitutional Right to Govern *Southern African Public Law* Issue 2 Vol 30 pages 556 – 579.
[35] Humby T 2015a Localising Environmental Governance: The Le Sueur Case *Potchefschroom Elektroniese Regsbald* Vol 17 No 4 pages 1660 – 1689.
[36] *Le Sueur* (see note 5).

5. Dissertation structure

Chapter 1 introduces the issue at hand and draws attention to the legislative authority of local government in relation to the protection of the environment, research questions, research methodology, dissertation structure and limitations of the study.

Chapter 2 introduces, describes and discusses allocation of legislative powers in relation to the three spheres of government with emphasis on local government. The key focus of the chapter is distinguishing between executive and legislative authority as well sources of authority.

Chapter 3 Focuses on municipal planning jurisprudence and draws emphasis to municipal planning powers held within local government. Although some of the cases are not related to protection of the environment through municipal planning, the views of the judiciary on the powers held by local government on municipal planning are important to note.

Chapter 4 describes and discusses the *Le Sueur* judgment in detail in the light of the various scholarly interpretations, character of the power that was exercised by eThekwini Municipality to make the amendments is identified and the source of the authority is also discussed.

Chapter 5 introduces a brief history of the South African Planning law and emphasises SPLUMA[37] provisions in municipal planning with particular reference to the protection of the environment. If SPLUMA were in force during the *Le Sueur* judgment would the legal approach to resolving the dispute have been different? Does SPLUMA make any difference to the local environmental legislative powers within the ambit of municipal planning?

Chapter 6 concludes and comments on the role and duty of local government as role player in legislating for the protection of the environment as part of municipal planning.

6. Limitations of study

The research is subject to the following constraints and limitations:
The environment is not an explicit competence of local government, therefore contextualising the implicit environmental legislative authority of local government was challenging. This study explored planning law as a source of environmental legislative power for local government and analysed scholarly views on the *Le Sueur* judgement. One of the key questions that this work aims to answer is if SPLUMA was in force during the *Le Sueur* judgment would the legal approach to resolving the dispute have been different? Notably, SPLUMA has been recently accented into law and there is no case law to date on municipal planning that takes into account SPLUMA and the protection of the environment. Therefore, analysis of SPLUMA in chapter 5 is not directly informed by any existing jurisprudence.

[37] SPLUMA (see note 8)

CHAPTER 2: ALLOCATION OF POWERS

1. Introduction

This chapter considers the allocation of powers in respect of the spheres of government with particular emphasis on local government. The emphasis of this chapter is on local government legislative authority and possible sources of legislative authority.

Allocation of Legislative and Executive Authority

In the year 1994 a democratically elected government in South Africa came into power and this resulted in a shift from Parliamentary Sovereignty to Constitutional Supremacy with its enshrined, entrenched and justiciable Bill of Rights. The current Constitution was promulgated on the 18th December 1996 and came into effect on the 4th February 1997. The Bill of Rights is the cornerstone of our supreme Constitution.[38]

The South African democratic dispensation is divided into three spheres of government, the national government, provincial government and local government. All the three spheres of government have been allocated executive and legislative authority. Put quite simply, legislative authority is the power to make laws and executive authority is the power to implement and execute the laws to ensure compliance.

Legislative authority within the Republic is conferred to all the three spheres of government as provided for by section 43 of the Constitution.[39] The national government's legislative authority is vested in Parliament as provided for by section 44[40] and the provincial governments' legislative authority is vested within the provincial legislatures as provided for by section 104.[41] Local government is also allocated legislative authority vested within the municipal council as provided for by section 156(2) and they can may make and administer by-laws for the effective administration of the matters which it has the right to administer. [42]

Executive authority within the national sphere of government is provided for by section 85[43] whilst the provincial government is allocated executive authority as provided for by section 125[44] of the Constitution. Local government has executive authority in respect of, and the right to administer matters listed in schedule 4 part B and schedule 5 part B, as well as any other matter assigned to it by the national or provincial legislation as provided for in section 156(1).[45] This means local government has legislative authority in relation to those matters listed in schedule 4 part B and schedule 5 part B.

[38] RSA Constitution s 7(1) Bill of Rights (see note 9).
[39] *Ibid* s 43 Legislative authority within the Republic.
[40] *Ibid* s 44 National Legislative Authority.
[41] *Ibid* s 104 Legislative Authority of Provinces.
[42] *Ibid* s 156(2) Powers and functions of municipalities.
[43] *Ibid* s 85 Executive authority of the Republic.
[44] *Ibid* s 125 Executive authority of Provinces.
[45] *Ibid* Section 156(1) Powers and functions of municipalities.

Sources of Power and Authority

Original powers

Original powers are powers that are conferred by the Constitution to each sphere of government and these include original legislative and executive authority. Schedules 4 and 5 allocate and itemize functional areas of competence for each sphere of government. Hence the national government and provincial government have concurrent original legislative authority for the functional areas listed under part A of schedule 4. The provincial government has exclusive legislative powers in functional areas of competence under part A of schedule 5.

Local government has original legislative powers and powers to administer functional areas under parts B of both schedule 4 and 5 (see Table 1) as provided for by section 156: –

> **Powers and functions of municipalities. -(1) A** municipality has executive authority in respect of, and has the right to administer-
> (a) the local government matters listed in part B of Schedule 4 and part B of schedule 5 and;
> (b) any other matter assigned to it by national or provincial legislation.
> **(2)** A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.[46]

Table 1: Local government legislative competences[47]

Schedule 4B of Constitution: local government areas of competence	**Schedule 5B of Constitution: local government matters over which provinces have legislative competence**
Air Pollution	Beaches and amusement facilities
Building regulations	Billboards and the display of advertisements in public places
Child care facilities	Cemeteries, funeral parlours and crematoria
Electricity and gas reticulation	Cleansing
Firefighting services	Control of public nuisances
Local tourism	Control of undertakings that sell liquor to the public
Municipal airports	Facilities for the accommodation, care and burial of animals
Municipal planning	Fencing and fences
Municipal health services	Licensing of dogs
Municipal public transport	Licensing and control of undertakings that sell food to the public
Municipal public works	Local amenities
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto	Local sport facilities
Stormwater management systems in built up areas	Markets
Trading regulations	Municipal abattoirs
Water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems	Municipal parks and recreation
	Municipal roads
	Noise pollution
	Pounds
	Public places
	Refuse removal, refuse dumps and solid waste disposal
	Street trading
	Street lighting
	Traffic and Parking

[46] RSA Constitution s156 ss (1) and ss (2) Powers and Functions of Municipalities (see note 9).
[47] *Ibid* Schedule 5 and Schedule 4 Parts B.

Although local government has been granted original powers and functions as noted above, the 'environment' is not listed as a local government competence. Instead, the 'environment' is listed under schedule 4 part A which is a competence that is shared concurrently by the national government and the provincial government. Hence, the 'environment' is not expressly a local government competence and local government has no original powers for legislating on environmental protection as provided for by the schedules.

'Municipal planning' is explicitly provided as a competence of local government and this competence is a potential source of local government's power to legislate on environmental issues. Provisions on municipal planning with reference to SPLUMA are discussed in Chapter 5. Notably, municipal planning is a relatively large functional area which includes environmental protection. Thus, the challenge is defining the role of municipal planning in relation to protection of the environment.[48]

Local government is further bound by the provisions of the Local Government: Municipal Systems Act. Section 4(2)(j) (rights and duties of the municipal council) states that local government should 'contribute, together with other organs of state, to the progressive realization of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.'[49] Again, the Systems Act section 23(1)(c) states that local government 'together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.'[50] Therefore an obligation is placed on local government to ensure that section 24 of the Constitution as a right is realized.

Incidental power

An incidental power is power that emanates from a closely related function and it can further be considered as part of the functional area, to ensure that the sphere of government functions effectively. To simplify further, it can be summarized as the power that augments the operative running of a functional area.[51] The Constitution allows for incidental powers for all three spheres of government where the national government is provided for in section 44(3)[52], the provincial government in section 104(4)[53] and the local government in section 156(5). The latter section provides that 'A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'.[54]

[48] Du Plessis and van der Berg at 583 (see note 31).
[49] Municipal Systems Act No. 32 of 2000 section 4(2)(j) *Section 24 of the Constitution is listed for Local Government to ensure that the environmental right is realized*.
[50] *Ibid* Section 23(1)(c) *Section 24 of the Constitution is listed for Local Government to ensure that the environmental right is realized as part of Municipal planning.*
[51] Steytler Nico and de Visser Jaap March 2014, *Local Government Law South Africa,* Chapter 1 the development of Local Government *Lexis Nexis* pages 1 – 32.
[52] RSA Constitution (see note 9) Section 44(3) 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.'
[53] *Ibid* Section 104(4) 'Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.'
[54] *Ibid* Section 156(5).

An example of incidental power not related to environmental legislative authority for local government, is the 2010 judgement of *Mazibuko v City of Johannesburg* wherein the City of Johannesburg installed prepaid water meters although there was no explicit reference to the power to install the meters for local government.[55] The court found that this would have been necessary for the effective functioning of the municipality in providing a service to the community as provided for by the Municipal Systems Act which empowers municipalities to do anything that is reasonably necessary for or incidental to the effective performance of its functions and the exercise of its powers, further echoing the provisions of section 156(5) of the Constitution on effective performance of their functions.[56] As such, the constitutional court concluded that the installation of the prepaid water meters was not a breach of the Constitution.[57]

In light of the above, incidental powers empower local government to exercise power on a competence that is not its core competence in terms of the schedules 4B and 5B of the Constitution when the authority is necessary for effective functioning in its core competence.

Assigned Power

A sphere of government that has authority on a matter or functional area can delegate or assign its power to another sphere of government. Essentially, Freedman draws on the differences of assigned and delegated powers noting *Executive Council, Western Cape Legislature v President of RSA.*[58]

As indicated earlier, power can be assigned through legislation. Notably, when a sphere of government has been assigned authority, there is full transfer of authority over the assigned matter.[59] However, if the particular legislation that empowers a sphere of government to implement its provisions is repealed, then the sphere that was assigned authority through particular legislation, forfeits its assigned authority.[60]

The Constitution allows for the assignment of powers; section 99 states that a member of the Parliamentary cabinet can assign functions to the Provincial Executive Council or to the Municipal Council.[61] Moreover, section 156(1)(b) states that local government has the executive authority and the right to administer any matter assigned to it by national or provincial government. Essentially, Freedman further notes that assigned powers are either 'expressly' or implicitly assigned.[62]

Section 156(4) of the Constitution allows for powers to be assigned to the local government:

> The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part **A** of Schedule 4 or Part A of Schedule *5* which necessarily relates to local government, if-

[55] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).
[56] *Ibid* Mazibuko (see note 55) para 111.
[57] *Ibid* Mazibuko (see note 55) para 169.
[58] Freedman (see note 30) discussing assigned municipal powers at 571.
[59] *Ibid* Freedman at 581.
[60] *Ibid* at 581.
[61] RSA Constitution section 99 (see note 9).
[62] Freedman (see note 30) at 579 – for an example implicit power see *Executive Council, Western Cape Legislature v President of Republic of South Africa* 1995(10) BCLR 1289 (CC).

