A CRITICAL ANALYSIS OF LEGISLATION AND POLICY PERTAINING TO WASTE MANAGEMENT AND THE CONTROL OF POLLUTION CAUSED BY WASTE IN URBAN AND INDUSTRIAL AREAS IN SOUTH AFRICA

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE LLM (International and Human Rights law)

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KEYWORDS

1. Critical analysis.
2. Legislation.
3. Policy.
4. Pollution control.
5. Waste management
6. Urban areas
7. Industrial areas.
8. Incentives.
9. Monitoring.
10. Implementation.

LIST OF ABBREVIATIONS

DEAT Department of Environmental Affairs and Tourism

DWAF Department of Water Affairs and Forestry.

DM&EA Department of Minerals and Energy Affairs.

PPA Physical Planning Act 125 of 1991.

LGMSA Local Government: Municipal Systems Act 32 of 2000.

LGTA Local Government Transition Act 209 of 1993.

NEMA National Environmental Management Act 107 of 1998.

ECA Environment Conservation Act 73 of 1989.

DFA Development Facilitation Act 67 of 1995.

MEC Member of Executive Council.

EIA Environmental Impact Assessment.

LDO Land Development Objective.

IDP Integrated Development Plan.

DPC Development and Planning Commission established in terms of section 5 of DFA.

ABSTRACT

The central problem of my research is on how pollution and waste can be controlled and managed in urban and industrial areas. This is worthy of study because if the above said problem is not studied in order to be properly controlled through proper measures, for example, through policy and legislation, its impact on the environment in general (soil, air, water) will worsen will worsen. That will not be in compliance with South Africa's international and Constitutional obligations to protect the environment from pollution. The way in which waste should be managed is also part the problem that must be studied because of South Africa's endorsement of Agenda 21, /CONF.151/26(1992) that focuses on strengthening the roles and capacities of local authorities to achieve sustainable development. It is therefore important to know the problems and their causes that are faced by the institutions charged with the implementation of waste management laws in order to solve those problems.

DECLARATION

I declare that ***A Critical Analysis of Legislation and Policy Pertaining to Waste Management and the Control of Pollution Caused by Waste in Urban and Industrial Areas in South Africa*** is my own work, and that all the sources I have used have been properly indicated and acknowledged by means of proper references.

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CHAPTER ONE

1.1. INTRODUCTION

1.1.1. WASTE MANAGEMENT

One of the challenges the new South African government must deal with is the problem associated with waste management and the control of pollution caused by waste. The authoritative report published by CSIR in 1991 estimated that South Africa generates almost three million tons of waste annually, which includes hazardous waste amounting to two million tons per year.[1]

Social effects of South Africa's industrial waste generation are all vivid, as poorer communities have had to bear the cost associated with the negative impact of waste generation. It is generally acknowledged that the previously disenfranchised majority had to bear an inequitable burden of the social cost of pollution caused by improper waste management. There has been neglect in providing proper sanitation systems, and inadequate health and safety measures were taken in the mining industry, resulting in respiratory and other medical problems affecting workers and other associated communities.[2]

It has been estimated that about ninety per cent of total waste generated in South Africa is disposed on land, and this has the potential of causing pollution of not only the land but also of the air and water. In the context of the new South Africa and in the light of the past discriminatory practices, there is a problem of the siting of waste disposal sites, the issue which in short concerns the question why previously disadvantaged communities should bear the ill-effect of waste generated by industry.[3]

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[1] *The Situation of Waste Management and Pollution Control in South Africa Report to t he Department of Environmental Affairs by the CSIR Programme for the Environment* CPE 1/91 (1991).
[2] Lorreta A. Feris (1999) '*The Asbestos Crisis-the need for strict liability for environmental damage*' in Glazewski, Bradfield (1999) '*Environmental Justice and the Legal Process*' at 287.
[3] Jan Glazewski (2000) '*Environmental Law in South Africa*' at 667.

Another problem is that South Africa is a water-deficient and drought –prone country as a result of unfavorable and unpredictable climatic conditions. This fact coupled with rapidly escalating population numbers, industrialization and the need to redress the past socio-economic and gender imbalances, all emphasize the need to ensure that the quality of water available to the South Africans is kept to an optimum through proper waste management policy, law, and practice in order to control pollution caused by waste.[4]

One of the problems with waste management in South Africa is that some aspects of waste management are not being paid proper attention to when compared to others, for example, solid waste probably has been less of physical irritation than liquid and gaseous pollutants, since solid waste is disposed of on land and unlike air and water pollutants, do not disperse widely. This may be one of the reasons why less attention has been paid to the control of solid waste than to the control of other pollutants.[5]

To the person in the street, the most commonly perceived form of solid waste is litter, and this has caused mainly aesthetic anxieties, he or she hardly knows about the more insidious problems of solid waste, and does not realize the danger of resource depletion that goes hand in hand with the generation of solid waste. Whereas air and water have a natural assimilative capacity, and therefore capable of disposing of pollution through self-renewal if the capacity is not exceeded, solid waste needs to be collected, transported and disposed of, mostly upon the land where it does not generally disperse and mingle with the soil. According to Rabie, the disposals of solid waste demonstrate the rule of physics that matter is indestructible: although it can be changed in character, it cannot be made to disappear.[6]

Therefore, the less visible aspects of waste must also be properly dealt with. This must be done because of the fact that in certain instances, solid waste disposal is interrelated with air pollution through the burning of wastes and odours from open

[4] Glazewski (2000) '*Environmental Law in South Africa*' at 759.
[5] Rabie, (1976) '*South African Environmental Legislation*' at 159
[6] See FN 159.

dumps. It is also interrelated with water pollution through contamination of underground water and the pumping of waste into the rivers, lakes and the sea.[7]

The solid waste management problem is also related, amongst others, to the improvement of methods of manufacture, packaging and marketing of consumer goods because the manufacturers generally do not accept the responsibility for the costs of getting rid of products that have been sold and have served their purpose. This refusal is for the reason that the disposal costs are not included in the price paid by the consumer for consumer goods. The problem is also related to the change in the characteristics of the discarded materials. The change towards packaged goods in disposable containers has for example put more plastics, glass, metals, and others instead of organic matter into refuse.[8]

There is also a relationship between the growth in waste generation and the economic and population growth in the country and the improvement of the standards of living. Lombard, Botha, and Rabie support this view.[9]Stein is also of the view that the concentration of the population in expanding urban areas has presented these communities with serious financial, management and technical problems in the management of waste resulting from domestic, commercial, and industrial activities carried on in these areas.[10] This makes it difficult to control pollution caused by waste in the concerned areas.

Although urban and industrial waste produce only a small percentage of total waste, they make up a disproportionate volume of waste, and are the most offensive to the environment and the most dangerous to health when allowed to accumulate near population centres. Such wastes should therefore be the chief targets of waste management programmes in urban and industrial areas in South Africa.[11]

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[7] Rabie *op cit at* 159.
[8] Rabie *op cit* at 160.
[9] Fuggle, Rabie (1992) '*Environmental Management in South Africa*' at 509.
[10] Stein '*Regulation of Waste Management in South Africa-A case for integration*' (1997) 4 SAJELP at 265.
[11] Rabie *op cit* at 162.

