

RA LE SUEUR V ETHEKWINI MUNICIPALITY 2013 JDR 0178 (KZP): AN ENVIRONMENTAL LAW READING

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1 Introduction

The Constitution of the Republic of South Africa, 1996 (“the Constitution”) assigned novel status, powers, functions and responsibilities to municipalities in terms of its provisions on local government,¹ an extensive Bill of Rights² and the constitutional principles for co-operative government.³ Almost two decades have passed since the Constitution was put into effect. Still, the implementation of government measures and the use of regulatory instrumentation to give effect to the constitutional powers, functions and responsibilities of municipalities in the new local government system continue to reveal legal difficulties. These include complexities related to the nature and division of constitutional powers and functions between the three spheres of government, each with its different line functions, and within the local government sphere (between district and local municipalities).

In recent years the judiciary has been confronted with the consequential impact of the new constitutional design of local government.⁴ It is, however, not only the constitutional make-up of local government that has required of the courts to decide on interesting legal questions. Since 1996 the judiciary has dealt with a range of ancillary and incidental legal questions based *inter alia* on the constitutional environmental right⁵ and the extensive body of

¹ Ch 7 of the Constitution

² Ch 2

³ S 41

⁴ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC); *Beja v Premier of Western Cape* 2011 JDR 0412 (WCC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *Joseph v Johannesburg Municipality* 2010 4 SA 55 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) among several other examples of cases where the courts for different reasons had to consider the “new” constitutional powers, functions and responsibilities of municipalities. See also W Freedman “The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of *Le Sueur v Ethekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)” (2014) 17 *PELJ* 567 567-568, 572, 575

⁵ S 24 of the Constitution

environmental law and policy⁶ that have emanated from it over the years. In this regard, the courts had to make the final call regarding issues related to sustainable development,⁷ the prevention and redress of different types of pollution,⁸ the protection of the natural resource base including water resources,⁹ environmental health and occupational health and safety,¹⁰ the protection of cultural heritage,¹¹ the conflict between conservation and industrial development,¹² access to environmental information¹³ and people's access to amenities that are dependent on natural resources, for example water, sanitation and electricity services.¹⁴ Given the broad scope of the legal definition of the environment applicable in South Africa¹⁵ and the continuing challenge at micro and macro scale to balance environmental, social, cultural and economic interests¹⁶ it is likely that many such cases will in future be brought before the courts.

It was in the case of *RA le Sueur v eThekweni Municipality*¹⁷ ("*Le Sueur*"), however, that the judiciary (the High Court of KwaZulu-Natal) was explicitly confronted with the meaning of the constitutional planning powers of municipalities in relation to the conservation of natural resources. While this case was not the first to deal with the interface between local government and

⁶ The national *corpus* of environmental law comprises, amongst others, of framework laws such as the National Environmental Management Act 107 of 1998 ("NEMA"), the National Water Act 36 of 1998 and a range of sector specific environmental acts ("SEMAs") such as the National Environmental Management: Air Quality Act 39 of 2004; the National Environmental Management: Waste Act 59 of 2008; the National Environmental Management: Biodiversity Act 10 of 2004; and the National Environmental Management: Integrated Coastal Management Act 24 of 2008

⁷ For example, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC)

⁸ For example, *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products* 2004 2 SA 393 (E); *Bareki NO and Another v Gencor Ltd and Others* 2006 1 SA 432 (T) and *Nature's Choice Properties Abrode (Pty) Ltd v Ekurhuleni Municipality* 2010 3 SA 581 (SCA)

⁹ For example, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) and *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry* 2006 JDR 0465 (SCA)

¹⁰ For example, *Mankayi v Anglogold Ashanti Ltd* 2011 3 SA 237 (CC)

¹¹ For example, *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2006 6 SA 222 (SCA) and *South African Heritage Resources Authority v Arniston Hotel Property (Pty) Ltd* 2007 2 SA 461 (C)

¹² For example, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W)

¹³ For example, *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* 2005 3 SA 156 (C) and *BHP Billiton PLC Inc v De Lange* 2013 3 SA 571 (SCA)

¹⁴ See, for example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *Beja v Premier of Western Cape* 2011 JDR 0412 (WCC); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W) and *Joseph v City of Johannesburg* 2010 4 SA 55 (CC)

¹⁵ S 1 of NEMA defines the environment as "the surroundings within which people 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" It is not only South African environmental law, however, that embraces a very wide notion of the environment, as is indicated by, *inter alia*, the work of L Godden & J Peel *Environmental Law: Scientific, Policy and Regulatory Dimensions* (2010) 5-6.

¹⁶ See in general on the balance of the different sustainability interests in the South African context, W du Plessis & AA du Plessis "Striking the Sustainability Challenge in South Africa" in M Faure & W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2012) 413-458

¹⁷ 2013 JDR 0178 (KZP)

the environment,¹⁸ it marks the moment when the judiciary most clearly had to determine its view on the implications of the fact that the “environment” is listed in Schedule 4A of the Constitution, which lists the functional areas of concurrent national and provincial legislative competence. The implications had to be judicially assessed with reference to “municipal planning”, specifically.