> *(a)* that matter would most effectively be administered locally; and
> *(b)* the municipality has the capacity to administer it.[63]

As noted assignments can either be expressly or implicitly assigned and by implicit assignment, Freedman observes that:

> The implication is that while the power to pass legislation on a matter that falls outside Schedules 4 and 5 cannot be assigned by implication to the provincial legislatures, it can be assigned by implication to the municipal councils. [64]

Thus, section 156(4) for the assignment of powers to local government does not include the term '*expressly*' while the provision for assigning legislative authority to the provincial government provides in section 104(1)(b)(iii) specifically includes expressly

> any matter outside those functional areas, and that is *expressly* assigned to the province by national legislation;…'.[65]

Therefore, legislative powers cannot be assigned to the province impliedly but can be impliedly assigned to local government. The Constitution provides that legislative powers can be conferred by national government to any legislative body in the sphere of government as provided for under section 44(1)(a)(iii)

> to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government;…'.[66]

Additionally, the provincial government can assign its legislative authority to the Municipal Council in its province as provided for in section 104(1)(c)

> to assign any of its legislative powers to a municipal Council in that province..'.[67]

Section 156(2) of the Constitution provides for the legislative authority for local government that they can make and administer by-laws for effective administration of matters which it has a right to administer, therefore an assigned power gives local government the authority to enact laws that would allow them to effectively administer the assigned area. Local government can be assigned powers by either national or province and it has legislative powers to enact by-laws for effective administration. Assignment of powers can be through statutory provisions.

2. Conclusion

This chapter considered the allocation of powers within the different spheres of government with special emphasis on the legislative authority of local government. Different sources of authority were considered including original power; statutory power; incidental power and assigned power. The Constitution confers legislative authority to local government as provided for in section 156(2) in order for municipalities to be able to effectively administer areas that they have a right to administer.

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[63] RSA Constitution section 156(4) (note 9).
[64] Freedman at 581 (see note 30).
[65] RSA Constitution section 104(1)(b)(iii) (see note 9).
[66] *Ibid* section 44(1)(a)(iii).
[67] *Ibid* Section 104(1)(c).

In terms of original powers, as provided in the Constitution, local government has been allocated competences in schedule 4B and 5B. As noted earlier, environment is not a local government competence hence its authority for environmental protection cannot be sanctioned from its original powers.

Notably, municipal planning is a core competence of local government and is a potential source of power for local government for the protection of the environment. Wherein, the municipal planning law as a statutory provision specifies planning for environmental protection, it could also be argued that municipal planning assigns authority to local government to protect the environment or it could be an incidental power to ensure the effective administration of an area.[68] Chapter 3 explores municipal planning jurisprudence and focuses on the views of the judiciary on municipal planning powers.

[68] Chapter 5 discusses the provisions of SPLUMA (see note 8) on the protection of the environment with specific emphasis to local government wherein the development principles in section 7 provide for the principle of sustainability, principle of efficiency and spatial resilience; section 12(1)(h) on preparation of spatial development frameworks for all spheres of government with the specific inclusion on environmental objectives of each sphere.

CHAPTER 3: MUNICIPAL PLANNING JURISPRUDENCE

The issue of municipal competence to legislate for the protection of the environment is closely related to the municipal core competence of municipal planning. Therefore, it will be instructive to consider municipal planning jurisprudence although some of the case law is not related to local environmental protection which is a central issue of the thesis. However, consideration of the views of the judiciary on the powers held by local government within municipal planning may influence views on local environmental legislative power under the ambit of municipal planning.

The South African jurisprudence on municipal planning powers has been very unambiguous on the authority of local government, in the planning and control of land use within their jurisdiction. Essentially, protection of the environment is also almost entirely reliant on land use which is part of municipal planning. This chapter gives a brief history on the South Africa planning law and highlights a few cases where the autonomy of local government in municipal planning has been recognized.

1. South African Planning Law

There are many views on the history of the South African planning law, Glazewski and du Toit note that it has its roots in North Africa where the Egyptians employed a similar grid pattern for house workers in the pyramids and this dates back as far as the third millennium Before Christ.[69] The South African planning law was further influenced extensively by the UK and the USA planning systems as well as human movements that were focused on improving social ills by incorporating nature as part of the city.[70]

The first identified 'Garden City' in South Africa was Pinelands on the edge of Cape Town and this form of development as a model, dominated the South African urban development within the apartheid planning legislation where in black townships there was hardly a tree on site.[71] The apartheid was an integral part of the planning legislation and this included racial segregation and economic zones. This has resulted in the legacy seen today, of unjust and distorted economic patterns that identify the South African landscape.

The 1913, Native Land Act influenced these spatial patterns. Provincial Town Planning Ordinances were incorporated into the four provinces with the Act of Union in 1910, then 1994 saw the coming in of a new democratic dispensation which resulted in changes in the planning laws within the Republic. Du Plessis extensively describes the complexity of land use management legislation in South Africa, diving it into three periods, namely: historical before 1994, transition before 1994 and 200 and post 2000 period.[72]

[69] Glazewski J and du Toit L October 2015 Chapter 9 planning law and the environment in *Environmental Law In South Africa* Part 2: Land, Planning and Development. *Lexis Nexis*.
[70] *Ibid* Glazewski J and du Toit L.
[71] *Ibid* Glazewski J and du Toit L section 9.1.2.
[72] Du Plessis A 2015 Chapter 16 'Land-use management and planning' at 564 (see note 14).

Under the new democratic dispensation nine provinces were established, including wall to wall municipalities and the planning laws and structures were scrutinized in order to create more balanced patterns and redress the apartheid legacy. To this day, provincial planning is still integral in the South African Planning law as provinces are expected to follow national acts, then enact their own planning legislation in their provinces but the progress has been noted to be rather slow and concerning.[73]

The first planning legislation that was enacted under the new dispensation was the Development Facilitation Act[74] (DFA) to promote housing developments and this was motivated by the urgent need to fast track the processes for the poor and marginalized communities but it was repealed and replaced by SPLUMA that came into effect on the 1 July 2015.[75]

Notably, Kwa-Zulu Natal was the first province to repeal the old order provincial town planning ordinances and enacted the Kwa-Zulu Natal Planning and Development Act 5 of 1998 which repealed the Town Planning Ordinance (Natal) 27 of 1949 inclusive of the planning legislation within the province.[76] The Act was then repealed by the Kwa-Zulu Natal Development Act 6 of 2008 excluding certain provisions.[77] Essentially some of the planning acts that are still in force in Kwa-Zulu Natal include the Kwa-Zulu Natal Land Affairs Act 11 of 1992, the Kwa-Zulu Natal Ingonyama Trust Act 3 of 1994 and the Kwa-Zulu Natal Amakhosi and Iziphakonyiswa Act 9 of 1990.

However, these planning laws will not be dealt with in this chapter, emphasis is now drawn to municipal planning as provided for by the Constitution, focusing on the local sphere of government.

2. Background

Scholars have found it difficult to explicitly define the actual meaning of municipal planning in relation to the protection of the environment for local government.[78] As provided for in the Constitution, municipal planning is a competence of local government. Local government has been allocated executive and administrative power on this functional area. However, both the national and provincial legislatures have also been accorded authority over 'municipal planning' as part of their oversight therefore this raises questions on the extent of local government's legislative authority.[79]

Thus, there is a lack of clear delineation of legislative powers held by both the national and the provincial legislatures over municipal planning. Municipal planning is a competence of local government and local government is accorded powers to make by-laws within municipal

[73] *Ibid* Du Plessis A 2015 Chapter 16 'Land-use management and planning' at 564 (see note 14).
[74] Development Facilitation Act 67 of 1995.
[75] SPLUMA (see note 8).
[76] Glazewski and du Toit (see note 69).
[77] *Ibid* Glazewski and du Toit.
[78] Du Plessis and van der Berg at 581 (see note 31).
[79] Bronstein (see note 32) at 648.

planning as provided for by section 156(2) of the Constitution.[80] Although both the national and provincial legislatures have been accorded legislative authority on municipal planning, the Constitution provides that a function should be best allocated at the lowest level possible for it to be most effectively administered as provided for in S156(4).[81] Thus, local government is best suited to legislate for local matters.

Briefly below, the views of the judiciary on municipal planning have been highlighted, echoing the autonomy of local government and confirming local government powers on municipal planning.

3. Municipal planning as defined by case law

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* judgment the constitutional court decision noted that municipal planning includes strategies for desired land use patterns where the spatial framework should outline guidelines on land management within local government.[82] While *Lagoon Bay Lifestyle Estate (PTY) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape* judgment noted that municipal planning encompasses 'intra-municipal planning' which includes integrated planning for development and land use management within its jurisdiction.[83] The *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* judgment notes that the prefix in municipal planning identifies and distinguishes this functional area from other others allocated to other spheres,[84] further simply defining it as control and regulation of the use of land.[85]

4. Judicial interpretation of local government authority on municipal planning

In the *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* judgment, local government challenged the constitutionality of the Development Facilitation Act 67 of 1995 which was a national statute/law that provided for executive authority of municipal planning functions to the provincial government and the judge protected the authority of local government in municipal planning:

> 'while national and provincial government may legislate in respect of the functional areas in schedule 4, including those in part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities.

[80] RSA Constitution section 156(2) 'A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer' (see note 9).
[81] *Ibid* RSA Constitution Section 156(4) 'The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in part **A** of Schedule 4 or part A of Schedule *5* which necessarily relates to local government, if-
(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.' (see note 9).
[82] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 134.
[83] *Lagoon Bay Lifestyle Estate (PTY) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape* 2011 4 All SA 270 (WCC) para 12.
[84] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55.
[85] *Ibid Gauteng Development Tribunal* para 55.

> Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid.'[86]

The original municipal planning powers were highlighted as provided for by section 156 (1) in the Constitution.[87] The provincial government's role was noted as providing monitoring and support as provided for by section 155(6)(a). Both national and province cannot by legislation give themselves power to exercise executive municipal powers and administration of municipal affairs.[88] Emphasis was drawn to municipal original powers, amplifying that the executive authority of municipal planning is vested within local government.[89] The judge further noted that 'it is just and equitable to protect the municipalities right to perform their functions and exercise their functions'. [90]

The *Maccsand (Pty) Ltd v City of Cape Town* judgment further set a trend that holding a mining right from a national sphere of government does not overturn the obligation to attain authorisation in terms of laws that govern the land.[91] Maccsand was granted a mining right in terms of the Mineral Petroleum Resources Development Act 28 of 2002 (MPRDA) but the land in question was municipal land and not zoned for mining.[92] Therefore, mining was not permissible until the land was first rezoned by local government. Subsequently, holding a permit from another sphere of government does not override the authority of local government to regulate the land and its use.

Attaining a mining license or right does not impede the obligation to acquire authorisations under relevant legislations with the functional capacity over other domains besides minerals, mining and prospecting[93]. Hence, the MPRDA has been noted to not have a "surrogate" municipal planning function that "trumps" planning legislation.[94] The court noted the importance of cooperative governance and essentially put forward that neither sphere is intruding into the functional area of another because each sphere has been accorded its own unique authority, therefore both spheres should exercise their powers separately under the same matter if there is an overlap.[95]

Thus, the national sphere had the authority to issue the mining right and local government has the authority to administer municipal planning functions and therefore in order for the mining to go ahead it would need the approval from both spheres of government. For that reason, holding a mining right from a national sphere of government does not 'trump' the authority of local government in its municipal planning functions.

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[86] *Ibid Gauteng Development Tribunal* para 28.
[87] *Ibid Gauteng Development Tribunal* para 46.
[88] *Ibid Gauteng Development Tribunal* para 59.
[89] *Ibid Gauteng Development Tribunal* para 47.
[90] *Ibid Gauteng Development Tribunal* para 81.
[91] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 46.
[92] *Ibid Maccsand CC.*
[93] Olivier NJJ, Williams C and Badenhorst PJ *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) PER 61, 2012.
[94] *Maccsand v City of Cape Town* (21712009; 5932/2009) [2010] Western Cape High Court, Cape Town at page 18.
[95] *Ibid Maccsand* Western Cape High Court.

Another court's decision of note is the *Lagoon Bay Lifestyle Estate (PTY) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape* case, where there was an application for subdivision and rezoning of land for a development. The changes were approved by local government but because of the size of the development the provincial authority presumed it was the competent authority, and it refused the application deriving its authority from provincial legislation (Land Use Planning Ordinance Cape 15 of 1985).[96] Again, the court again protected the municipal planning function as a local government function.[97]

Yet again, the court's decision in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* stated that the provincial government cannot simply override local government planning decisions on appeal as this is unconstitutional.[98] Where Humby in analysing this judgement notes that:

> …the constitutional court undoubtedly played a valuable role in affirming that the functional area of municipal planning is primarily located in the local government sphere, and that this function is inclusive of decision-making authority over zoning and subdivision within a municipal area.[99]

The court observed that both national and provincial powers should be 'hands off' in relation to oversight of local government matters.[100]

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others noted that although the national government and provincial government have authority, it is clear that local government is accorded autonomy by the Constitution in carrying out its mandate of municipal planning and the Constitutional Court has been very unambiguous about the autonomy of local government.[101]

The Constitutional Court affirmed the autonomy of local government planning powers in *Pieterse N.O. and another v Lephalale Local Municipality* and by setting aside section 139 of the Town-planning and Township Ordinance 15 of 1986.[102] The court stated that section 139 was invalid because it interfered with municipal planning decisions, as it provided for the provincial sphere to appeal against municipal planning decisions. The court held that 'matters on land planning are best left for municipal determination'.[103]

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[96] *Lagoon Bay* (see note 186).
[97] *Ibid Lagoon Bay.*
[98] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* 2014 4 SA 437 (CC) para 21.
[99] Humby 'Hands on or hands off? The Constitutional Courts denial of a provincial planning role *Habitat Council v Provincial Minister Local Government Western Cape* 2013 (6) SA 113 (WCC) *Minister of Local Government, Western Cape v The Habitat Council* (*City of Johannesburg Metropolitan Municipality* Amicus Curiae) 2014 (5) BLCR 591 (CC)' 1 *TSAR* 17 8, 2015, 178.
[100] *Habitat Council* para 21(see note 201).
[101] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BLCR 1458 (CC).
[102] *Pieterse N.O. and another v Lephalale Local Municipality and Others* [2016] ZACC 40 para 13
[103] *Ibid Pieterse* para 14.

5. Conclusion

The courts have been consistent about the autonomy of local government on municipal planning matters as noted above. Although some of these cases are not related to environmental conservation/regulation as part of municipal planning, undoubtedly, they echo and amplify that the judiciary recognizes and upholds the authority of local government in municipal planning. An inference can be drawn on the existing jurisprudence on municipal planning that local government has power and authority to plan for how land should be used, with that said that includes planning for the protection of the environment.

The courts have further affirmed that the realization of the environmental right should be ensured, the *Fuel Retailers* case is an important case to note in that the Constitutional court affirmed protection of the environment and sustainable development.

> The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself.[104]

Fuo argues that the courts provide an opportunity to use their authority to demystify local government powers in furthering the environmental right, noting that the courts overturn existing laws and policies 'that unduly limit the role of municipalities in fostering the objectives of section 24 of the Constitution'.[105] Judge Gyanda in *Le Sueur* noted that historically local government under municipal planning has exercised executive legislative responsibility over environmental affairs within the municipality.[106]

The preceding jurisprudence affirms the authority of local government over municipal planning. Thus can local government not use the authority it enjoys to plan and regulate how land within its jurisdiction will be used to protect the environment? Decisions made for land use are central to many environmental concerns.[107] Therefore:

> it is impossible as a matter of accepted town planning practice to divorce environmental and conservation concerns from town planning principles[108]

eThekwini municipality succeeded in legislating for the protection of the environment under the ambit of municipal planning. The next chapter deals with the *Le Sueur* case and analysing the source of authority that was in effect.

[104] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) para 102.
[105] Fuo (see note 33) at 33.
[106] *Le Sueur* para 21 (see note 5).
[107] Glazewski J and du Toit L (see note 172).
[108] *Le Sueur* para 29 (see note 5).

CHAPTER 4: THE *LE SUEUR* JUDGMENT

1. Introduction

Generally, open space systems are not a new phenomenon in South Africa as Van Wyk noted the initiation of open space systems within a number of cities, where:

> Durban, which published documentation in 1984 and launched its Durban Metropolitan Open Space System (DMOSS) in 1989. A Cape Town Metropolitan Open Space System (CMOSS) study was initiated in three phases, the first commencing in 2000. The City of Johannesburg completed its Metropolitan Open Space System in 2002 (JMOSS) and published by-laws on open space in 2003. Other towns and cities that have implemented open- space systems are Pietermaritzburg, Port Elizabeth, East London, Bloemfontein, Empangeni and Port Alfred.[109]

Internationally, open space system legislation is receiving significant attention and there was a call made for South Africa to focus on enacting legislation regulating open spaces within municipalities.[110] Notably, open space systems are of interest to many stakeholders including municipalities that have already developed these spaces and those that intend to. A 'land mark' judgment of note in environmental law is *Le Sueur and Another v eThekwini Municipality and Others.*[111]

The judgement has brought much scrutiny in understanding local environmental authority and this chapter will not give specific emphasis to open space systems per se but the focus will be on contextualizing the reasoning for the *Le Sueur* judgment. The judgement did not clarify the source of the authority for the city nor its character.

Many commentators have analysed this judgment with no consensus in their views on the source of authority (Freedman[112], du Plessis and van der Berg[113], Bronstein[114], Muir[115], Humby[116]). Therefore, this chapter analyses existing views on the *Le Sueur* judgement and adds to the ongoing discourse.

The structure of this chapter briefly introduces the case, followed by the summary of arguments including the judgment, then an analytical interpretation of the judgment taking note of already existing views on the judgment and the concluding comments.

2. Background

The eThekwini Metropolitan Municipality made amendments to its town planning scheme by creating a Geographical Information Systems layer to overlay on the town planning scheme in

[109] Van Wyk J 2005 Open space systems in urban land-use planning – invaluable assets in conserving the environment and enhancing the quality of life *TSAR* 2 at 256.
[110] *Ibid* van Wyk.
[111] *Le Sueur* (see note 5).
[112] Freedman (see note 30).
[113] du Plessis and van der Berg (see note 31).
[114] Bronstein (see note 32).
[115] Muir (see note 34).
[116] Humby T 2015a (see note 35).

order to the protect the environment. The amendments to DMOSS resulted in posing limitations on developments of the affected sites including privately owned properties.

DMOSS allows for regulating proposed developments within or adjacent its boundaries in order to protect the environment, hence the implication is that private property owners had to take into account both the existing zoning provisions and DMOSS provisions that included incorporation of an environmental authorisation from the municipality.

Notices were sent out to inform land owners that were affected by the amendments of the scheme; however, some private land owners affected by the scheme felt that it was unconstitutional for the municipality to enforce the amendments as part of the town planning scheme.

A private owner Le Sueur took to the KwaZulu-Natal High Court, eThekwini municipality applying for the amendments to be set aside as being unconstitutional. He argued that the municipality had no authority in terms of the *Constitution of the Republic of South Africa*¸1996 or any other law to legislate on environmental matters because the environment is not a local government competence. The court's decision was that the amendments were not unconstitutional and local government can regulate on environmental matters.