Traditionally, waste management, especially the collection and disposal of solid waste, has been considered as the function of local government. Although other forms of environmental pollution, such as air and water pollution are controlled on a national scale, waste management remains principally a local concern whereas a general feature of waste by-laws primarily relate to the protection of health and prevention of public nuisances.[12]They are not designed as conservation measures to reduce the volume of waste to prevent abuse of natural resources.[13]

Another problem in this regard is that some of the most important aspects of waste management, such as the provision of incentives for recycling, cannot be dealt with at the local level,[14] and that is because of the fact that there are some factors constraining the existing efforts made by local authorities to enable themselves to deal with the above-mentioned aspects of waste management, for example, in the former Witwatersrand region, it has been said that local authorities were constrained by the Transvaal Local Government Ordinance 17 of 1939[15] in their ability to offer financial incentives to individual companies in the form of rebates or tax holidays.

The above-mentioned Ordinance states that a local authority can set differential rates for different land uses but cannot vary these rates within each category. Accordingly, whilst some local authorities could reduce the rates levied on industrial land, they would have to do so for all industries and not as a means for either attracting or retaining specific enterprises.[16]Therefore a supra-local level of planning is required so that several bodies concerned with waste management can be combined on a regional basis. This could allow for integrated use of disposal facilities in order to achieve greater economy. Greater economy in this regard could be achieved through reduction of operational, labour and other costs caused by the current numerous local government institutions that deal with the control of waste in an uncoordinated

[12] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 519.
[13] Rabie *op cit at* 169.
[14] Rabie *op cit* at 169.
[15] Section 80B.
[16] Input Paper: *Poverty and Inequality Report-The Constitutional Context* <http://www.gov.za/reports/1998/poverty/context.pdf>.

manner. More efficient control of pollution caused by waste, and the provision of opportunities for a more comprehensive consideration of the reuse and recycling of wastes could also be achieved in this manner.

1.1.2. LACK OF COORDINATION

There seems to be too little consideration, coordination and central planning. Neither the national government nor the provincial governments have played any significant role to coordinate and stimulate waste management. Lombard, Botha, and Rabie say in this regard that in formulating and implementing a waste management strategy effectively, consultation is an important but often neglected element, because the more informed the people are, the greater the opportunity for cooperation and tolerance among various sections of the society and, particular attention must be paid to the management of waste in informal settlements.[17]

Historically, the lack of a clear waste management strategy in many public and private sector organizations in South Africa has resulted in the belated discovery of the devastating effects of poor waste management on the environment. Despite the existence of a considerable number laws of that provide some control over the production and disposal of waste that are in line with that of the developed countries, more specific legislation is still needed to control the waste management industry in South Africa.[18]

The management of waste should be a multi-disciplinary exercise and requires the input of a team with a wide field of expertise in order to deal comprehensively with the many facets of the waste management problem. There are many waste management laws in South Africa. These laws, however control waste management

[17] Lombard, Botha, and Rabie '*Solid Waste*' in Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 493.
[18] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 493.

in a haphazard and uncoordinated manner, for example the 1991 CSIR[19] report revealed that waste management legislation is dispersed among at least 37 Acts of Parliament, 16 Provincial Ordinances, and numerous local by-laws.[20] This results in lack of effectiveness in the implementation of the concerned legislation.

This fragmentation of waste management legislation in South Africa has a result that the provisions of waste management statutes are administered by a multitude of public authorities, for example, section 20 of the ECA, which is a specific provision dedicated to waste management is administered by the Department of Water Affairs and Forestry, but eight other government departments are also involved in one way or another in the administration of this section through various inspection and control powers that these departments exercise over this section.

For example, the Department of Mineral and Energy Affairs, in terms of the provisions of Minerals Act 50 of 1991,[21] inspects section 20 in respect of mining waste. The Nuclear Energy Act 46 of 1999[22] inspects the same section in respect of radioactive waste. The Minister of Agriculture inspects section 20 in respect of remedies, insecticides and herbicides in terms of the provisions of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947.[23]

The department of Health controls section 20 in respect of nuisances and human health and safety in accordance with the provisions of the Health Act 63 of 1977.[24] The Department of Land Affairs controls section 20 in respect of land use and management in terms of the Development Facilitation Act 67 of 1995.[25] The

[19] *The Situation of Waste Management and Pollution Control in South Africa Report to the Department of Environmental Affairs by the CSIR Programme for the Environment* CPE 1/91 (1991).
[20] Stein (1997) 4 SAJELP at 255.
[21] Section 8.
[22] Section 45(1)-(3) and section 46(1)-(3).
[23] Section 7.
[24] Section 20(1)(a)-(b)(i) and (ii), and (c).
[25] Section 27 and section 28.

Department of Transport inspects section 20 in respect of the safe transportation of dangerous goods.[26]

Waste management legislation in South Africa fails to contribute adequately to the avoidance of waste production as far as possible, greater use of degradable packaging material, the sorting of household waste at source to facilitate disposal and recycling, the recycling and utilization of waste, and the disposal of all residual waste in an environmentally acceptable manner.[27]

1.1.3. WASTE MANAGEMENT STRATEGIES

In South Africa there is no definitive national policy for waste management.[28] The important subject of the control of hazardous wastes is regulated by a number of diverse statutes, such as, amongst others, the Hazardous Substances Act, Nuclear Energy Act and the ECA. These statutes are administered by different government bodies, such as DEAT, DM $ EA thus frustrating a uniform approach. At the local level of government, where most of the control of waste seems to lie, there is seemingly no uniform set of by-laws for waste management.[29]

The diffuse and uncoordinated way in which waste management and the control of pollution caused by waste is being dealt with by the South African legislation has been to some extent made worse rather than simplified by the new Constitution[30] which creates concurrent national, provincial, and in some instances, local government legislative competence in the sphere of pollution control.[31]For example, water quality standards will be imposed at national level in terms of the Constitution,[32] while local governments are responsible for legislation concerning the

[26] Stein '*Regulation of Waste Management in South Africa-A case for integration*' (1997) 4 SAJELP at 264.
[27] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 521.
[28] Glazewski (1992) '*Environmental Law in South Africa*' at 668.
[29] Stein *op cit* at 521.
[30] Act 108 of 1996.
[31] Glazewski op cit at 632.
[32] Schedule 4.

treatment of water and sanitation services as well as domestic waste water and sewage disposal systems.[33]

There is a potential for legislative conflict in this situation, as well as likelihood that instead of promoting integration, it will create division because of the seemingly ad hoc appearances in schedules 4 and 5[34]of certain pollution control functions without apparently the whole pollution picture having been considered.[35]

The above-mentioned constitutional arrangement presents possible practical administrative difficulties because administrative actions, such as the issuing of permits and granting of exemptions, are also carried out by officials at all levels of government. For example, a waste disposal site approved under the ECA[36] by the national Department of Water Affairs and Forestry, which has also been approved in terms of Provincial legislation and, which is contaminating ground water, may have constituted public nuisance but administrative responsibility between the national, provincial, and local levels of government may be unclear in this regard.[37]