Drawing on earlier scholarly works that deal with the legally relevant interface between local government and the constitutional environmental duties of the state,¹⁹ this case comment ventures into an outline of the factual background and judgment in the *Le Sueur*-case as far as it concerns the execution of original and assigned municipal powers regarding the conservation of natural resources and the protection of biodiversity. We further share our observations on what the facts and the judgment of the *Le Sueur*-case may mean from the perspectives of the objectives of South African environmental law and the entire state’s constitutional duty towards the environment.

2 The *Le Sueur*-case: Factual background and judgment

2.1 Factual background

The *Le Sueur*-case was prompted by the eThekweni Municipality’s use of its planning authority to protect sensitive environmental areas in the city – including a wilderness area around the Kloof Waterfall Hillcrest Plateau.²⁰ Amongst other measures, the eThekweni Municipality (“the Municipality”)

¹⁸ See, for example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC); *Beja v Premier of Western Cape* 2011 JDR 0412 (WCC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2009 JDR 1211 (CC) and *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC)

¹⁹ See, for example, AA du Plessis “Some Comments on the Sweet and Bitter of the National Environmental Law Framework for Local Environmental Governance” (2009) 24 *SAPL* 56 56-96; AA du Plessis “Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution” (2010) 21 *Stell LR* 265-297; AA du Plessis *Fulfilment of South Africa’s Constitutional Environmental Right in the Local Government Sphere* LLD thesis North-West University (2009); AA du Plessis “Climate Governance in South African Municipalities: Opportunities and Obstacles for Local Government” in B Richardson (ed) *Local Climate Change Law* (2012) 353-387; AA du Plessis “Local Agenda 21+15: A Rights-based Approach to Local Environmental Governance” in J Benidickson, B Boer, AH Benjamin & K Morrow (eds) *Rio+10* (2011) 47-65; and AA du Plessis & LJ Kotzé “The Heat is On: Local Government and Climate Governance in South Africa” (2014) 58 *Journal of African Law* 145-174

²⁰ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 1 See also Legalbrief Environmental “Court Confirms Local Government’s Powers on Environment” (26-02-2013) *Legalbrief* <<http://www.legalbrief.co.za/article.php?story=20130226101210630>> (accessed 26-08-2013)

introduced the Durban Municipality Open Space System (“D-MOSS”)²¹ as a type of land use zone into its town planning scheme.²²

eThekwini’s D-MOSS was initially known as the eThekwini Environmental Services Management Plan – a policy directive of the Municipal Council (“the Council”) – which was established to protect an interconnected system of open spaces of land and water comprising areas of high biodiversity value in Durban.²³ As a policy directive, the D-MOSS did not originally enjoy the “legislative authority” of that of a town planning scheme, which raised enforcement challenges.²⁴ In response, the Municipality passed a resolution in 2010 to integrate the D-MOSS into its town planning scheme by means of amendments to the latter.²⁵ This decision effectively prevented residents living in the jurisdiction of eThekwini Municipality, and who were affected by the amendments, from developing their properties without first obtaining permission from the Municipality.²⁶

An affected property owner, Le Sueur,²⁷ approached the High Court as first applicant, challenging eThekwini’s amendment of its town planning scheme on constitutional and a number of other legal grounds.²⁸ In what may be considered a significant stance, the eThekwini Municipality, the City of Cape Town²⁹ and the MEC of Co-operative Governance and Traditional Affairs

²¹ Detailed information regarding the D-MOSS is available at <http://www.durban.gov.za/Documents/City_Government/IDP_Policy/08%20Environment.pdf> and <http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx>. Other municipalities in South Africa have similar systems in place. See, for example, the Cape Town Metropolitan Open Space System (“C-MOSS”) <<https://web1.capetown.gov.za/websearch/search/search.aspx?lib=acm/comsup/Weblib&docName=Policy>>, the Johannesburg Metropolitan Open Space System (“J-MOSS”) <www.joburg.org.za/docs/jmossreport.doc> and the Tshwane Open Space Framework <<http://www.tshwane.gov.za/Services/OpenSpaceManagement/Open%20Space%20Framework/Open%20Space%20Framework%20Vol%201.pdf>>

²² *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) para 1. A town planning scheme is also known as a land use scheme in, for example, the Spatial Planning and Land Use Management Act 16 of 2013.

²³ eThekwini Municipality “What is the Durban Metropolitan Open Space System” *eThekwini Municipality* <http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/-What-is-the-Durban-Metropolitan-Open-Space-System.aspx> (accessed 27-08-2013). For a discussion of the meaning and sub-categories of “open space” in the municipal planning context, see J van Wyk *Planning Law* (2012) 255. Also see Freedman (2014) *PELJ* 584-585.