3. Arguments

The applicant argued that eThekwini municipality first introduced the amendments to the town planning scheme in terms of the Town Planning Ordinance (old order statutory provision) [117] and completed it under the KZN Planning and Development Act.[118] The applicant argued that these are invalid.[119] The focus of this chapter will be on the second argument put forward by the applicant which contends that local government has no constitutional authority to introduce amendments to a town planning scheme to conserve the environment as the 'environment' is not a local government functional area.[120]

The applicant argued that the environment is a competence of both national government and provincial government as provided for by the Constitution in schedule 4 part A, hence local government is limited to legislate matters as per section 156(1) with regards to the provisions set out in section 156(2) and these do not include the environment.[121] The applicant

[117] Town Planning Ordinance No 27 of 1947.
[118] KZN Planning and Development Act No 6 of 2008.
[119] *Le Sueur* para 4 (see note 5).
[120] *Ibid Le Sueur.*
[121] *Ibid Le Sueur* para 16 – Republic of South African Constitution, 1996 Section 156.
'Powers and functions of municipalities-
(1) A municipality has executive
(a) the local government matters listed in Part B of Schedule 4 and Part B of
(b) any other matter assigned to it by national or provincial legislation.
(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

acknowledged that the amendments to the town planning scheme are legislative in character, but questioned the authority of local government, stating that it does not have original or delegated powers to legislate for the environment.[122] The applicant further put forward that the framework for managing the environment in South Africa is NEMA and does not empower local government to legislate on the environment.[123]

eThekwini, as the local government, responded by submitting that municipal planning is a competence of local government thus, an original power, and municipal power needs to be assessed and interpreted as provided by section 156, where the power can be either original or assigned.[124] It further noted the provision in section 156(5) for incidental powers where local government has authority to exercise any power that concerns a matter that is necessary for the effective performance of its functions and stated that local government is best positioned to deal with issues locally.[125]

To amplify further, eThekwini submitted that the environment is a typical example of a functional area that should reside in all three spheres of government as provided for by cooperative governance.[126]

4. The judgment

Judge Gyanda noted that the applicant's interpretation is both narrow and incorrect as local government is part of the 'state' and local government has a constitutional obligation to protect, promote and fulfil the rights as provided for by section 7(2) of the Constitution.[127] Further stating that although schedules 4 and 5 in the Constitution allocate competences, they are not the only provisions for government responsibilities and duties.[128]

Referring to section 24(b) of the Constitution, which provides that everyone has the right to have an environment protected, for the benefit of present and future generations it was alluded that there is no indication that this provision is only applicable to the national and provincial government, therefore it is also binding to local government.[129] Section 24(b) and section

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(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part **A** of Schedule 4 or Part A of Schedule *5* which necessarily relates to local government, if-
(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.
(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.'

[122] *Ibid Le Sueur* para 16 (chapter 2 further describes both original and delegated powers under sources of authority) (see note 5).
[123] *Ibid Le Sueur.*
[124] *Ibid Le Sueur* para 20.
[125] *Ibid Le Sueur.*
[126] *Ibid Le Sueur.*
[127] *Ibid Le Sueur* para 19.
[128] *Ibid Le Sueur.*
[129] *Ibid Le Sueur.*

152(1)(d) on the promotion of a safe healthy environment were noted as reasonable legislative provisions for promoting sustainable development.[130]

The court noted that municipal planning is an original competence for local government, it has executive authority and the right to administer this functional area, further noting the different sources of power within the Constitution.[131] The court highlighted the principle of subsidiarity alluding to local government being best positioned to understand local environmental issues.[132]

The judge further agreed with the respondent that the constitutional drafters did not envisage a state that functions in hermetically sealed vacuums, noting that no power is absolute and hence should be read in conjunction with section 40(1) and 40(2) on cooperative government which is applicable to all spheres.[133] Therefore environmental matters are a typical example of a competence that should reside in all three spheres of government.[134]

The judge further mentioned the historical role of local government in carrying out municipal planning; local government would inevitably exercise executive and legislative responsibility on environmental matters within its jurisdiction.[135] In other words, environmental protection is part of municipal planning historically. The judge further highlighted that these powers were conferred through the Local Government Transition Act.[136]

The court further noted that the Systems Act section 23(1)(c) constitutes a legislative mandate on local government to develop integrated development plans (IDP) that take into account environmental matters.[137] Attention was also drawn to section 2(4)(f) of Local Government; Municipal planning and Performance Management Regulations on spatial development frameworks (SDF's) as part of the IDP.[138] The court further noted that there is no dispute that the amendments were introduced as part of the IDP, which is a legislative obligation for local government. Moreover, the provisions of the amendment are not in conflict with any national or provincial laws. [139]

Noticeably, the Minister of Environmental Affairs (representing the National Department of Environmental Affairs); the MEC Agriculture and Environmental Affairs (representing

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[130] *Ibid Le Sueur* para 19 (see note 5).
[131] *Ibid Le Sueur* para 20.
[132] *Ibid Le Sueur.*para 20.
[133] *Ibid Le Sueur* para 20.
'(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.'
[134] *Ibid Le Sueur* para 20.
[135] *Ibid Le Sueur* para 21.
[136] *Ibid Le Sueur* para 22 – Local Government Transition Act no 209 of 1993 (for the rest of this dissertation referred to as LGTA).
[137] *Ibid Le Sueur* para 24 – Systems Act Section 23(1)(c) 'together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 4, 25, 26, 27 and 29 of the Constitution.'
[138] *Ibid Le Sueur* para 26 – Local Government; Municipal Planning and Performance Regulations GN 796 in *GG* 22605 of 24 August 2001, Section (2)(4)(f) 'contain a strategic assessment of the environmental impact of the spatial development framework'.
[139] *Ibid Le Sueur* para 26.

provincial Agriculture and Environmental Affairs, Kwa-Zulu Natal and the MEC for Cooperative Governance KwaZulu-Natal (representing provincial COGTA) did not oppose the respondent.[140] Judge Gyanda, noted that if eThekwini Municipality was transgressing the authority of both the national and provincial sphere of government, then these spheres would have expressed objection to eThekwini legislating for the environment.[141] The City of Cape Town as *amicus curiae* to the court stood in solidarity with the respondent also opposing the application.[142]

Affidavits that were brought forward as evidence convinced the court that municipal planning and environmental conservation cannot be separated.[143] The court was satisfied that the respondent proved that municipal planning also partly involves environmental regulation even prior to the enactment of the Constitution.

Under the new dispensation it still carries the same meaning which includes regulation of the environment.[144] The judge stated that NEMA places an obligation to protect the environment on all spheres of government.[145] In further recognizing the provisions of NEMA for local government, the judge further added

> 'NEMA therefore recognizes the role of Municipalities and Municipal duties with regard to the environment in its Municipal planning function. It is clear, therefore, that Municipalities are entitled to regulate environmental matters from micro level for the protection of the environment'.[146]

The Environmental Protection Plan published in the Kwa-Zulu Natal provincial government Gazette published May 2009, recognizes environmental relevance as part of municipal planning, further including environmental regulation that will spur through the IDP.[147] Also, the National Environmental Management: Biodiversity Act No. 10 of 2004 was cited as requiring alignment of local governments' IDPs and SDF's with national and provincial legislation; also highlighting the National Biodiversity Framework.[148]

Judge Gyanda concluded by stating that local government is authorized to legislate in respect of environmental matters for the protection of the environment and the amendments to eThekwini's town planning scheme are indeed constitutional and valid, there is no usurping of authority by local government on other spheres in respect to environmental legislation. The judge dismissed the application with costs.[149]

[140] *Le Sueur* para 29 (see note 5).
[141] *Ibid Le Sueur* para 29.
[142] *Ibid Le Sueur* para 2.
[143] *Ibid Le Sueur* para 29.
[144] *Ibid Le Sueur* para 33.
[145] *Ibid Le Sueur* para 34.
[146] *Ibid Le Sueur* para 37.
[147] *Ibid Le Sueur* para 35.
[148] *Ibid Le Sueur* para 38.
[149] *Ibid Le Sueur* para 40.

7. Comments and analysis

In analysing the *Le Sueur* judgement, a number of views from the commentators agree that it is indeed favourable for local government to regulate on environmental matters under the ambit of municipal planning. Questions have been raised on the source of environmental legislative authority based on the outcome of this judgment. As such, du Plessis and van der Berg note that this judgment resulted in explicitly confronting planning powers relating to the conservation of the environment within local government.[150]

The passing of this judgement is noted as a time when the court had to plainly define the implications of 'environment' on planning.[151] In agreement with Muir this paper submits that 'the *Le Sueur* judgment is legally tenuous but it seems to be logically, intuitively and practically correct.'[152] The emphasis on the issue at hand is the legality of the powers that were exercised by eThekwini for implementing its DMOSS.[153]

Many source/s of authority have been identified for local government and these have been described and discussed in chapter 2.[154] Therefore, the next section briefly summarises some key points that were mentioned by the commentators on the *Le Sueur* judgment:

Du Plessis and van der Berg note that the implementation of constitutional powers and functions within local government continues to present legal difficulties based on the complexity of the division of powers within the three spheres of government.[155] In the past there has never been a need to determine whether amendments to a planning scheme are either legislative or executive in nature, however such a need has arisen in order to further understand the impact of section 156(1)(a) of the Constitution on municipal planning.[156]

It has been suggested that municipal planning power on planning schemes is legislative in character.[157] DMOSS amendments affected multiple unrelated properties and should be regarded as a large scale rezoning as opposed to small scale rezoning that can be compared to spot decisions as provided for in the *Gauteng Development Tribunal* which were noted as administrative/executive in character.[158]

The commentators do not reach a consensus on the source of local government powers for regulating the environment. For example Humby suggested that the judgement was correct in placing the environment as part of municipal planning; because municipal planning is an

[150] Du Plessis and van der Berg at 581 (see note 31).
[151] *Ibid* Du Plessis and van der Berg at 582.
[152] Muir at 570 (see note 34).
[153] *Ibid* Muir.
[154] Chapter 2 under sources of authority discusses different sources of authority. For more reading see: Muir A 2015 The Le Sueur Case and a Local Government's Constitutional Right to Govern *Southern African Public Law* Issue 2 Vol 30; Freedman W 2014 The Legislative Authority Of The Local Sphere Of Government To Conserve And Protect The Environment: A Critical Analysis of *Le Sueur v eThekwini Municipality* [2014] PER 62 *PELJ* (17)1.
[155] Du Plessis and van der Berg at 580 (see note 31).
[156] Bronstein (see note 32) at 653.
[157] Muir (see note 34) at 572.
[158] Bronstein (see note 32) at 661.

original competence as such legislating for the environment would be an incidental power.[159] However, Bronstein argues that the amendments to DMOSS are unlikely to be incidental in character and the Constitution cannot be deemed as the source of the power, but rather these powers were sourced through assignment from competent legislatures. [160]

The old provincial ordinances or provincial legislation empower local government to make and amend town planning schemes through delegation.[161] Spatial development frameworks (SDF's) are within the municipal legislative ambit through assignment by the national legislature and these assignments sufficiently justify municipal legislative amendments like DMOSS.[162] Therefore Bronstein deems that power is assigned but the source is not clearly identified.