This is because the National Government may have promulgated water quality standards, which it is constitutionally entitled to do,[38] while the Provincial Government is responsible for enforcing the conditions of approval granted under provincial planning legislation and, while the Local Government is obliged by the Constitution to adopt by-laws to control public nuisance and to enforce such by-laws.[39]

This might also cause confusion as to the allocation of responsibilities to different levels of government, because the Constitution, while providing for the administration of different pollution control laws at various levels of government. It

[33] Part B of Schedule 4.
[34] Constitution Act 108 of 1996.
[35] Glazewski *op cit* at 364.
[36] Section 20.
[37] Glazewski *op cit* at 364.
[38] Schedule 4 of the Constitution Act 108 of 1996.
[39] Part B of Schedule 5.

simultaneously acknowledges the need for cooperative government.[40] From the civil society's perspective, this situation makes it difficult to know which sphere of government is responsible and ultimately to whom one must complain in order to remedy the problem, which in turn shows that there are problems concerning overlapping jurisdiction and pinpointing responsibilities.[41]

In order for waste management and the pollution caused by waste to be properly and effectively controlled in a holistic manner, the problems within the existing waste management legislation must be eliminated to ensure that waste management policy and legislation achieve the objectives they were intended to achieve at their formulation and enactment.

1.1.4. DELIMITATION OF STUDY

The critical analysis of waste management legislation and policy in this regard will be dealt with mostly through desk-bound research. The research will also include interviews with local government officials charged with the implementation of these laws and experts in the field of pollution control and waste management law and practice.

Different aspects of the research problem are dealt with in detail in different chapters of this research project. *Chapter two* provides the discussion of waste management in urban and industrial areas in South Africa. *Chapter three* deals in detail with the problems associated with pollution control in urban and industrial areas in South Africa. *Chapter four* contains conclusions and recommendations. Conclusions will be made with reference to the literature that forms the framework of this research project and, with reference to interviews conducted with selected officials and experts. Recommendations will be based on the shortcomings revealed through the critical

[40] Glazewski *op cit* at 632.
[41] Glazewski (2000) '*Environmental Law in South Africa*' at 364.

analysis of policy and legislation pertaining to waste management and pollution control in urban and industrial areas in South Africa.

CHAPTER 2

WASTE MANAGEMENT IN URBAN AND INDUSTRIAL AREAS IN SOUTH AFRICA

2.1. INTRODUCTION

The South African waste management legislation does not achieve its intended purposes as far as waste management in urban and industrial areas is concerned. Critics agree in this regard that insufficient enforcement is the main reason for the ineffectiveness of environmental protection through legislative means.[42]Loots[43]and, Rabie and Fuggle support this view.[44]

In South Africa, the most common methods of enforcing environmental laws are through criminal sanctions, administrative actions and civil litigation. It has been said that none of the above mentioned enforcement methods were effectively implemented during the apartheid era and the situation has not significantly improved beyond 1994.[45]

The fragmented nature of environmental legislation and the division of responsibilities for the administration and enforcement of such legislation is one of the most serious problems relating to environmental law, including waste management law in South Africa.[46] The above-mentioned problems also result from the fact that the responsibility for regulating the environment is divided between

[42] Loretta A. Feris (2000) ' *The conceptualization of Environmental Justice Within the Context of the South African Constitution*' (Dissertation presented for the Degree of Doctor of Laws at the University of Stellenbosch) at 82.
[43] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 16 at 17
[44] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 516.
[45] Feris op cit at 82.
[46] Feis *op cit* at 82

national government departments, provincial administrations, and local municipalities.[47]

At the national level, the responsibility is equally fragmented, with different government departments controlling different matters, such as water and air pollution separately. It is this fragmented control that makes it difficult to regulate environmental problems, especially waste management, in a coordinated fashion.[48]

As waste management is not the primary objective of all the different state departments that deal with the implementation of environmental law, a conflict of interests often arises between the involved governmental departments.[49] For example, most government departments, as well as other administrative bodies, some of which are development-orientated, are in some way or another involved in the administration of environmental affairs on the one hand. On the other hand, policies made and executed by development-orientated administrative bodies often lie at the root of environmental pollution and the degradation and depletion of natural resources.[50]

The conflict of interest might arise when development-orientated government departments are expected to consider environmental impacts when performing their functions, as their primary objective is only economic development and not environmental protection.[51] This fragmented waste management legislation is also an economically unsound way of regulating the environment because each department that is involved requires monetary and human resources.[52]

Stein notes in this regard that a central feature of the lack of coordination in the legislation on waste management is the problem of the definition of "waste". To

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[47] Feris *op cit* at 82.
[48] Feris *op cit* at 184.
[49] See the discussion in 3.4.2 with section 14 (f) and schedules 1 and 2 of NEMA.
[50] Rabie '*The Environment Conservation Act and its Implementation*' (1994) 1SAJELP at 5.
[51] Act 73 of 1989.
[52] Feris *op cit* at 186

illustrate this problem she takes the ECA[53] as her example, in which the definitions of waste excludes wastewater, effluents and mining waste and designate them for control under separate pieces of legislation.[54] This is a clear example of the fragmentation of waste management legislation. This problem is dealt with within the national, provincial, and local government levels.[55]

2.2. WASTE MANAGEMENT AT THE NATIONAL GOVERNMENT LEVEL

2.2. (A) HAZARDOUS WASTE

The ECA does not define hazardous waste. This Act leaves the definition of hazardous waste to section 51 of the Hazardous Substances Act 15 of 1973[56]that is also relevant because it makes provision for control over the dumping and other forms of disposal of certain hazardous substances to be affected through the regulations made in terms of this Act. Such regulations have been issued in respect of the disposal of both empty and full containers of certain hazardous substances. [57]

These regulations provide, among other things, that returnable containers of such hazardous substances the labels of which do not specify that it should be returned to the supplier must be perforated, flattened and then buried in the ground, or disposed of in an alternative safe manner.[58]Contravention of any of these provisions amounts to an offence.[59]These regulations also govern the transportation of certain hazardous substances by means of a road tanker,[60]which may include hazardous waste.

The problem with the above-mentioned regulations is, however, that their application is substantially limited by the fact that they apply to only 300 listed types of chemicals, and the road tankers that carry less than 500 litres of hazardous substances

[53] Act 73 of 1989.
[54] Stein *op cit* at 257.
[55] Stein *op cit* at 257.
[56] Section 29(1)(a)(vi).
[57] Government Notice R72 of 11 January 1985.
[58] Regulation 10(3).
[59] Regulation 11 read with section 29(8) of the Hazardous Substances Act.
[60] Government Notice R73 of 11 January 1985.

are kept outside the scope of the regulations so that no special roadworthiness requirements are imposed on such vehicles.[61]

The above-mentioned situation is problematic in the sense that the persons targeted by the regulations can defeat the object of the regulations for example, through using many trucks with a load capacity of less than 500 litres to transport the regulated hazardous waste instead of a few trucks that have a load capacity of more than the 500 litres in order to escape regulation.[62]

The relevance of the Hazardous Substances Act to the definition of hazardous waste is that it makes the declaration of various hazardous substances in respect of which, among other things, particular packaging requirements must be complied with.[63]