²⁴ eThekwini Municipality “Durban Metropolitan Open Space System FAQ” *eThekwini Municipality* <http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx> (accessed 27-08-2013). In South Africa, town planning schemes bind all users of land within the area and are regarded as legislative in character. Town planning schemes can be classified as legislative administrative acts (rule making) or legislative administrative action (subordinate or delegated legislation). See Van Wyk *Planning Law* 281-282 who also provides reasons for this classification.

²⁵ eThekwini Municipality “Durban Metropolitan Open Space System FAQ” *eThekwini Municipality*.

²⁶ *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) para 1. See also Legalbrief Environmental “Court Confirms Local Government’s Powers on Environment” *Legalbrief*.

²⁷ Technically the two applicants were RA le Sueur and RA le Sueur NO and Others. For purposes of this case comment the applicants are referred to only as “Le Sueur”.

²⁸ *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) para 1.

²⁹ The City of Cape Town was admitted by order of the court as *amicus curiae* to introduce or lead the evidence of a witness in the form of an affidavit. The City of Cape Town arguably had a vested interest in the outcome of this matter because of the fact that it has spent many years developing “overlay zones” similar to that presented in the D-MOSS Amendments to assist the municipality in protecting the environment. See *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) para 28.

in solidarity opposed Le Sueur's application,³⁰ while both the Minister of Environmental Affairs and the MEC of Agriculture and Environmental Affairs KwaZulu-Natal filed notices indicating their intention to abide by the court's decision.³¹

The relief sought was to have the proposed amendments to the eThekweni Town Planning Scheme declared unconstitutional and set aside.³² One of the main issues that had to be resolved by the court was whether the Municipality had the authority, in terms of the Constitution or any other law of general application, to legislate on environmental matters in the way it did when it amended its town planning scheme.³³ The question before the court was thus whether the eThekweni Municipality had the necessary authority to legislate on conservation (biodiversity) matters by means of its town planning scheme (the D-MOSS) despite the environment being listed in the Constitution under the concurrent legislative authority of national and provincial government.³⁴

2.2 Arguments

The essence of the applicant's arguments was that the Municipality acted beyond the scope of its constitutional powers in amending its planning instrumentation in a way that effectively resulted in eThekweni Municipality's creation of new local environmental law. Le Sueur argued that the Municipality did not have the necessary authority to introduce amendments to its legally enforceable town planning scheme with protection of the environment being the subject matter.³⁵ The applicant maintained that the D-MOSS amendments to the Town Planning Scheme amounted to "legislative instruments and are law"³⁶ that render the amendments unconstitutional and illegal because they transgressed the area of local government legislative authority.³⁷ In terms of the Constitution, "the environment" falls within the exclusive legislative competence of national and provincial government.³⁸ In essence, therefore, it was argued that municipalities do not have original or delegated authority to legislate on environmental matters because the environment is listed in Schedule 4A of the Constitution.³⁹ Le Sueur was further of the (misguided) opinion that NEMA does not empower municipalities to make local environmental law and that, by virtue of the D-MOSS amendments, the Municipality created its own localised environmental impact assessment

³⁰ Para 2 Solidarity between municipalities and between local and provincial authorities in environmental adjudication complements the call for co-operative environmental government in s 41 of the Constitution and s 16 and ch 3 of NEMA

³¹ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 2

³² Para 1

³³ Para 3

³⁴ Sch 4A of the Constitution

³⁵ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 4

³⁶ Para 16

³⁷ Para 16

³⁸ Para 16

³⁹ Para 16

(“EIA”)⁴⁰ process, while NEMA makes no provision for municipal EIA procedures.⁴¹

The applicant argued that the functions of the national, provincial and local spheres of government are different and distinct.⁴² In this regard it was emphasised that the legislative authority of municipalities only extends to matters listed in Schedules 4B and 5B of the Constitution and that, notwithstanding section 152 of the Constitution⁴³ read with section 156(1),⁴⁴ “the environment” does not fall within these limits.⁴⁵ The argument was raised that although municipalities have the functional power of “municipal planning”,⁴⁶ such planning does not by default encompass municipal legislative authority in terms of the environment *per se*.⁴⁷ Le Sueur indicated its understanding of the environmentally relevant functional areas in respect of which municipalities do in fact have authority, namely air pollution, water and sanitation services, beaches, cemeteries and refuse removal. It was submitted that none of these listed areas covered “environment”, “nature conservation” or “biodiversity protection”.⁴⁸ In similar vein Le Sueur maintained that overlaps in the regulation of matters of land-use by national, provincial and local government do not *de facto* empower municipalities to legislate on such overlapping matters.⁴⁹

On the converse, the respondents (the eThekweni Municipality and others) argued that Le Sueur’s approach to and understanding of municipal planning *vis-à-vis* the state’s environmental duties had been unduly narrow and