Freedman also agrees that power is assigned to local government and there is no need to consider incidental powers as the court only focused on original and assigned powers.[163] Moreover, Freedman notes that for power to be assigned there is no need for it to be explicit as the Constitution permits for implicit assignment to municipal council much more easily that the provincial legislatures.[164] Therefore, Judge Gyanda is correct in the implicit assignment of legislative authority over environmental matters under the ambit of municipal planning within local government.[165]

In further analysing the judgment, Freedman notes that the inclusion of the 'environment' as part of municipal planning anticipates an overlap in environmental protection with both the national and provincial spheres of government as a schedule 4 part A competence.[166] Taking note of the *Gauteng Development Tribunal* case, he notes that functional areas should be distinct from one another and not include another sphere's functions.[167]

There is no provision that allows local government to legislate the overlap for the environment as part of municipal planning.[168] Therefore local government should not 'predominantly' legislate for the protection of the environment rather it should be based on its core competence of municipal planning.[169]

Bronstein commented that the statutory provisions cited within the court's reasoning in *Le Sueur* do not give substantial grounds to deem the statutory provisions as a source of power to make the amendments to the scheme.[170] There is a need to further determine the scope of the powers that the national and provincial spheres of government possess under parts B of the

[159] Humby T 2015a (see note 35) at 1668.
[160] Bronstein at 662 (see note 32).
[161] *Ibid* Bronstein.
[162] *Ibid* Bronstein.
[163] Freedman at 588 (see note 30).
[164] *Ibid* Freedman at 581.
[165] *Ibid* Freedman at 588.
[166] *Ibid* Freedman at 589.
[167] *Ibid* Freedman at 578.
[168] *Ibid* Freedman.
[169] *Ibid* Freedman.
[170] Bronstein (see note 32) at 650.

schedules because these in turn also inform how wide or narrow the powers should be interpreted for local government.[171]

However, Muir provides an alternative approach to the above views to arrive at the same decision. The reasoning from the judgment is not clear and hence there are questions on whether there is irregular disguising of the 'environment' as municipal planning. Muir notes that if one were to follow the process of allocation of powers and the legislating authority vested within local government, then the legislating of the 'environment' by local government could be deemed as unlawful because the 'environment' is not a local government competence.[172]

Citing section 151(3) of the Constitution Muir notes that: 'A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution'.[173] Muir puts forward that local government's source of authority cannot be confined to original, incidental and assigned powers but the 'right to govern' as a source of authority must also be considered.[174]

Therefore, the power to govern its own affairs 'implies' both executive and legislative authority including a hybrid of the two powers.[175] Muir puts forward that the local government powers both executive and legislative, are similar to those held by national government except that national government is not limited by geographic limitations within the country. [176] Hence, he argues that whilst the arguments have been attempting to locate the source of authority for the DMOSS amendments as provided for by section 156 of the Constitution based on the schedules, there is a need to look at alternative sources. [177]

Thus, Muir poses a question and asks 'Therefore, do Schedules 4B and 5B define the municipal right to govern and itemise original local government powers?' [178] Then the follow up question that is further posed, 'Is there any indication that Parts B are not the sole source of original local government power and therefore they do not define the right to govern?'[179] Muir further noted that it is a difficult question to answer in practice and there are practical scenarios that illustrate that the original source of powers for local government only based on parts B of schedules 4 and 5 are insufficient.[180]

Section 24 of the Constitution is noted as providing for a duty to all spheres of government to protect the environment, but it is put forward that even so, the duty cannot amount to be either an assigned power or incidental power.[181] The state has an obligation to ensure that the Bill of Rights is fulfilled, but the question is whether within the confines of the original powers based

[171] *Ibid* Bronstein at 644.
[172] Muir (see note 34) at 573.
[173] RSA Constitution section 151(3) (see note 9).
[174] Muir at 571 (see note 34).
[175] *Ibid* Muir.
[176] *Ibid* Muir at 575.
[177] *Ibid* Muir at 573.
[178] *Ibid* Muir at 572.
[179] *Ibid* Muir at 573.
[180] *Ibid* Muir.
[181] *Ibid* Muir.

on the schedules, do these powers indeed satisfactorily allow for the realization of these rights?[182] Muir suggests that, how these powers are interpreted needs to change as the vested powers inclusive of incidental powers, can be insufficient in satisfactorily providing capability to local government.

In conclusion, to the character of the power that was used to legislate for the environment, one agrees with Muir and Hubby that the character is legislative. However, it is important to note that environment is not a core competence of local government, however it falls within the ambit of municipal planning as an original competence for local government but local government cannot predominantly legislate for the environment. Hence this power would be assigned to local government within municipal planning, though the assignment might be implicit as noted by Freedman.

8. Discussion

Indeed, Judge Gyanda correctly noted the narrow and incorrect interpretation of the applicant as local government has a duty to uphold and ensure that the rights in the Bill of Rights are realized. The commentators as described above have made their observations on the source and character of power that is at play for the DMOSS in *Le Sueur*.

Are the amendments in DMOSS legislative or executive?

In agreement with the *Le Sueur* judgement[183], Bronstein[184], Muir[185] and Freedman[186] regard the DMOSS amendments as being legislative in character.

What is the source of local government's authority?

In the judgment, eThekwini Municipality relied on the broadness of the term environment:

> In the main, eThekwini Municipality defended the legality of the amendment of its town planning scheme (which effectively created local conservation law) on the basis that "the environment" is a broad notion that encapsulates many issues and dimensions. It was submitted that an inclusive reading of the Constitution as well as environmental and local government law renders it practically impossible for municipalities to not share in the state's environmental duties.[187]

The judge noted that all spheres of government have the responsibility to protect the environment but it is particularly important for local government because of the principle of subsidiarity[188] i.e. it makes more sense for them to deal with issues that affect their communities as they are the sphere that is closer to the people.

[182] *Ibid* Muir.
[183] *Le Sueur* para 16 and para 21 (see note 5).
[184] Bronstein at 662 (see note 32).
[185] Muir at 571 (see note 34).
[186] Freedman at 581 (see note 30).
[187] du Plessis and van der Berg at 586 (see note 31).
[188] *Ibid* du Plessis and van der Berg.

There also was emphasis on the historical role of local government legislating and administering municipal planning but this confers no power to regulate the environment as part of municipal planning. Bronstein highlights that there was reference and emphasis to the IDP and other legislation but none of these illustrate the source of power to make the amendments valid.[189]

The judgement further drew emphasis to a number of environmental statutes and instruments that are essential for the realization of the environmental right in South Africa i.e. NEMA, National Biodiversity Framework, National Environmental Management: Biodiversity Act, and the Kwa-Zulu Natal Environmental Integrated Plan. The national legislature in NEMA section 46 further provides for model environmental by-laws, where section 46(1) provides for the Minister to provide model bylaws aimed to put measures in place in order to manage environmental impacts of any development within any jurisdiction of a local government.[190] Moreover, local government is further empowered by the Systems Act to adopt standard draft bylaws in section 14(1).[191] Hence, all these provisions and statutes, show commitment from government to ensure the realization of the environmental right.

Based on the three categories of legislative powers that can be conferred to local government, Humby suggests that the source of local government environmental legislative powers is incidental within the ambit of municipal planning for the environment.[192] However, both Muir[193] and Freedman question the legitimacy of including the environment as part of municipal planning in order for this power to be recognized as an original power.[194]

Freedman notes that an incidental power cannot confer a new functional area or competence.[195] The protection of the environment is a new functional area for local government as this competence resides with both the national and provincial spheres of government.

This work concurs with Muir and Freedman that eThekwini's source of legislative authority was implicitly assigned. However, Muir draws emphasis to the 'right to govern' within local government and argues that interpretation in municipal planning cases has been predominantly, based on interpretation of functional areas listed in schedules 4 and 5 as provided by section

[189] Bronstein (see note 32) at 662.
[190] NEMA section 46 on Model environmental management bylaws (see note 15).
[191] Systems Act section 14(1) on standard draft bylaws (see note 49).
[192] Humby at 1680 (see note 35).
[193] Muir at 570 'In *Le Sueur* it appears that the functional area of 'environment' was shoe-horned into 'municipal planning' rather than determining that the authority stemmed from an assigned or an incidental power' (see note 34).
[194] Freedman at 588 'Given that the purpose of the incidental power is not to confer new functional areas on municipalities, but rather to confer the power on them to adopt measures that will enhance the effective administration of the functional areas over which they already have authority, it might be possible to argue that those parts of the D-MOSS that make provision for environmental authorisations do fall into the incidental powers of the eThekwini Municipality. It is not clear, however, that those parts of the D-MOSS that deal with the protection of biodiversity do. This is because they appear to deal with matters that fall into the functional area of the "environment".' (see note 30).
[195] *Ibid* Freedman.

156 because the cases clearly dealt with scheduled functional area disputes but there has never been a need to further unpack and interrogate the inherent power to govern.[196]

Freedman's view on the implicit assignment by Parliament to the Municipal Council as the source of authority to legislate for the environment within municipal planning is also favoured. Local government has been given authority to govern and has an obligation to ensure that the environmental right is realized.

The *Le Sueur* judgement has displayed that local government has environmental legislative authority. However another judgement of interest is the *Abbott v Overstrand Municipality and Others*[197] of the Supreme Court of Appeal (SCA) which failed to prove legal obligation of the municipality to prevent damage being caused to the applicants' house by flooding of the Klein River.

Mr Abbot (applicant) built a house on a river bank (Klein River) at Hermanus in the Western Cape Province. The applicant bought the property in 1982, claimed that there was an established practice by the municipality in respect to breaching the berm of the mouth of the estuary when there was a possible threat of damage to the low lying properties.[198] Further claiming that in 2010 the municipality departed from this practice[199] and in 2013 submitted to him in writing that they were in no legal obligation to protect his house from being flooded by the Klein River.[200]

In 2014, the applicant approached the Western Cape High Court alleging damage to his property due to flooding by the Klein River. The relief sought was that the municipality must take reasonable steps to protect his house from flooding.[201] The applicant argued that in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and in terms of common law that the decision of the municipality refusing to prevent further damage to his house should be reviewed and set aside. The High Court dismissed the application as he failed to prove that the conduct of the municipality resulted to the damage of his house. [202]

Then SCA noted that there was no legal obligation for the municipality to protect the applicant's house. Reference was made by the court that the logical starting point in determining the municipal obligation is section 156(1) of the Constitution.[203] The SCA held that schedules 4B and 5B do not give local government authority to breach a berm in the estuary and protect riparian properties as these matters fall under the 'environment and nature conservation' which is a competence of the province and national government.[204]

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[196] Muir at 572 (see note 34).
[197] *Abbott v Overstrand Municipality and Others* [2016] ZASCA 68 (It will be referred to as *Abbott* for the rest of this dissertation).
[198] *Abbott* para 1(see note 197).
[199] *Ibid Abbott* para 8.
[200] *Ibid Abbott* para 8.
[201] *Ibid Abbott* para 6.
[202] *Ibid Abbott* para 6.
[203] *Ibid Abbott* para 14 (see note 197).
[204] *Ibid Abbott* para 15.