The definition of hazardous waste is determined by the administrative guidelines of the Department of Water Affairs and Forestry in its Minimum Requirements for Handling and Disposal of Hazardous waste.[64] The problem highlighted in this paragraph is the ECA's difficulty in defining hazardous waste, which in turn raises concerns about the ECA's ability to control the generation, transportation, and disposal of hazardous waste that the ECA itself is unable to define.[65]

The fragmentation of administrative control powers, and in many instances the duplication of these powers contributes to one of the most significant problems in waste management in South Africa, and that is the situation of inadequate enforcement, as the availability of human resources to monitor and control environmentally damaging activities is severely limited, mainly due to the financial constraints in the budgets of various regulatory authorities.[66]

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[61] Fuggle RF, Rabie MA (1992) ' *Environmental Management in South Africa*' at 517.
[62] Fuggle and Rabie *op cit* at 517.
[63] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 516.
[64] Stein *op cit* at 257.
[65] Stein '*Regulation of waste management in South Africa*' 1997) 4 SAJELP at 257.
[66] Feris *op cit* at 186.

This fragmentation of waste management legislation is also visible in the legislation controlling solid waste. Various pieces of legislation in this regard deal with different aspects of solid waste separately. For example, with regard to objects discarded on roads, both the Advertising on Roads and Ribbon Development Act[67] and the National Roads Act [68] prohibit the leaving of any disused vehicle or machine, any rubbish or other refuse on certain roads, or within a certain distance of such roads. Non-compliance with either of the above Acts results in a criminal sanction.[69]

The local authority in question may remove such objects, or may order that they be removed, and may recover the cost of removal from the person who left them on the road in question.[70]The problem with these provisions is that no time limits or formalities are prescribed in relation to the removal and disposal of the disused vehicles or machines. Another problem with the above-mentioned pieces of legislation is that they do not define 'a disused vehicle or machine', 'rubbish or refuse' that they aim to control.[71]

2.2. (B) ANIMAL WASTE AND HEALTH MATTERS

Concerning animal waste and health matters, solid waste control can be effected through the control of nuisances,[72] and through regulations issued in terms of the Health Act,[73] the International Health Regulations Act,[74] Regulations in terms of the Animal Slaughter, Meat and Animal Product Hygiene Act[75] that deals with the methods of disposal from the abattoir.[76]The Sea Shore Act,[77] which regulates the

[67] Act 21 of 1940, section 8(1).
[68] Act 54 of 1971, section 16(1).
[69] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 514.
[70] Advertising on Roads and Ribbon Development Act 21 of 1940, section 8(3), and the National Roads Act 54 of 1971, section 16(2)-(3).
[71] Fuggle RF, Rabie MA (1983) '*Environmental Concerns in South Africa*' at 403.
[72] Health Act 63 of 1977, section 1 read with section 20(1)(b).
[73] Health Act 63 of 1977, Chapter V
[74] Act 28 of 1974, article 14(3) of the schedule to the Act read with section 2 of the Act.
[75] Act 87 of 1967.
[76] Section 38(1)(n).
[77] Act 21 of 1935.

deposition of waste upon the seashore, also deals with the same problem of waste and health matters.[78] This wide range of legislation dealing with substantially the same issue in an uncoordinated manner illustrates the fragmented nature of the South African urban and industrial waste management legislation.

2.3. WASTE MANAGEMENT AT THE PROVINCIAL GOVERNMENT LEVEL

On the provincial level, although the powers of the then provincial councils had been extended in order to enable them to legislate for the control of environmental pollution according to the Financial Relations and Consolidation Amendment Act 38 of 1945,[79] only the Free State and the KwaZulu-Natal Provincial Ordinances did regulate the disposal of waste.[80]

In terms of the Free State Ordinance,[81] no person may leave any rubbish on public land or water except at places especially adapted and set aside for such purpose, nor on private land in such a manner that it is visible from a public place.[82] Contravention of this Ordinance is an offence.[83] The Natal Ordinance[84] similarly renders it an offence for any person in any manner whatsoever, whether willfully or negligently to perform any act of littering on, in or into any land, whether private or public, the sea or inland waters.[85]

A problem in this regard is the fact that only two out of the then four provinces actually utilized their extension of powers to legislate for the control of environmental pollution generally, and waste management specifically.

Another problem with the environmental protection legislation at the provincial level, which includes waste management legislation, is that although the provinces have

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[78] Section 10(1)(d).
[79] Second Schedule to the Act.
[80] Stein '*Regulation of Waste Management in South Africa*' (1997) 4 SAJELP at 260.
[81] *The Prohibition on the Dumping of Rubbish Ordinance* 8 *of* 1976 (Free State).
[82] Section 2(1)(a).
[83] Section 4(1)(a) read with section 4(1), and section 4(2).
[84] *The Prevention of Environmental Pollution Ordinance* 21 *of* 1981 (KwaZulu-Natal).
[85] Section 2(1)-(2) read with section 6.

been given extended powers by the Constitution[86] to enable them to legislate on both matters, with respect to which the national government can also legislate,[87] and on matters with respect to which only the provinces can legislate,[88] they still treat themselves as administrative institutions. This is because of the fact some provinces still leave considerable environmental control powers to the discretion of the provincial MEC's than to the Provincial legislature itself.

An example of this situation is the fact that some Provincial Government's environmental protection measures are still dealt with through administrative decisions for example, in the KwaZulu-Natal Planning and Development Act,[89]Chapter 4 that deals with development plans and,[90]which empowers the concerned provincial Minister to prescribe a number of measures relating to the environment, including assessment of environmental impacts of proposed developments,[91]leaves it to the discretion of the provincial Minister to determine which activities will have detrimental effect on the environment, and which shall be subject to environmental impact assessment. It is not the Provincial Legislature that takes a decision in this regard.[92]

The Western Cape Planning and Development Act also has the same defect as the KwaZulu-Natal one because it controls the issues it covers through regulations. This became evident in the fact that, for this Act to take effect, it had to wait for regulations to be issued in order to give it effect.

This situation is undesirable because waste management is a very important aspect of securing the safety of the environment upon which we depend for survival. Therefore, leaving the regulation of substances that poison our environment in the hands of the

[86] Act 108 of 1996.
[87] Schedule 4 matters.
[88] Schedule 5 matters.
[89] Act 5 of 1998.
[90] Section 31.
[91] Section 31(1)(a).
[92] Glazewski *op cit* at 258.

administrative official, who might not be properly educated about the protection of the environment, might not be a wise way of protecting the environment.

2.4. WASTE MANAGEMENT AT THE LOCAL GOVERNMENT LEVEL

Local legislation that pertains to waste management is not free from defects. This is because the common control of waste, especially solid waste by local authorities is mostly exercised over the littering of public places,[93] and not on all aspects of waste.