⁴⁰ D-MOSS provides for a network of open-space conservation and recreation areas, linked by open-space corridors which aim to ensure that biodiversity is protected and the supply of ecosystem goods and services is maintained. See eThekweni Municipality “The Value of D-MOSS to the City” *eThekweni Municipality* <http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/The-value-of-D%e2%80%99MOSS-to-the-City.aspx> (accessed 16-10-2013). EIA carries a very specific meaning and is defined in the South African environmental law context as the systematic process of identifying, assessing and reporting environmental impacts associated with an activity and includes basic assessment and scoping and environmental impact reporting. See GN R543 in GG 33306 of 18-06-2010. This is accordingly not the type of assessment for which the D-MOSS provides. D-MOSS calls for assessment in a controlled area where, despite the underlying zoning, development may occur only with authorisation or support from the Environmental Planning and Climate Protection Department of the eThekweni Municipality. See the eThekweni Municipality “Durban Metropolitan Open Space System FAQ” *eThekweni Municipality*.

⁴¹ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 16. Notably, NEMA provides in ss 33(1)(b) and 46(3) for standard draft environmental bylaws to be tailored and adopted through the bylaw-making processes of municipalities. This serves to acknowledge that NEMA foresees that municipalities will create, adopt and enforce local environmental (by)laws. The court also raised this point as is indicated below.

⁴² *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 16.

⁴³ S 152(1)(d) of the Constitution provides that one of the objects of local government is to promote a safe and healthy environment.

⁴⁴ S 156(1) of the Constitution provides that a municipality has executive authority in respect of and the right to administer the local government matters listed in Schs 4B and 5B and any other matter assigned to it by national or provincial legislation.

⁴⁵ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 16.

⁴⁶ The applicant referred to the case of *The City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) and argued that the court decreed that municipalities alone hold the functional area of “municipal planning” which the court defined to be “the control and regulation of land use at Municipal level including the zoning of land and establishment of townships”.

⁴⁷ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 16.

⁴⁸ Para 16.

⁴⁹ Para 16.

incorrect.⁵⁰ Whereas the applicant focused its reasoning mainly on the limited scope of the legislative powers of local government, the respondents defended the D-MOSS amendments and its implications with particularly strong reliance on the environmental duties of municipalities in South Africa.⁵¹

In the main, eThekweni 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. The respondents referred to section 7(2) of the Constitution, which places a duty on the state to promote, protect and fulfil the Bill of Rights (including the section 24 environmental right).⁵² They argued that the term “state” in this instance included local government, ie every municipality.⁵³ The Municipality maintained that the general environmental duties of the state that emanate from the Bill of Rights speak to all three spheres of government. With reference to the constitutional environmental right it was reasoned that there is nothing in the Bill of Rights to suggest that the environmental protection afforded by section 24 translates into a constitutional duty that rests exclusively with the national and provincial authorities.⁵⁴

eThekweni and others further argued that both sections 24 and 152(1)(d)⁵⁵ of the Constitution, with their environmental emphasis, bind a municipality when exercising any of its powers and performing any of its constitutional and/or statutory functions – including its planning functions. On the basis of institutional subsidiarity-thinking,⁵⁶ the respondents highlighted that section 156(1)(b) of the Constitution provides that a municipality has executive authority and the right to administer not only matters listed in Schedules 4B and 5B but also “[a]ny other matter assigned to it by national or provincial legislation” and that such matters may even include matters reserved for national and provincial legislative authority in Schedules 4A and 5A.⁵⁷ In making reference to existing judicial precedent, the respondents concluded

⁵⁰ Para 19

⁵¹ See paras 19-26 for example

⁵² S 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development

⁵³ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 19

⁵⁴ Para 19

⁵⁵ See n 52 (wording of s 24 of the Constitution) and n 44 (wording of s 152(1)(d) of the Constitution)

⁵⁶ Institutional subsidiarity means that governance should take place as close as possible to the citizens and that national and provincial government fulfil a subsidiary role – it thus translates into a preference for executing functions and powers at lower levels of government where possible. See J de Visser “Institutional Subsidiarity in the Constitution: A Slapstick Asymmetry or Rights-based Approach to Powers” (2008) 10 *LGB* 16 16-17; J de Visser “Institutional Subsidiarity in the Constitution” (2010) 21 *Stell LR* 90 90-115 and A Christmas & J de Visser “Bridging the Gap between Theory and Practice: Reviewing the Functions and Powers of Local Government in South Africa” (2009) 2 *CJLG* 107 108-115

⁵⁷ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 20

that the drafters of the Constitution could not have intended to allocate authority (including the authority to pass environmental law) amongst the three spheres of government in “hermetically sealed, distinct and water tight compartments”.⁵⁸

2 3 Judgment

The judgment in this matter put the division of the constitutional legislative and executive powers of government in relation to the environment as well as the concept of co-operative government in the spotlight. In agreeing with the Municipality, the court first of all reminded the parties of section 40(1) of the Constitution, which obliges national, provincial and local authorities to observe and adhere to the principles of co-operative government.⁵⁹ Giyanda J agreed with the respondent that the environment is an “ideal example of an area of *legislative* and *executive* authority or power”⁶⁰ which the constitutional drafters considered and which actually had to reside in all three spheres of government – ie it could not have been inserted in the more narrow Schedules 4B and 5B of the Constitution, which afford regulatory authority to local government in particular.⁶¹ Giyanda J confirmed the reasoning in *Maccsand v City of Cape Town*⁶² (“*Maccsand*”) that when the exercise of powers by two government spheres overlap, neither sphere intrudes on the functional area of the other.⁶³ However, neither Giyanda J nor the court in the *Maccsand* matter specified whether reference was made in this context to legislative or executive powers, or to both.