The court needed to determine whether any power had been assigned to the municipality or not. The applicant alluded to various pieces of legislation, pre-1991 resolutions of council meetings and 1994 regulations under the Sea-shore Act 21 of 1935, challenging that these provisions gave the municipality authority over the sea shore and estuary.[205]

However, the SCA found that the applicant's claims were factually incorrect and misplaced, moreover the applicant did not take into account the re-allocation of powers and responsibilities as provided for by the Constitution. The judge noted that local government has no legal obligation to perform these functions stating that 'It should also be borne in mind that the municipality cannot lawfully assume powers it does not have, nor can it be compelled to take steps it has no authority to take'.[206]

> The local government matters listed in Part B of Schedules 4 and 5 do not confer any authority on the municipality relative to the breaching of the berm in the estuary and the protection of riparian property owners against flooding. By contrast, Part A of Schedule 4 of the Constitution lists the areas of 'Environment' and 'Nature conservation' as concurrent national and provincial functions. [207]

No powers had been assigned to the municipality in relation to this function and it cannot be compelled to exercise this function with no authority. The court held that Mr Abbott fell short of proving that the municipality indeed had legal authority or an obligation to prevent the damage.

The merits of the *Abbot* judgment set it apart from the *Le Seuer* judgment in that, Mr Abbot sought that the Overstrand Municipality should exercise power that is not a municipal planning function. Rather than putting forward that the judiciary hold different views on the role of local government in regulating the environment it needs to be highlighted that there are distinct differences between these cases.

The *Abbot* judgement was centred around whether the municipality had a legal obligation to take steps and prevent flooding damage to Mr Abbot's house. However, the applicant failed to prove such an obligation

Conceivably, had the applicant taken note of allocation of powers and responsibilities as provided by the Constitution and based the arguments on the disaster risk reduction function as provided for by the Disaster Management Act 57 of 2002, s 24 of the Constitution 'environmental right', s 41(1)(b) of the Constitution 'secure the wellbeing of the people of the Republic', s 152(1)(d) of the Constitution 'promote a safe and healthy environment' perhaps the court's reasoning would have been different.

Du Plessis notes that the primary responsibility of the disaster risk reduction function and addressing climate change in South Africa is a responsibility of all spheres of government

[205] *Ibid Abbott* para 22.
[206] *Ibid Abbott* para 24.
[207] *Abbott* para 15.

including local government, even though disaster management is a functional area concurrent to both national and the province, it does not exempt local government from this function.[208]

Although the *Le Sueur* judgement emphasises local government's obligation for legislating for the protection of the environment, the *Abbott* judgement placed no obligation on local government to breach a berm in the estuary and protect riparian properties. Therefore, the interpretation of the 'environment' is essential in order to fully understand how far local government can go. Thus, the environment needs to be defined explicitly in order to clarify the roles for the different spheres of government and avoid incorrect interpretation.

9. Conclusion

The *Le Sueur* judgment has played a progressive role in allowing and building up adaptive environmental governance within local government.[209] However, there are conflicting views on the source of the authority. But, there is concurrence that local government does have a role to play in the protection of the environment as part of municipal planning.

> Most importantly, the Minister of Environmental Affairs; the MEC; Agriculture and Environmental Affairs, KwaZulu-Natal and the MEC for Co-Operative Governance, KwaZulu-Natal have not contradicted the view or stand point of the first respondent in this regard at all. If indeed, the first respondent was transgressing into the exclusive realm of the National and Provincial Governance in legislating on Environmental matters, I would be extremely surprised, to say the least, if they did not express their objection thereto in the present application..[210]

There is a challenge with this judgment, based on the lack of detail in the court's argument on 'environment' as noted by Freedman and this may open up wide range of interpretations on 'environment'. Kidd on 'environment' notes a wide range of possibilities that could be provided for under the realization of section 24.[211] In other words, the possibilities of what the term environment entails are numerous. However, Feris notes that interpreting section 24 too widely might dilute the essence of environmental provision which is seen as affirming the significance of the environment and ecologically sustainable development[212].

Hence the role of the judiciary in interpreting the 'environment' is essential in clarifying the mysteries and as noted by Fuo the judiciary has an essential role to play in further clarifying the murky source of authorisation.[213] However, within the land use planning framework progress has been made and SPLUMA is now finally in effect. The provisions of SPLUMA imply that legislature is purposefully providing for environmental matters within land-use planning and Chapter 5, aims to provide more insight in regards to SPLUMA. The question is:

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[208] Du Plessis Chapter 23 'Disaster risk reduction and climate change adaptation and resilience at 864 (see note 14).
[209] Humby T 2015a at 1681 (see note 35).
[210] *Le sueur* para 29 (see note 5).
[211] Kidd M 2010 Environment in Currie I and De Waal *The Bill of Rights Handbook* 6th ed *Juta Cape Town.*
[212] Feris LA at 87 (FERIS, LA. The role of good environmental governance in the sustainable development of South Africa. *PER* [online]. 2010, vol.13, n.1 [cited 2018-05-30], pp.73-234. Available from: <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000100003&lng=en&nrm=iso>. ISSN 1727-3781.
[213] Fuo - at 20 (see note 33).

Do the recent developments in the land use planning framework after the *Le Sueur* judgement make any difference in relation to local environmental legislative powers?

CHAPTER 5: SPATIAL PLANNING AND LAND USE MANAGEMENT ACT

1. Introduction

Worldwide there is increased pressure due to urbanization[214], and therefore, there is a need for planning that caters for the needs of the people whilst ensuring that the environment is protected. Spatial policy coordinates and connects principal decisions by creating shape in order to improve the functioning.[215] SPLUMA provides a framework for spatial planning and land use management towards spatial transformation. The term 'planning' somewhat promises the consideration of foresight and having a vision in how the land will be regulated, used and managed.

In the past there has been a lack of strong environmental regulations and land-use planning guidelines and this resulted in numerous unsustainable developments.[216] However, careful planning for the future in land use planning has benefits for both short and long term.[217] In interpreting spatial planning, Judge Yacoob in *Wary Holdings (Pty) Ltd v Stalwo* indicated:

> Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land.[218]

Development has the tendency to ignite some controversy and concerns. In some instances, these may be based on genuine concern for the environment. Also in some instances proposed developments result in legal action. The South African courts have made a number of judgments pertaining to land use planning that involves the protection of the environment and have shown that the environmental right is justiciable.

> The State must protect, promote and fulfill the rights in the Bill of Rights… there is nothing in the Bill of Rights itself to suggest that the protections offered by Section 24 of the Constitution are only binding on National and Provincial spheres of Government. Quite evidently these obligations apply to all three spheres of Government.[219]

Some of the issues that have been brought forward in the courts are inter-governmental conflicts in terms of decision making within the ambit of 'spatial planning'. Chapter 3 has briefly touched on these cases.[220]

The focus of this chapter is on planning law with specific emphasis to SPLUMA. The key question is whether the enactment of SPLUMA changes anything in terms of the authority for

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[214] Grimm NB, Faeth SH, Golubiewski NE, Redman CL , Wu J, Bai X & Briggs JM 2008 Global change and the ecology of cities *Science* vol 319 no 5864 pages 756 – 760 at 756.
[215] NDP 2030, Chapter 8 (see note 2).
[216] Rouget M 2015 Land-use planning and biological invasions *Quest* vol 11 issue 2 pages 18 – 20 at 18.
[217] *Ibid* Rouget.
[218] *Wary Holdings* para 128 (see note 185).
[219] *Le Sueur* para 19 (see note 5).
[220] Chapter 3 notes inter-governmental conflicts in terms of decision making within the ambit of spatial planning, and these cases were referred to: *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal, Maccsand (Pty) Ltd v City of Cape Town, Lagoon Bay Lifestyle Estate (PTY) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape*, *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others*, *Pieterse N.O. and another v Lephalale Local Municipality*.

local government to protect the environment? If SPLUMA was in force during the *Le Sueur* judgment would the legal approach to resolving the dispute have been different? Focus is drawn to the SPLUMA provisions with emphasis on environmental provisions as part of municipal planning. These provisions are later discussed in light of the question above within the context of the *Le Suer* judgement and a conclusion is drawn.

2. Spatial Planning and Land Use Management Act

SPLUMA caters for three categories of spatial planning, national, provincial and municipal.[221] As noted in the previous chapters, municipal planning has been defined by the judiciary in various court cases but it has had no 'explicit' interpretation, but now it has been provided for legislatively in SPLUMA.[222] Sections 5(1)(a), (b) and (c) provide the elements of municipal planning.[223] Therefore, the focus of this chapter is on provisions of SPLUMA in municipal planning that promote sustainable development.

In the past the environmental assessment legislative provisions had developed independently from spatial planning but due to SPLUMA there is a shift now with the enactment of SPLUMA to incorporate environmental concerns as part of spatial planning. Section 54(1)(e)(i) provides for the Minister to make regulations prescribing on submission of additional information, explanations and environmental impact assessments. This demonstrates the possibility of considering environmental matters as part of spatial planning has been recognised in the Act.

Section 35(1) of SPLUMA provides for the mandatory establishment of a Municipal Planning Tribunal (MPT) which is empowered to make decisions on land use. On the 23 March 2015, the Minister of Rural Development and Land Reform published the regulations in terms of section 54 of SPLUMA. The regulations 4.1.1(g) on the composition of the MPT provides for an environmental assessment practitioner registered with a voluntary association to form part of the 15 member MPT.[224] This suggests forward thinking in terms of including personnel with environmental skills to form part of the MPT that makes decisions on land use.

Section 20(2) of SPLUMA states that an SDF should be part of an IDP as provided for in section 26(e) of the Systems Act.[225] Section 12(1)(h) provides for the mandatory preparation of the SDF that needs to include and provide among other things environmental objectives of

[221] SPLUMA section 5 (see note 8).
[222] Kidd M 2013 Environmental law Legislation Annual Survey of South African Law *Juta* pages 380 – 424.
[223] SPLUMA section 5(see note 8).