Another common problem with local legislation in this regard is that refuse is usually not defined.[94] The problem of lack of definition of issues dealt with in local waste management and pollution control legislation is a continuing one because even the recent DFA,[95] which provides for the land development objectives to be formulated for all local government areas in the form of integrated development plans, does not define what these land development objectives are, but only lists the items covered.[96]

2.4.1. THE DEVELOPMENT FACILITATION ACT

The purpose of the DFA is to introduce extra-ordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land, and in so doing to lay down general principles governing land development throughout the republic; to provide for the establishment of a Development and Planning Commission.[97]

The purpose of the DPC is to advise the government on policy and laws concerning land development and national and provincial decisions and resolve conflicts in respect of land development projects.[98] Further purposes of the DFA are to facilitate the formulation and implementation of land development objectives by reference to

[93] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 512.
[94] Fuggle RF, Rabie MA (1992)'*Environmental Management in South Africa*' at 520.
[95] Act 67 of 1995.
[96] Section 28.
[97] Section 5.
[98] Section 6(a)(1).

which performance of local government bodies in achieving such objectives may be measured; to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses; to promote security of tenure while ensuring that end-user finance in the form of subsidies and loans becomes available as early as possible during the land development process; and to provide for matters connected therewith.[99]

According to the DFA, the land development objectives shall relate to (a) the objectives of the relevant authority in relation to access to and the standard of service for land development, including public transport and water, health and education facilities; (b) the objectives relating to urban and rural growth and form in the relevant area; (c) the development strategies of the relevant authority in relation to land development as provided for in the DFA;[100](d) the quantum of land development objectives in the sense of the provisions of section 28(1)(d)(i)-(iv).

However an undesirable feature about The DFA in connection with its provision for LDO's is the fact that such LDO's are only given practical reality by the Local Government Transition Act.[101]The inclusion of environmental considerations both within the general overarching principles and the procedural details of the DFA, such as section 28(1)(b)(viii) is admirable. There is, however, possible cause for concern in that the actual consideration of environmental factors in the development process is left to the discretion of officials rather than being directly legislated for.[102]Section 28(2) of DFA is an example of this situation.

[99] Long title.
[100] Section 28(1)© (i)-(iv).
[101] Jan Glazewski (2000) '*Environmental Law in South Africa*' at 251.
[102] Kidd M (1997) '*Environmental Law: A South African Guide*' at 160.

2.4.2. THE LOCAL GOVERNMENT TRANSITION ACT

The purpose of the Local Government Transition Act[103]is to provide for the restructuring of local government. However, the LGTA furthers the fragmentation of local government legislation in the sense that, in its three-phase structure that includes the 'pre-interim'; the 'interim' and; the 'final phase', it leaves the initiation and the regulation of the 'final phase' to the Local Government: Municipal Structures Act.[104]

This undesirable fragmentation is worsened by the fact that the LGTA also gives practical reality to the provisions of yet another piece of legislation namely, the DFA. This is because of the fact that the land development objectives provided for in the DFA[105]are only given practical reality by the integrated development plans provided for by the LGTA.[106]

The LGTA does this through requiring the various types of local authorities provided for in the DFA to carry out certain environmental duties, such as formulation and implementation of local IDP's, which in turn must incorporate, amongst other things, integrated economic development.[107]

2.4.3. THE PHYSICAL PLANNING ACT

The objective of the Physical Planning Act[108]is to promote the orderly physical development of the republic and, to provide for the division of the Republic into regions for the preparation of national development plans; regional development plans; regional structure plans and urban structure plans by the various authorities responsible for physical planning and related matters.[109]Urban structure plans shall, among other things, consist of guidelines for the future physical development of the

[103] Act 209 of 1993.
[104] Act 107 of 1998.
[105] Section 27(1).
[106] Schedule 2, paragraph 3(a).
[107] Sections 10©(2) and10(c)(3)(a) of LGTA respectively.
[108] Act 125 of 1995.
[109] Long title.

area to which that urban structure plan relates.[110]These objectives of the PPA are to be achieved through specified planning processes. However, the fact that the PPA does not lay down any direct land-use control measures to support this objective is a cause for concern.[111]A further undesirable feature about the PPA is that any plans developed in compliance with it are unreliable in this sense, if such plan is incompatible with the LDO's provided for in the DFA[112], such plan shall be deemed to be amended.[113]

In the local legislation, provisions are also generally enforced through criminal sanctions, the enforcement of which is questioned. This is discussed in detail in 2.5 below. Another problematic common method of refuse control adopted by the local legislation is the abatement notice procedure that is prescribed for dealing with nuisances. In terms of this procedure, a notice is served on the author of the nuisance calling upon him to remove it within a specified time. Failure to comply with the notice is an offence, and that entitles the local authority to abate the nuisance itself, and to recover the costs incurred from the author of the nuisance.[114]

An abatement notice is problematic because of the fact that according to this procedure, the concerned local authority must first wait for environmental damage to occur before taking an action, while on the other side there is a view by the environmentalists that the legislative provisions dealing with waste management should be proactive rather than being reactive.[115]

This view is supported by the argument that the damage to the environment and to the health of the citizens who are affected by the polluting activity might be

[110] Section 24(1).
[111] Kidd (1997) '*Environmental Law: A South African Guide*' at 156.
[112] Section 27.
[113] Section 29(2).
[114] Fuggle RF, and Rabie MA (1983) '*Environmental Concerns in South Africa*' at 405.
[115] Feris *op cit* at 182.

significant and even irreversible. If the authorities must wait until the damage is done, the purpose of waste management will not be achieved.[116]

The problem with the abatement notice procedure is one of the reasons put forward as to why the effectiveness of criminal sanctions in waste management is questioned. The problem of ineffective waste management legislation is a problem that cuts through all levels of government, and it is a problem found in almost every piece of legislation that deals with waste management in urban and industrial areas.[117]

A further example of the fractured regulatory control of waste management is evident in the fact that the waste management legislation pertaining to waste disposal does not end in the ECA. For example, the solid waste by-laws administered by the Greater Johannesburg Metropolitan Council, create additional requirements for the disposal of solid waste.[118]

In the Greater Johannesburg Metropolitan Council's by-laws, industrial refuse is specially catered for in that when an occupier of premises within the municipal area uses the services of a private contractor to remove industrial refuse, the Council must be advised of this in writing and must give written permission for this purpose.[119]

The Council is also entitled to stipulate conditions in its permit.[120] This in turn further illustrates how the fragmented legislation and administration of waste management issues flow from the national level of government to the local level of government. This situation severely limits anyone's hopes that waste management will ever be dealt with in a comprehensive and coordinated manner by the current South African waste management legislation without new legislation being put in place.

[116] Feris (2000) '*The Conceptualization of Environmental justice Within the Context of the South African Constitution*' at 182.
[117] Feris *op cit* at 182.
[118] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 520.
[119] Stein '*Regulation of Waste Management in South Africa*' (1997) 4 SAJELP at 260.
[120] Stein *op cit* at 259.

2.5. CRIMINAL SANCTION AS ENFORCEMENT MECHANISM

At all levels of legislative competence, almost all the concerned legislation relies on criminal sanctions for environmental offences.[121] This is a problem in that criminal sanctions are being said to be ineffective within the environmental context, and such ineffectiveness is ascribed to the following factors:[122]

1) Prohibited activities are not effectively policed; this in turn is due to the lack of knowledge by the police about the existence of environmental crimes.

2) Relatively little public knowledge exists about the threats to the environment and what constitutes an environmental offence.