In an effort to explain the nature of the environmental powers of municipalities, the court dwelled somewhat on the meaning of “municipal planning”.⁶⁴ It confirmed that, under the banner of “municipal planning”, municipalities have historically always exercised “executive legislative responsibility”⁶⁵ over environmental affairs within their areas of jurisdiction, and that the drafters of the Constitution must have been aware of and must have

⁵⁸ Para 20

⁵⁹ Para 20

⁶⁰ Emphasis added

⁶¹ Para 20

⁶² 2012 4 SA 181 (CC)

⁶³ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 20 With reference to *Maccsand v City of Cape Town* 2012 4 SA 181 (CC) the court stated further that there is no reason why two spheres of government cannot co-exist, even if their functions and powers (for example, environmental powers and functions) overlap, and that it is in this context that the Constitution obliges state authorities to co-operate with one another in mutual trust and good faith and to co-ordinate their actions

⁶⁴ See n 46 above

⁶⁵ The court did not indicate what it meant with “legislative executive” authority or power and it is assumed that it refers to the executive’s creation of legally enforceable instrumentation, for example, a town planning scheme. Town planning schemes are usually prepared in terms of provincial ordinances or Acts and are thus regarded as legally enforceable documents. See SALGA, South African Planning Institute & Municipal Institute of Learning “An Introduction to Municipal Planning in South Africa” (01-08-2011) *SALGA* <<http://www.salga.org.za/pages/Knowledge--Hub/Municipal-Planning>> (accessed 30-04-2014). De Vos and Freedman further divide the matters over which municipalities have both legislative and executive authority into three categories, namely, the matters set out in Schs 4B and 5B of the Constitution, matters that have been assigned to a municipality by national or provincial government (see ss 44(1)(a)(iii) and 104(1)(c) of the Constitution), and matters which are reasonably necessary for or

recognised this fact in the design and formulation of the Constitution.⁶⁶ When the functional areas were allocated in Schedules 4 and 5, the drafters of the Constitution were conscious of the fact that municipal planning encompassed environmental considerations.⁶⁷ In other words, the drafters consciously and despite the apparent or potential overlap listed “the environment” in Schedule 5A of the Constitution and “municipal planning” in Schedule 4B. In similar vein *Giyanda J* explicitly confirmed that “it is impossible as a matter of accepted town planning practice, to divorce environmental and conservation concerns from town planning principles”.⁶⁸ He resorted to different examples such as municipal integrated development planning (“IDP”)⁶⁹ and spatial development frameworks (“SDFs”)⁷⁰ to further illustrate to the parties that municipal planning and the (localised) regulation of environmental affairs must be understood as being inextricably linked – as has been the case for decades. Like the respondents, the court also relied on the subsidiarity argument to support its view that municipalities may in terms of the Constitution use their planning authority so serve environmental purposes.⁷¹

The court turned to South Africa’s framework environmental law and other environmental law instruments in deciding this matter. The parties before the court were reminded that the environmental management principles in section 2 of NEMA apply to all organs of state, including every municipality.⁷² Contradicting the contention of the applicant and to substantiate its understanding of the environmental role of local government, the court referred to section 33 of NEMA⁷³ and its recognition of the competence of municipalities to legislate in respect of the environment.⁷⁴ The court further sketched its perspective on the environmental role of municipalities with reference to the National Biodiversity Framework (“NBF”) in terms of the National Environmental Management: Biodiversity Act⁷⁵ and the provincial KwaZulu-Natal Environmental Implementation Plan (“EIP”).⁷⁶

incidental to the effective performance of municipal functions (see s 156(5) of the Constitution) It follows that a municipality may base its power to pass legislation on a particular subject matter on any one or on all three of these categories In this regard see P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 295-300 The court in *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) also noted that legislative and executive authority over environmental matters as part of municipal planning has been assigned to municipalities by national and provincial legislation (para 22) The environment is accordingly acknowledged as a matter that is reasonably necessary for or incidental to the effective performance of, among other functions, a municipality’s municipal planning function

⁶⁶ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) paras 21-22

⁶⁷ Para 23

⁶⁸ Para 29

⁶⁹ Para 24

⁷⁰ Para 26

⁷¹ Para 20 The court cites s 156(4) of the Constitution which determines that national and provincial authorities must in some instances assign to municipalities the administration of a matter not listed to fall within the Schs 4B and 5B powers of local government See also n 56