> Categories of spatial planning
> 5. (1) Municipal planning, for the purposes of this Act, consists of the following elements:
> *(a)* The compilation, approval and review of integrated development plans;
> *(b)* the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and
> *(c)* the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.

[224] Regulations in terms of the Spatial Planning and Land Use 16 of 2013 GN 38594.
[225] SPLUMA section 20(2) (see note 18).

the relevant sphere.[226] Essentially SPLUMA places a greater responsibility on the municipality to be more proactive in its land use planning as opposed to being reactive.

From the outset of preparation of the SDF, there is a need to take into account the environmental objectives of local government and further take into account environmental provisions by other environmental state organs. There is no contradiction between SPLUMA and the Systems Act[227] on the SDF and IDP, they echo the same sentiments. SPLUMA section 25 states that the purpose and content of a land use scheme must give effect and be consistent with the SDF therefore, they need to be aligned. Section 25(1)(d) provides that in determining the land use and development of land within a municipality there must be promotion of minimal impact on public health, the environment and natural resources.

To further illustrate foresight of the national legislature on accommodating protection of the environment, SPLUMA provides that land must be zoned for each purpose and schedule 2 lists land use purposes and 1(e) is conservation purposes. Conservation purposes under section 2 of SPLUMA definitions are

> means purposes normally or otherwise reasonably associated with the use of land for the preservation or protection of the natural or built environment, including the preservation or protection of the physical, ecological, cultural or historical characteristics of land against undesirable change or human activity. [228]

Notably, the definition for conservation purposes as indicated above includes environmental protection explicitly as part of spatial planning.

Moreover, on provisions that take into account environmental matters section 21(j) provides that the SDF must contain '…strategic assessment of the environmental pressures and opportunities within the municipal area, including the spatial location of environmental sensitivities'.[229] Hence onus has been placed on local government to make a concerted effort in understanding environmental pressures within its jurisdiction and this has to be incorporated as part of the SDF.

There is emphasis in SPLUMA for the municipality to adopt a single land use scheme as provided in section 24. It is further provided for that, land use scheme must 'take cognisance of any environmental management instrument adopted by the relevant environmental management authority, and must comply with environmental legislation…'[230] Thus an agenda of accountability in adopting a single land use scheme is important and further specifying that the single land use scheme should take note of environmental statutory provisions.

SPLUMA also provides for open space systems and section 50 provides that approval of residential development applications must be subject to the provision of parks and open spaces. This is further an important inclusion in redressing the apartheid legacy within townships where there was no provision of parks and open spaces within the black communities. Section 42(1)(c)(v) alluded to the same sentiments of the need to cater for open spaces.

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[226] SPLUMA section 12(1)h (see note 8).
[227] Systems Act (see note 49).
[228] SPLUMA section 2 (see note 8).
[229] *Ibid* SPLUMA section 21(j).
[230] *Ibid* SPLUMA section 24(2)(b).

Section 12(1)(m) further provides that there is a need to be cognisant of environmental management instruments adopted by the relevant environmental management authority. These integrated environmental management tools include tools such as the Environmental Management Framework (EMF). These tools are used to support decision making regarding environmental impacts, NEMA s44 provides for the Minister to make regulations and the EMF regulations were published in 2010 (GN R547) with accompanying guidelines.[231]

SPLUMA in section 21(j) provides for the need to take note of environmental pressures within a local government jurisdiction. Thus, the inclusion of this provision suggests that local government must ensure forward planning in anticipating environmental impacts as well the protection of the environment. In light of the above, although SPLUMA only came into effect after the *Le Sueur* judgment, the eThekwini Municipality in its DMOSS took the initiative to forward plan for environmentally sensitive areas and compiled a layer with spatial location of environmentally sensitive sites. Therefore, DMOSS has taken into account provisions of SPLUMA.

SPLUMA further provides that land development decisions that are contrary to the SDF are forbidden and unlawful, unless a deviation is warranted.[232] Therefore under SPLUMA the SDF is protected by the law and any decision that is contrary to it is illegal. Section 24 of SPLUMA specifies that there must be a single land use scheme within five years from the commencement of the Act. Moreover, in preparing the scheme local government is required to comply with environmental legislation and take into account environmental management instruments that have been adopted by relevant environmental management authorities (for example SANBI, DEA, etc.)

Land use purposes have been defined within SPLUMA and conservation purposes as a form of land use also integrate the protection of the environment as part of municipal planning. It is also provided in section 25(1)(d) that in determining the land use and development of land within a municipality there must be promotion of minimal impact on public health, the environment and natural resources. Du Plessis and van der Berg note that the *must* within SPLUMA should be seen in the same light as the constitutional environmental obligation as provided for in section 24 of the Constitution.[233]

Land use schemes have force of law and are binding on all land owners and land users within the municipality.[234] Henceforth within the *Le Sueur* context, the private land owners would have had to comply with the provisions of the scheme and the by-laws as section 26 provides that land use schemes have a legal bearing once approved, thus even private land owners are bound by the same provisions.

[231] Department of Environmental Affairs (DEA) *Guidelines 6, Environmental Management Frameworks* (2011).
[232] SPLUMA section 22 (see note 8).
[233] du Plessis and van der Berg (see note 31).
[234] SPLUMA section 26 (2) and (3) (see note 8).

NEMA Principles linking with SPLUMA Principles

SPLUMA regulates municipal planning but promotes the foresight of sustainable development which in turn promotes the protection of the environment. Notably, there are instances when socio-economic needs have been weighed against the need for sustainable development and this has resulted in growing tensions. However, SPLUMA attempts to balance various matters and it is centred on five development principles: spatial justice, sustainability, efficiency, spatial resilience and good administration.[235]

Therefore, SPLUMA principles promote sustainable development but the socio-economic needs of the people are also central to planning decisions. Thus, it attempts to balance equity and justice, environmental matters, the economy, procedural fairness including the needs of the future as well as present generations. The environmental centred provisions of SPLUMA, reference to environmental legislative frameworks and the principle of sustainability within SPLUMA further speaks to number of NEMA principles and the link is drawn below:

The NEMA principle of sustainability[236] is very important in that it specifies that development should be socially, environmentally and economically sustainable. This principle places a responsibility on the local government to ensure sustainability when it governs, which is an important consideration under municipal planning for development.[237] This principle holds local government accountable in planning for future developments, thus they have a responsibility to ensure development that is sustainable.

The principle of carrying capacity and ecological integrity[238] considers that development, use and exploitation of renewable resources and ecosystems should be cognisant of the capacity of the environment in terms of what it can support without environmental degradation. Whilst, the precautionary principle[239] states that a risk-averse and cautious approach must be applied, hence taking into account risks associated with limited knowledge. Thus for risks to be sustainable one needs to know the long-term implications and whether these are sustainable.

The preventative principle[240] notes that negative impacts on the environment and people's environmental rights should be anticipated and prevented and where they cannot be prevented they should be minimised and remedied. Hence, this places an onus on local government to prevent negative impacts to the environment or at least minimize the impacts and remedy. Principle of the best practicable environmental option[241], environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, taking note of the effects of decisions on all aspects of the environment and all the people in the environment by pursuing the selection of the best practicable environmental option.

[235] SPLUMA section 7 (see note 8).
[236] NEMA section 2(3) (see note 15).
[237] Du Plessis at 259 (see note 14).
[238] NEMA section 2(4)(a)(vi) (see note 15).
[239] *Ibid* NEMA section 2(4)(a)(vii).
[240] *Ibid* NEMA section 2(4)(a)(viii).
[241] *Ibid* NEMA section 2(4)(b).

Decisions made at local government relating to the environment should ensure that all elements of the environment are taken into cognisance and the different aspects must not be adversely impacted upon at the expense of another, decisions should ensure best environmental benefits or ensure least damage to the environment. The principle of environmental justice, places responsibility on local government for environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.[242]

Local government has a responsibility to ensure that all decisions and actions that relate to governing the environment are not unbalanced, impacting different sectors of society discriminately than others, hence ensuring equal sharing of environmental benefits and costs. Principle of participatory governance,[243] participation of all interested and affected parties in environmental governance should be promoted ensuring that all people develop the understanding, skills and capacity that is necessary to achieve participation that is equitable and effective, participation that includes vulnerable and disadvantaged persons.

The NEMA principles noted above, echo the same sentiments with SPLUMA towards ensuring sustainable development that is participatory. Local government therefore has a responsibility to ensure that there is public participation in decision making, on matters that may have an environmental impact and may affect their health and welfare.

6. Discussion

Van Wyk highlights that a municipality has an obligation to consider development applications from the perspective of whether the proposed development is indeed environmentally justifiable.[244] This implies that local government should not make decisions solely on attractiveness based on town planning 'incentives' that do not take into account environmental considerations; decisions should promote development that is environmentally sustainable or environmentally justifiable.

As such it is evident that the national legislature when drafting SPLUMA ensured that the provisions of the Act cater for a legislative framework that enables all spheres of government to ensure that the environmental right is realised. The environmental provisions in SPLUMA are central to the Act. Essentially the provision for zoning for conservation purposes, justifies the DMOSS scheme that was under attack within the *Le Sueur* judgement.

Section 24 of SPLUMA provides that land use zoning categories and regulations must be compiled for the entire municipal area and further notes that areas that were not previously subject to the land use scheme must be included. As such eThekwini Municipality had foresight of developing zones within its jurisdiction as it is now a legislative requirement under SPLUMA.

[242] NEMA section 2(4)(c) (see note 15).
[243] *Ibid* NEMA section 2(4)f.
[244] Van Wyk J 2012 *Planning law* 2nd ed Juta's Property Law Library at 450.

SPLUMA further provides for mapping environmental pressures and opportunities, the DMOSS scheme within eThekwini is a layer that further includes environmentally sensitivities for inclusion as part their decision making process within municipal planning. Moreover, SPLUMA explicitly further provides for the inclusion of open space systems and DMOSS is an open space system.[245] SPLUMA provides for employing decision assisting tools like the EMF and compliance with environmental legislative framework as part of municipal planning.

Section 26 of SPLUMA further provides that the land use scheme has a legal bearing. Therefore, SPLUMA is protected by law and any decision contrary to it is illegal. The provisions are also applicable to all land users and owners, thus privately owned land is also subject to these provisions, as such the applicant Le Sueur would have had to comply with the provisions of the land use scheme in eThekwini if the Act was in force during the trial.