3) The investigation of environmental offences is difficult and officials require environmental knowledge and legal training.

4) Prosecutions of environmental offenders often fail due to a lack of knowledge about environmental criminal law.

Almost all the above-mentioned problems are caused by a lack of public awareness about the importance of the protection of the environment. It is said in this regard that the government at all levels has not done enough to educate the public about the importance of a safe environment for them and, this failure has been attributed to budget constraints that the government has always experienced.[123]This lack of public awareness is ascribed to the government's ignorance of even elementary facts about pollution-control and its relation to hygiene in the sense that, important information

[121] Fuggle and Rabie *op cit* at 405.
[122] Kidd (1997) '*Environmental Law: a South African Guide*' at 24
[123] Fuggle RF, Rabie MA (1983)'*Environmental Concerns in South Africa*' at 311, Kidd *op cit* at 24, Feris op *cit at* 82.

about the environment remains buried in public offices, unless the public makes the first approach.[124]

It is said in this regard that the cost effectiveness of enforcing criminal sanctions in order to control, for example, littering also reveals that this sanction is inadequate.[125] This is because litigation is expensive and only few individuals do have the kind of resources required by the extensive and complicated litigation process.[126]

Another problem facing South Africa is that waste management legislation in South Africa mostly focuses on waste disposal rather than waste minimization and that is not in conformity with the *'cradle to grave'* approach.[127] This situation is undesirable because it focuses on symptoms rather than focusing on the root causes of waste,[128] through a systematic approach to waste management, which is designed to effectively reduce the unnecessarily high levels of waste generation.

2.6. WASTE MANAGEMENT STRATEGIES

Another problem facing waste management in South Africa is that South Africa has no definitive national policy on waste management.[129] Since the publication of the 1991 CSIR[130] waste management report which provided an overview of the relevant international and national laws applicable to waste management at the time, there has been a number of ongoing policy initiatives to formulate a comprehensive waste management policy and strategy for South Africa.[131]

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[124] Fuggle and Rabie *op cit* at 312.
[125] Andre Rabie (1976) '*South African Environmental Legislation*' at 176.
[126] Feris *op cit* at 186.
[127] Stein ' *Regulation of Waste Management in South Africa*' (1997) 4 SAJELP at 255 describes the '*Cradle to Grave*' approach in the waste management context as the approach that regulates waste starting from its generation, transportation, treatment and final disposal.
[128] Fuggle MA, Rabie RF (1983) '*Environmental Concerns in South Africa*' at 407.
[129] Glazewski (2000) '*Environmental Law in South Africa*' at 668.
[130] Glaewski (2000)'*Environmental Law in South Africa* ' at 759.
[131] Fuggle RF, Rabie MA (1992)'*Environmental Management in South Africa*' at 513.

In the year 2003, no definitive waste management policy has emerged, but only a progressive number of further initiatives,[132] such as the statutory environmental policy declared under the ECA,[133] the 1999 Waste Management Strategy[134], the 2000 Integrated Pollution and Waste Management White Paper,[135] and the 2002 National Integrated Waste Management Bill.[136]

2.6.1 THE STATUTORY ENVIRONMENTAL POLICY DECLARED UNDER THE ECA

In this general statutory environmental policy, a paragraph headed Pollution Control provides that pollution, of whatever nature, should be prevented by formulating an effective comprehensive policy, the promulgation of appropriate legislation, the establishment and maintenance of norms and standards, the application of the best practicable environmental options based on the most suitable environmental technology, the fostering of positive attitudes among industries and the public and participation in international co-operation. This policy further provides that a national strategy for integrated waste management and integrated pollution control will be developed in which the elements of responsibility, accountability, minimizing, treatment and reuse will enjoy priority.[137]

It also provides that disposal into the atmosphere; land and waste environments should be limited to acceptable levels and standards. Protection against hazardous waste, the control of environmentally detrimental agricultural, trade or industrial practices and the promotion of recycling will be included in the strategy. The safe management of hazardous materials will be arranged in accordance with internationally accepted standards and practices.[138]

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[132] Jan Glazewski (2000) '*Environmental Law in South Africa*' at 668.
[133] General Policy in terms of the Environment Conservation Act 73 of 1989, GN51 in *Government Gazette* No.15428 dated 21 January 1994.
[134] Version C, PMG 130, PSC 69, June 1999.
[135] *Government Gazette* No. 20978 dated 17 March 2000.
[136] Draft 8.0, June 2002.
[137] Glazewski J, (2000) '*Environmental law in South Africa*' at 668.
[138] Glazewski *op cit* at 669.

2.6.2. THE 1999 WASTE MANAGEMENT STRATEGY

This National Waste Strategy sets out the purpose of integrated pollution and waste management. According to this National Waste Strategy, the objective of integrated pollution and waste management is to move away from fragmented and uncoordinated waste control to integrated waste management. Such an holistic and integrated management approach extends over the entire waste cycle from cradle to grave, and covers the prevention, generation, collection, transportation, treatment and final disposal of waste. This strategy says that integrated waste management represents a paradigm shift in South Africa's approach to waste management, by moving away from waste management through impact management and remediation and establishing a waste management system which focuses on waste prevention and waste minimization.[139]

2.6.3. THE 2000 INTEGRATED POLLUTION AND WASTE MANAGEMENT WHITE PAPER

The stated purpose of this white paper is to encourage the prevention and minimization of waste generation, and thus pollution at source; to encourage the management and minimization of the impact of unavoidable waste from its generation to its final disposal; to ensure the integrity of sustained 'fitness for use' of air, water and land; to ensure that any pollution of the environment is remedied by holding the responsible parties accountable; to ensure environmental justice by integrating environmental considerations with the social, political and development needs and rights of all sectors, communities and individuals and, to prosecute non-compliance with authorizations and legislation[140].

[139] Executive summary at (ii).
[140] Paragraph 1.4 at page 12.

2.6.4. THE 2002 NATIONAL INTEGRATED WASTE MANAGEMENT BILL

According to this Bill, its objectives are : (a) to establish a waste management hierarchy of the following order, avoidance; re-use; recycling and reprocessing; and disposal, (b) to minimize the consumption of natural resources and final disposal of waste by the avoidance of waste and the minimization, re-use and recycling of waste, (c) to encourage waste separation to facilitate re-use and recycling, (d) to ensure that industry and the public share the responsibility for minimizing and managing waste, (e) to promote and ensure the efficient resourcing of waste service planning and implementation, (f) to achieve integrated waste planning, management and services on a national; provincial and municipal basis and, (g) to promote and ensure environmentally responsible waste management, in accordance with the principles of environmentally and socially just sustainable development.[141]

Despite the publication of these various reports and policies over a period of a decade, there still appears to be a lack of overall direction and identification of responsibilities for waste management and pollution control in South Africa.[142]

Although the ECA provided for the Minister to make and publish enforceable environmental policy,[143]the reality is that administrative determination of environmental policy made it vulnerable to political influences and it could change as administrations changed.