⁷² Para 34

⁷³ This section allows a person to institute a private prosecution in respect of a breach of any duty laid down in *inter alia* any municipal bylaw, where that duty is concerned with the protection of the environment and the breach of that duty is an offence See s 33(1)(a)(b) of NEMA

⁷⁴ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 36

⁷⁵ Para 38

⁷⁶ Para 35 See PN 76 in *Extraordinary Provincial Gazette of KwaZulu-Natal* of 13-05-2009

In the final instance the court ruled that municipalities are authorised to “regulate” environmental matters from the micro level for the protection of the environment and that the D-MOSS amendments of the eThekweni Municipality did not transgress the constitutional or other environmental powers of the national and provincial authorities.⁷⁷ Consequently the court was satisfied that the D-MOSS amendments were not unconstitutional and invalid and dismissed the application with costs.⁷⁸

3 Compulsory or voluntary municipal planning for the purposes of nature conservation among other matters of relevance

It is our contention that the *Le Sueur*-case judicially confirms that: (i) municipalities have a discernible role to play in the state’s execution of its constitutional environmental duties; (ii) the environmental role of local government cannot be understood to be limited to water, sanitation, electricity, storm water and air quality management; and (iii) a municipality may use its planning powers and municipal planning instrumentation such as the D-MOSS for purposes of local environmental governance⁷⁹ as far as the Constitution and other law allow. From an environmental law perspective this verification is welcomed as it reminds the local government fraternity and regulated local communities that the protection and realisation of the constitutional environmental right is everyone in government’s duty and business. It also reiterates that the role of local government in environmental governance is extensive and not limited to classic municipal service rendering and, moreover, that municipal planning is useful for the execution of this role. However, the court did not, at any point, clearly state whether the extent of original and assigned municipal authority over the environment (in the conservation sense) is limited to being an incidence of municipal planning. The court only explicitly confirmed that in the new local government dispensation municipal planning continues to include environmental issues despite, or perhaps as a result of, the way in which the schedules to the Constitution divide legislative and executive authority between the national, provincial and local authorities. In a more implicit sense the court also confirmed that a town planning scheme

⁷⁷ *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 40

⁷⁸ Para 40

⁷⁹ The term has not appeared in the judgment but when one considers the overall gist of the arguments of the respondents and the court’s judgment, *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) in essence dealt with an issue of local environmental governance. Local environmental governance is defined as “the management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own and the total environment ... at local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future interests human beings hold in the environment. This management process necessitates a collection of legislative, executive and administrative functions, instruments and ancillary processes that could be used by local government, the private sector and citizens to stimulate sustainable behaviour within the community as far as products, services, processes, tools and livelihoods are concerned, both in a substantive and procedural sense” See Du Plessis *Fulfilment of South Africa’s Constitutional Environmental Right in the Local Government Sphere* 156 and on environmental governance in general, JG Nel & W du Plessis “Unpacking Integrated Environmental Management – A Step Closer to Effective Co-operative Governance?” (2004) 19 *SA Public Law* 181 181-190 and LJ Kotzé *A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province* (2006) 37

with its different land use zones such as the D-MOSS (“open space”) creates legally binding rules, ie it has the function of (local) law.

From an environmental law perspective the *Le Seuer*-case leaves a number of significant questions undecided. While the case invoked many references to the constitutional authority (legislative, executive and “legislative executive”)⁸⁰ and environmental duties⁸¹ of municipalities, the almost loose and haphazard way in which the applicant, the respondents and the court referred to these matters, leave the environmental and planning law fraternity in the dark on aspects of the meaning and execution of local government’s planning and original and assigned environmental “authority” and “duties”.

One of the questions that remains unclear concerns the legal nature and implications of the zoning of an “open space system”. The court refrained from venturing into an explanation of the meaning and relevance of the phrases “open space” and “open space system” as being part of “the creation of a sustainable interconnected and managed network of different categories of both developed and undeveloped land that will support interaction between ecological, social and economic activities”.⁸² It remains to be clarified what a municipality’s declaration of an “open space” or its adoption of an “open space system” exactly means in terms of the rights and duties it creates for the municipality, local residents and developers, for example. As a category of land use, “open space”, and as an ideal consequence where open spaces are connected, an “open space system” may be imposed in terms of town planning or zoning schemes or under laws relating to protected areas, for example.⁸³ We propose that the court, in *Le Sueur*, had an opportunity to judicially describe the legal nature of an open space system and to address the legal force and implications of such a system as a type of land zone. This may have clarified the “inconsistency in the approach to the nature of a town planning scheme”.⁸⁴ As Van Wyk puts it:

“In general terms, town planning can be regarded as complementary to the bylaws and regulations that govern the construction, form and use of buildings and land in the interests of public health. A few older cases view a town planning scheme broadly as legislative in character. A town planning scheme can be classified as a legislative administrative act (rule making) or legislative administrative action (subordinate or delegated legislation).”⁸⁵