7. Conclusion

Evidently, the provisions in SPLUMA indicate a concerted effort by the government to mainstream environmental matters and ensure that the environmental right is realized as part of spatial planning. Hence in noting Judge Yacoob's statement, there is probably no functional area within the Constitution that can be carried without the use of land. [246]

The provisions in SPLUMA indicate that all spheres within government have an obligation towards the protection of the environment. A comment on the *Le Sueur* judgment, notes that it is encouraging to see local government going an extra mile and exceeding expectations of the set rules in order to conserve the environment.[247] As such local government has a role to play in the realization of the environmental right.

This thesis concurs with du Plessis and van der Berg that in interpreting the Constitution, NEMA, Environmental Management Legislation, Systems Act and SPLUMA including other statutory provisions, it is clear that local government has been tasked with a role for planning and taking responsibility of regulating and protecting the environment.[248]

Is the coming into effect of SPLUMA a game changer for local government? Yes, especially for those that were doubtful about whether local government has a role to play in the conservation of the environment. However, SPLUMA does not explicitly confer powers to protect the environment, instead it provides an enabling framework to be proactive towards the protection of the environment within municipal planning. Therefore, under SPLUMA local government is empowered to legislate for the protection of the environment using the land use scheme as a vehicle in its strides towards protection of the environment.

As such, to those that had foresight in local government's role in environmental conservation it is a confirmation that indeed local government can protect the environment using the

[245] SPLUMA s 50, s 42(1)(c)(v) (see note 8).
[246] *Wary Holdings* para 128 (see note 185).
[247] du Plessis AA and van der Berg at 590 (see note 31).
[248] *Ibid* du Plessis AA and van der Berg.

SPLUMA provisions and it is legally justifiable. However, there are still many unanswered questions about how far local government can go in protecting the environment and it seems as though the judiciary still has an essential role to play in delineating the roles of each sphere in the realization of the environmental right as well as detailing what is meant by the 'environment'.

Fundamentally, the *Le Sueur* judgement is consistent with SPLUMA even though SPLUMA was not in effect when the judgement was made. Thus, if SPLUMA were applicable at the time when the judgement was made, the court would have still decided in favour of the municipality. The source of the powers for the amendments of the town planning scheme would have still been considered as assigned from national and province through the provisions of SPLUMA, instead of an implicit assignment, these would have been explicitly assigned to local government through the provisions within SPLUMA.

The character of the amendments would still be legislative as provided for by SPLUMA as these would have needed to form part the SDF within the land use scheme in order to carry the legal force. Thus, there is no room for uncertainty; it is obvious that the powers to regulate and protect the environment under municipal planning for the local government can be clearly identified.

The eThekwini Municipality has incorporated DMOSS as an instrument in the SDF for environmental planning as per the eThekwini Municipality Spatial Development Framework Review.[249] DMOSS within eThekwini has further been amended and now includes more environmentally sensitive sites.[250] Thus DMOSS is no longer just a policy, it now enjoys legislative authority and it is protected by law.

Thus the enactment of SPLUMA has allowed eThekwini Municipality to use its provisions to incorporate DMOSS as part of the municipal planning schemes. Therefore, SPLUMA provisions have reinforced the outcome of the *Le Sueur* judgment for eThekwini Municipality and all other municipalities that have or aspire for open space systems as part of their planning.

Accordingly, the next section concludes on all the views that have been put forward and the legal stand of local government legislating for the environment under the umbrella of 'municipal planning'.

[249] eThekwini Spatial Development Framework Review 2015 -2016 (Final report published May 2015). http://www.durban.gov.za/Resource_Centre/reports/Framework_Planning/Documents/SDF%20Review%202015-2016.pdf (Accessed 09/12/2016) another 2016 – 2017 Review is also available on the eThekwini website with amendments to DMOSS.

[250] www.durban.gov.za/dmoss_tp_amendments (accessed 11/11/2018).

CHAPTER 6: CONCLUSION

The objective of this study was to establish whether local government has legislative authority to regulate the environment and to further establish where these powers emanate from; using the context of the *Le Sueur* judgment. The dispute that arose in *Le Sueur* was not ultimately about the authority to legislate for environmental conservation in general but in relation to DMOSS which is a layer that is part of the planning scheme.

Municipal planning is a legislative function[251]and SPLUMA under the ambit of municipal planning provides for zoning which caters for environmental conservation and these are enforceable and have a legal bearing. Thus, SPLUMA provides legislative authority for environmental conservation but only in relation with zones that have been adopted as part of the land use scheme.

Essentially, SPLUMA does not confer general legislative authority to local government for environmental conservation but the power to legislate for the environment is only within the context of municipal planning. *Maccsand* has illustrated that zoning schemes within municipal planning have a legal bearing and are protected by law, hence the provision in SPLUMA for zoning for conservation purposes has the thrust of law.[252]

The powers and authority of local government in the recent court judgments have been emphasized. Other spheres of government have been cautioned not to 'trump' local government planning powers. Thus, indeed local government is recognized as a sphere of government that is autonomous and independent. Former Chief Justice Sandile Ngcobo, further notes that there is no single absolute power and the South African model of separation of powers has no hierarchical division.[253]

Thus, the powers vested within local government can only be altered or withdrawn if the Constitution is altered; hence they are protected by the Supreme Constitution. Local government is therefore deemed as not just an administrative body that is under the control of other spheres of government but it is rather governing in its own initiative.[254]

The judiciary has played an important role in interpreting the statutes and it is still anticipated that the courts are still going to play an integral role in further clarifying the roles of environmental regulation within the different spheres. As indicated by Freedman, there is a

[251] Chapter 2 discusses the character of municipal planning.
[252] Chapter 5 discusses SPLUMA in relation to protection of the environment and highlights a number of provisions within SPLUMA that indicate the incorporation of protection of the environment as part of municipal planning. To note a few of these provisions: Section 20(2) provides for the compilation of the spatial development framework; section 12(1)(h) for the SDF to include environmental objectives; section 21(j) to include strategic assessment of environmental pressures and sensitivities; section 24(2)(b) noting of environmental statutory provisions.
[253] Ngcobo S (see note 20) at 38.
[254] Bekink B and Botha C 2015 *Maccsand v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources 2012 4 sa 181 (CC)* making sense of the interwoven legislative interplay of timelines, hierarchical status, geographical space and governmental spheres in South Africa Recent Case Law *De Jure* Vol 48 Issue 2 pages 456 – 467 at 462.

need to further clarify and unpack explicitly what is meant by the 'environment'.[255] Such clarity will further assist in delineating who has which role to play. Thus, Freedman notes that local government as provided for by the schedules has been allocated environmental matters that do not deal with environmental conservation while the national and provincial government have a competence of environmental protection. [256]

As such, local government municipal planning cannot simply include 'environmental' matters.[257] However, this does not imply that local government has no competence on environmental matters but the parts included need to be clearly distinguished. Due to the lack of guidance provided by the judiciary, the interpretation of functional areas is open to being interpreted by different legislatures variably.[258]

The implications of this could result in a lack of an accepted standard or definition. As a result, the definition of local government powers can be flawed, as definitions can in some instances either be 'overinclusive' or 'underinclusive' which has repercussions in extending the constitutional mandate.[259] Hence, more clarity is sought on what the 'environment' entails.

Essentially, the provisions of SPLUMA empower local government to be more proactive in regulating the environment; it gives local government more thrust to endeavour in ensuring that the environmental right is realized. The provisions within SPLUMA mandate for a land use scheme and spatial development frameworks. Section 156(2) of the Constitution empowers local government to enact laws for effective administration and the Municipal Council is the legislative authority for the making of by-laws.

Essentially the land use scheme is protected by law, bearing in mind that all municipalities have been mandated to compile them and specifically include environmental pressures and sensitive sites within their spatial planning. These provisions somehow indicate the decisiveness of the government to integrate environmental matters as part of spatial planning in all spheres of government. Therefore, local government under spatial planning can make by-laws that are enforceable.

If SPLUMA was in force during the *Le Sueur* judgment would the legal approach to resolving the dispute have been different? Invariably from the preceding chapter, it is more obvious than ever that local government has role to place in terms of protecting the environment as part of municipal planning. Hence, if SPLUMA was in place, the source of the legislative authority for environmental protection within the ambit of municipal planning would have been more clearly distinguishable. SPLUMA confirms that planning may be used towards the achievement of environmental objectives, within the ambit of municipal planning this would constitute as legislative authority.

[255] Freedman at 589 (see note 30).
[256] Freedman at 568 (see note 30).
[257] Steytler and Tesfaye (see note 28) at 334.
[258] *Ibid* Steytler and Tesfaye.
[259] *Ibid* Steytler and Tesfaye.

Therefore, SPLUMA changes the view that local government can only 'act' on just self-initiative but rather it clearly shown that local government has an obligation and is assigned to be cognisant of environmental matters as part of its municipal planning. Local government is recognized as one of the key players in the realization of the environmental right. The principle of subsidiarity seems to be at the forefront in fulfilling the constitutional obligation of ensuring that the environmental right is realized within local government.

There seems to be a shift to include local government as a role player in environmental regulation through the legislative provisions. The views of the judiciary on the role of local government in the realization of the environmental right points to the possibility of the judiciary being more uncompromising in holding local government responsible in its constitutional obligations. There is appreciation on the efforts of local government in going beyond the norm in order to ensure that the environmental right is realized. However, strengths and capacity within different municipalities differ remarkably and hence the confirmation of the environmental obligation might be seen as somewhat of a bewildering task rather than an opportunity to serve.

Thus, in agreeing with du Plessis and van der Berg, the constitutional and legislative provisions do indeed make it very difficult and almost impossible to argue that local government has no environmental constitutional obligation.[260] Although these provisions may be seen as going beyond what is traditionally known as competence of local government in environmental matters, the same was put forward by judge Gyanda in the *Le Sueur* judgment.

Local government has an enormous task ahead in ensuring that throughout the Republic of South Africa, within all the 257 municipalities the environmental right is realized. Each municipality must take into account that environmental considerations are incorporated in their spatial planning within five years of the enforcement of SPLUMA. This is a tall order for local government to heed to their constitutional and legislative obligations as provided for in section 24 of the Constitution.[261]

Chapter 3 of the Constitution provides for cooperative government within the three spheres of government, hence local government has an obligation to interrelate with other spheres of government in ensuring that the environmental right is realized.[262] Planning law therefore can be deemed as source of environmental legislative power for local government; however the confines of this power must be widely recognized as SPLUMA does not confer 'blanket' powers to regulate the environment but provides a platform within the ambit of municipal planning for environmental conservation.

[260] du Plessis and van der Berg at 592 (see note 31).
[261] RSA Constitution (see note 9).
[262] *Ibid* RSA Constitution section 40.

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