This is because of the fact that a change in political leadership might easily lead to a change in the national environmental policy that is determined administratively as such change of policy would not even have to be debated by the legislature in accordance with the democratic procedures, but only decided by a member of the executive.[144]

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[141]Chapter 1, paragraph (1)(a) at page 9.
[142] Glazewski *op cit* at 67.
[143] Section 2(1)©.
[144] Glavovic *op cit* at 111.

Feris argues that a better approach may be to determine national environmental policy by way of legislation. This would help to constrain the successive governments from changing the national environmental policy as political and democratic procedural hurdles to amending legislation are higher than they are for reversing administrative decisions.[145]

We have to find ways of preventing waste from leaving the formal waste stream to become litter.[146] We must also be proactive rather than reactive, as regards development and implementation of waste management strategies. Given the poor administration and enforcement of environmental laws in South Africa coupled with the environmental injustice that has occurred during the Apartheid era and that still occurs now, it is important that necessary conditions, mechanisms and institutions are established to give effect to environmental justice.

This can be achieved through properly providing legislatively for waste waste management policies and strategies and, effective and environmentally appropriate punishment for contravention.

[145] Feris op *cit at* 184.
[146] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 510.

CHAPTER 3

POLLUTION CONTROL IN URBAN AND INDUSTRIAL AREAS IN SOUTH AFRICA

3.1. INTRODUCTION

Pollution is controlled in terms of South African legislation in a haphazard and uncoordinated manner. There is no comprehensive treatment of the matter, but only a variety of Acts, ordinances, by-laws, and regulations, which deal with certain aspects of pollution control.[147] Even in the ECA[148] in which provision is made for issuing regulations in respect of pollution control, no attempt is made to compile a comprehensive list of all the legal provisions dealing with pollution control.[149] Fuggle and Rabie support this view.[150]

Moreover, practically, every local authority has promulgated legislation pertaining to waste control, but only as far as that pertains to the protection of public health. Although it does seem that, a new direction aimed at achieving a more comprehensive legislative treatment of pollution has developed in the ECA, through the provision for control over waste disposal sites, and for extensive waste management regulations. It is still a problem that the provisions of this Act do not supersede the numerous existing provisions in other legislation.[151]

The characteristics of the South African pollution control law that stand out show that it is media specific, with separate legislation for air, water and land, and for different types of pollutants.[152] This fragmentation of legislative control of pollution is often the case not only with different types of pollution, it is often also the case that there is a number of different control authorities involved in the control of one type of

[147] For examples, see para. 1.1.2. in Chapter 1.
[148] Act 73 of 1989.
[149] Jan Glazewski (2000) '*Environmental Law in South Africa*' at 697.
[150] Fuggle RF, Rabie MA (2002) '*Environmental Management in South Africa*' at 511, Fuggle RF, Rabie MA (1983) '*Environmental Concerns in South Africa*' at 402
[151] Fuggle RF, Rabie MA (1992) '*Environmental Management in South Africa*' at 512.
[152] For a list these statutes see Peckham op cit at 89.

pollution as well.[153] This state of affairs is undesirable for a number of reasons; amongst them the fact that the pollutants often travel across different media and that makes this fragmented control inefficient.[154]

Although South Africa's obligation to protect its citizens is a well-known constitutional principle,[155] however, in respect of the pollution control issue, South Africa seems to have left both the environment and its citizens inadequately protected against the effects of environmental degradation.[156]

3.2. POLLUTION CONTROL PROBLEMS CAUSED BY SHORTCOMINGS IN THE ENVIRONMENT PROTECTION LEGISLATION IN SOUTH AFRICA

The Environment Conservation Act[157] and the recent National Environmental Management Act,[158] which are being considered in South Africa as being some important pieces of legislation as far as environmental protection is concerned,[159] will be used as examples in illustrating the above-mentioned problems. The same pieces of legislation will also be used as examples in discussing the problems associated specifically with the environmental pollution control, the control of activities that may have detrimental effect on the environment and, with regard to the problems facing public participation.

[153] See para. 1.1.2. for examples.
[154] Kidd (1997) '*Environmental Law: A South African Guide*' at 152.
[155] Section 24.
[156] Feris (1999) '*The Asbestos Crisis-The Need for Strict Liability for Environmental Damage*' in Glazewski, Bradfield (1999) '*Environmental Justice and the Legal Process*' at 291.
[157] Act 73 of 1989.
[158] Act 107 of 1998.
[159] Fuggle RF, Rabie MA (2000) '*Environmental Management in South Africa*' at 512.

3.3. THE LEGISLATIVE CONTROL OF ENVIRONMENTAL POLLUTION IN SOUTH AFRICA

Although the ECA,[160] which I shall use as an example for the purpose of this discussion, suggests an intention of dealing comprehensively with environmental pollution, it in fact refers to only two forms of pollution, namely general prohibition on littering[161]and waste management.[162]The ECA stipulates a penalty for littering,[163]for example, a maximum of R1000 or three months imprisonment or both. It is argued that this provision by itself may not be practical in South Africa's conditions, and may also be criticized on the grounds that it treats the symptoms and not the true causes of littering. It would have been preferable for the basic principles of pollution control to be articulated as substantive legislation in the Act itself.[164]

3.4. THE LEGISLATIVE CONTROL OF ACTIVITIES THAT MAY HAVE DETRIMENTAL EFFECT ON THE ENVIRONMENT IN SOUTH AFRICA

3.4.1 THE ENVIRONMENT CONSERVATION ACT

The ECA 73 of 1989 offers a good example for the purpose of this discussion. This Act authorizes the Minister to identify such activities by notice in the government gazette either generally or in respect of certain areas.[165]The Minister would only identify such activities after consultation with the then Council for the Environment and the then Administrator of each province, and with the concurrence of the relevant Ministers responsible for the execution, approval or the control of the activity in question. The concurrence provisions in the various sections have been a serious limiting factor in the exercise of powers in terms of the Act in this regard.[166]

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[160] Part IV.
[161] Section 19.
[162] Section 20.
[163] Section 19(1) read with section 29(3), section 20(6) read with section 29(4).
[164] Glavovic *op cit* at 111.
[165] Section 21.
[166] Glavovic op *cit at* 112.

Once an activity has been identified in terms of the ECA, it may not be undertaken without authorization from the Minister under regulation which may only be issued after consideration of reports concerning the impact of the activity in question and other considerations in terms of section 22(2). The ECA also provides for the making of regulations by the Minister concerning the scope and the content of the environmental impact reports.[167] The negative feature about this provision of the ECA is that, notwithstanding several years of debate and anticipation of legislation providing for compulsory environmental impact assessments. However, an opportunity was not taken in the Act itself to provide for mandatory furnishment of such assessments.[168]

Once an activity has been identified in terms of the ECA, it may not be undertaken without authorization from the Minister under regulation which may only be issued after consideration of reports concerning the impact of the activity in question and other considerations in terms of section 22(2). The ECA also provides for the making of regulations by the Minister concerning the scope and the content of the environmental impact reports.[169]

The ECA also leaves the waste disposal activities, which should be regulated by it, subject to the control and regulation of the Minister of Water Affairs, unless such activities are subject to the provisions of other legislation.[170]This once again shows a problem of the fragmented nature of pollution control by this piece of legislation.[171] This situation is problematic in the sense that the "other legislation" that certain substances are made subject to often fail to regulate the disposal of such substances.[172]

[167] Section 22(2).
[168] Section 21.
[169] Section 22(2).
[170] Section 20(6).
[171] Brian Peckham '*Some Thoughts on the Regulation of Hazardous Waste Disposal in South Africa*' (1994) 1 SAJELP 85 at 89.
[172] Peckham *op cit* at 90.