This brings us to the next question concerning the type of authority that is at play when a municipality inserts an instrument such as the D-MOSS for purposes of nature conservation into its town planning scheme. Does it execute legislative, executive or “executive legislative” authority? And what is the difference and what are the implications? What is the legal function of a town planning scheme with one or more open space systems included in such

⁸⁰ See *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) paras 16, 20, 21 and 22 for example

⁸¹ See paras 19, 23, and 24 for example

⁸² See Van Wyk *Planning Law* 256, 245 Van Wyk also indicates that “open space systems” (in the urban land-use planning context) are regarded as invaluable assets in conserving the environment and enhancing the quality of life

⁸³ 252-255

⁸⁴ 281

⁸⁵ 281-282

a scheme? How should municipalities and the regulated fraternity understand the limitations of land use created by open space systems and what is the scope of the enforceability of the local rules created by an open space system? The legal uncertainty in this respect is further fuelled by sections 25 and 26 of the Spatial Planning and Land Use Management Act (“SPLUMA”), for example. These sections determine that first, a land use scheme must give effect to and be consistent with the municipal spatial development framework and determine the use and development of land within the municipal area to which it relates,⁸⁶ and secondly, that an adopted and approved land use scheme has the force of law, and all land owners and users of land, including a municipality (among other government institutions) are bound by the provisions of such a land use scheme.⁸⁷ Section 32 of SPLUMA further states that a municipality “may” pass a bylaw aimed at enforcing its land-use scheme. Although somewhat obfuscated, SPLUMA provisions read together with the conclusions reached in the *Le Sueur*-case at least point to the fact that one is dealing with local law that, similar to any other municipal bylaw, demands adherence by all.

Given the extensive outline of the constitutional environmental duties of local government and the careful analyses of the connection between municipal planning and the environment by the court and respondents in the *Le Sueur*-case, how voluntary is the use of municipal planning for purposes of environmental protection? The question of whether their planning function mandates (on a compulsory basis) or merely enables (on a voluntary basis) municipalities to take up certain measures and to design planning instruments specifically aimed at nature conservation remains unanswered. The arguments in the *Le Sueur*-case in favour of municipal resource protection – especially the arguments of the respondents and the court – raise questions about the legal implications in the instance where land in a municipal area covers biologically sensitive areas or culturally significant areas, for example, but the municipality desists from taking local planning action (for example, refrains from adopting planning measures).⁸⁸

It is encouraging to see some South African municipalities going beyond the call of duty; in other words, exceeding the minimum expectations set by formal and explicit legal rules, requirements and norms and standards. Yet, the question remains whether or not municipal planning as a municipal function should be seen as putting a positive (assigned) justiciable duty on municipalities to conserve and protect the natural resource base, despite the latter (the environment) not being an explicit functional area of local government detailed in Schedules 4B and 5B of the Constitution. An inclusive reading of the Constitution, NEMA, sectoral environmental management legislation, the Local Government: Municipal Systems Act, the recent SPLUMA and a range of other national laws makes it clear that municipalities

⁸⁶ S 25 of SPLUMA

⁸⁷ S 26

⁸⁸ Of relevance in this regard are the principles of co-operative government in ch 3 of the Constitution, which discourages inter-governmental litigation, and the provision in NEMA (s 48), which precludes criminal action against non-compliant organs of state

must plan for and take responsibility for the environment, including natural resource protection. The question prompted by the *Le Sueur*-case is whether a municipality is obliged to use its spatial planning powers to actively protect the natural environment? Is there such an explicit positive duty created by the law as it stands?

SPLUMA may shed some light on this matter. For example, part of the content of a municipal spatial development framework (“MSDF”) is that it “*must* include a strategic assessment of the environmental pressures and opportunities within the municipal area” including the spatial location of environmental sensitivities, high potential agricultural land and coastal access strips where applicable.⁸⁹ SPLUMA also provides that an MSDF *must* identify the designation of areas in which more detailed local plans must be developed.⁹⁰ This may typically refer to plans directed at ecologically sensitive areas. While an MSDF is a municipal planning instrument that differs from a land use scheme, SPLUMA’s provisions on SDFs generally suggest that municipal spatial planning must heed environmental impacts, environmental protection *et cetera*.

When it comes to land use schemes, SPLUMA is more explicit. Section 24 mandates a municipality to adopt a single land use scheme, which *must* take cognisance of any environmental management instrument adopted by the relevant environmental management authority and it *must* comply with environmental legislation.⁹¹ This is a very broad way of implying that municipalities have less discretion than may appear in using planning instruments such as land use schemes (with zoning categories such as land use zones, for example open space) to comply with their constitutional and statutory environmental law duties. To the extent that a municipality is a regulator of local communities, this understanding has further significant effect in the sense that the adoption of a land use scheme with legal force results therein that a municipality creates local law that is binding on local developers, residents and activities in the demarcated area of the municipality.

Section 25 of SPLUMA further provides that a land use scheme *must* give effect to and be consistent with the municipal SDF (as aligned with environmental law) and determine the use and development of land within the municipal area to which it relates to promote, *inter alia*, “minimal impact on public health, the environment and natural resources”.⁹² The compulsory “*must*” in the recent legislation should be interpreted consistently with the constitutional environmental duty of local government in section 24 of the Constitution. This renders it virtually impossible to argue against: (i) the existence of an environmental duty on the part of local government – a duty which transcends the traditional provision of water and sanitation services and air quality management, for example; (ii) the contention that municipal planning must be directed at the protection of natural resources. While the

⁸⁹ S 21(j) of SPLUMA (emphasis added)

⁹⁰ S 21(l)

⁹¹ S 24(2)(b)

⁹² S 25(l)

court in the *Le Sueur*-case made its view clear on this first point, the second has not been expressly addressed.

In the *Le Sueur*-case, the court quoted extensively from the *Maccsand* and other related cases (for example, *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*)⁹³ to convey and substantiate its view that South Africa is confronted with constitutional areas of regulatory overlap between national, provincial and local government.⁹⁴ It was stated that the environment is “an ideal example of an area of legislative and executive authority or power which had to reside in all three levels [*sic*] of Government”⁹⁵ and, with reference to the national and municipal approval of subdivision of agricultural land “[t]here is no reason why the two spheres of control cannot co-exist even if they overlap”⁹⁶. In addition, the court resorted to the matter of constitutional overlap to explain that the environment must be regarded as falling within the executive and legislative authority of municipalities despite the fact that the environment has been constitutionally allocated to provincial and national government. Still, the court’s remarks in this regard do not provide any new insights.

Given the increased number of court cases in recent years that question the meaning and implications of governmental overlap in the areas of planning and the environment, judicial clarification is still eagerly awaited. It is perhaps unreasonable to expect the court to have been more precise in laying down guiding principles for inter-governmental organisation in the event of regulatory overlap in areas such as the environment. While statements such as “[t]he Constitution allocates powers to three spheres of Government in accordance with the *functional vision of what is appropriate* to each sphere”⁹⁷ offer some judicial insight, their practical meaning remains obscure at most. As Freedman explains, more clarity is required on, for example, which sort of environmental matters may be regarded as forming part of the functional area of municipal planning.⁹⁸ It is therefore hoped that once the judiciary does venture into a judicial exposé of how intergovernmental overlaps in terms of original and assigned legislative and executive authority may have to be dealt with, that it will be guided by the principle of (institutional) subsidiarity⁹⁹ which has been usefully employed for this purpose in foreign federal and semi-federal government constructions (such as the European Union and Germany)¹⁰⁰ for decades.

4 Conclusion

From the perspectives of the objectives of South African environmental law and the entire state’s constitutional environmental duty, the *Le Seuer*-case

⁹³ 2009 1 SA 337 (CC)

⁹⁴ See *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) para 20 for example

⁹⁵ Para 20

⁹⁶ Para 20

⁹⁷ Para 20 Giyanda J quoting from *Maccsand v City of Cape Town* 2012 4 SA 181 (CC) para 47 (emphasis added)

⁹⁸ Freedman (2014) *PELJ* 590-592

⁹⁹ See n 56

¹⁰⁰ See, for example, A Follesdal “Subsidiarity, Democracy, and Human Rights in the Constitutional Treaty of Europe” (2006) 13 *Journal of Social Philosophy* 61 61-80

confirms a number of significant viewpoints with regard to the role players and instrumentation in environmental governance. The fact that a number of questions remain unanswered, however, suggests that this case is certainly not the last judicial attempt to address the intersecting area of local environmental governance, municipal planning and co-operative government.

The eThekweni Municipality and other respondents celebrated victory in this matter as the court supported their arguments that community members such as *Le Sueur* (the applicant) must heed local environmental law – be it environmental bylaws or planning instrumentation with legal force. In the bigger scheme of things, however, the environmental law and governance fraternity may celebrate victory as the arguments and reasoning clearly indicate that the judiciary is cognisant of the prominent role of municipalities in the execution of the state's environmental law duties. The implications are that we may increasingly expect the South African judiciary to be fierce when approached with keeping municipalities accountable in terms of their constitutional and statutory environmental law duties.

SUMMARY

Drawing on earlier scholarly works that deal with the legally relevant interface between local government and the constitutional environmental duties of the state, this case comment ventures into an outline of the factual background and judgment in *RA Le sueur v Ethekewini Municipality* 2013 JDR 0178 (KZP) as far as it concerns the execution of original and assigned municipal powers regarding the conservation of natural resources and the protection of biodiversity. The authors further share their observations on what the facts and the judgment of this case may mean from the perspectives of the objectives of South African environmental law and the entire state's constitutional duty towards the environment.