Furthermore, the ECA's definition[173]of waste is problematic itself. This definition specifically excludes substances such as water used for industrial purposes, matter discarded onto a septic tank, building rubble used for filling purposes, radio-active substances that are discarded, minerals, tailings, waste rock or slimes produced, ash resulting from electricity generation, as well as substances that are subject to the provisions of any other law in terms of the Act.[174] This may result in a substantial volume of potentially hazardous waste escaping regulation in terms of the provisions of the ECA.

If waste escapes regulation in terms of the ECA, and if it is not subject to regulation in terms of other legislation, the above-mentioned situation implies that such waste will not be subject to any other form of regulation. The potential for environmental harm that this gap presents is considerable.[175]In addition, the ECA regulates all waste, which falls within its definition of waste. Other legislation cover certain aspects of waste disposal related to the nature for example nuclear waste, the origin for example mining activities, the destination for example dumping at sea or the potential health hazard of the substance.[176]

The problem with the above-mentioned different pieces of legislation, which cover different aspects of waste disposal is that none of the above-mentioned categories of legislation refers in its definition specifically to hazardous waste. Due to this and the ambiguity of the wording of section 20, which is a specific provision dedicated to waste management in the ECA, there is no clarity as to whether waste substances that are subject to other legislation are, if not in fact regulated under such other legislation, necessarily excluded from the provisions of section 20. There is a possibility therefore that a hazardous substance can totally escape the regulation net because of

[173] Section 1.
[174] Section 20 (6).
[175] Peckham '*Some Thoughts on the Regulation of Hazardous Waste Disposal in South Africa*'. (1994) 1 SAJELP 85 at 89.
[176] Peckham *op cit* at 89.

the different types of definitions and exclusions that are in the current pollution control legislation.[177]

3.4.2 THE DEFINITION OF HAZARDOUS WASTE BY THE DEPARTMENT OF WATER AFFAIRS.

Although the Department of Water Affairs defines hazardous waste as waste that is listed in the Republic of South Africa-International Maritime Dangerous Goods Code,[178] or which consists of a mixture of wastes listed in this code, practically there are problems created by this choice of definition of hazardous waste, among them the possibility of exclusion of the listed substances from the jurisdiction of the Minister because of the wording of section 20(6) of the ECA, which states that it applies subject to the provisions of any other law. The second problem is that practically, the above definition may exclude waste that does not fall within the listed categories because it limits itself to the listed substances.[179]

3.4.3. THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

It is being said that environmental framework legislation must have some generic elements. It must have some flexibility to address environmental issues and for responding to changes in socio-economic and sociological parameters. Flexibility of environmental framework legislation is achieved by means of broad-based policy-principles, which in turn are supported by separate, sector-specific legal arrangements, which are usually cascaded down from sector-specific policy-documents such as white papers, policy-statements and discussion documents.[180]

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[177] Peckham *op cit* at 96.
[178] SABS Code 0228-1990.
[179] Peckham *op cit* at 97.
[180] Nel and Du Plessis 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' (2001) 8 SAJELP 1 at 4.

Environmental framework legislation either contains environmental policy-statements or broadly defined environmental principles, which serve as a framework against which all or defined actions are to be considered.[181]

Environmental framework legislation should also facilitate desired outputs, despite its broad-based, flexible and overarching nature. Some of these outputs are:

a) Provision for broad-based representation and input in order to ensure both intra-governmental equity and recognition of local knowledge and diverse needs.[182]

b) The establishment of cooperative governance, which should contain alignment of policies, plans and programmes across different spheres of government and, between fragmented line-function competencies. Cooperative governance should also create procedures and processes for management by outsiders.[183]

c) In connection with international cooperation, environmental framework legislation at nation al level should ensure participation in negotiations dealing with the writing of conventions and, to ensure the establishment of mechanisms and competencies to regulate international treaties and conventions.[184]

d) One of the objectives of framework legislation is to allow for inter-regional coordination and integration of fundamental principles of environmental law.[185]

e) It is also proposed that a framework legislation should provide for district environmental committees to ensure vertical cooperation to the lowest sphere of government.[186]

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[181] Nel and Du Plessis *op cit* at 6.
[182] Nel and Du Plessis *op cit* at 6.
[183] Nel and Du Plessis *op cit* at 8
[184] Nel and Du Plessis *op cit* at 8.
[185] Nel and Du Plessis *op cit* at 9.

f) Environmental framework legislation should also provide for environmental authority to coordinate, monitor and supervise environmental activities, implement environmental policy, ensure the integration of environmental concerns in national planning; initiate legislation; set standards; review EIA's and promote environmental awareness programmes. This environmental lead agent should also allow for a properly conducted public participation process.[187]

g) Environmental framework legislation should integrate multiple environmental governance and management instruments such as market-based instruments, command and control instruments and strategies, agreements and dispute settlement, and governance-based civil instruments.[188]

h) In the event of fragmented and decentralized government dispensations, the roles, responsibilities and authorities of the various spheres of governance, as well as of the different executive competencies should be clearly defined in environmental framework legislation in order to prevent conflict and the omission of duties.[189]

i) Environmental framework legislation should make provision for conflict resolution between organs of state. It should also define mechanisms for conflict resolution should it occur.[190]

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[186] Nel and Du Plessis op cit at 10.
[187] Nel and Du Plessis op cit at 11.
[188] Nel and Du Plessis op cit at 13
[189] Nel and Du Plessis op cit at 12.
[190] Nel and Du Plessis op cit at 12.

3.4.4. THE COMPARISON OF NEMA TO THE ELEMENTS OF ENVIRONMENTAL FRAMEWORK LEGISLATION

a) ***CHARACTERISTICS***:

NEMA is designed to serve as framework legislation in that it was planned to be supported by sector-specific subordinate legislation. NEMA omits some sector-specific issues, such as waste management. NEMA compares well with most of the identified characteristics of environmental framework legislation.

Although NEMA neither defines policy, nor does it provide for the formulation of environmental policy. However, NEMA achieves flexibility by means of a list of generic principles.[191] NEMA compares well with the sustainability principles and rights. However, two significant omissions are the principle of rehabilitation of existing disturbed ecosystems as well as the duty to develop norms and standards that define environmental quality.[192]

b) ***INTENDED ACHIEVEMENTS***:

NEMA addresses some of the achievements expected from environmental framework legislation. However, significant omissions offer opportunities for improvement.[193]

c) ***INTERNATIONAL COOPERATIVE GOVERNANCE***:

NEMA conforms to the generic requirements for environmental framework legislation as far as international environmental instruments are concerned in that

[191] Section 2.
[192] Nel and Du Plessis *op cit* at 20
[193] Nel and Du Plessis *op cit* at 20.

it makes arrangements to participate in negotiations, implement agreements as well as to measure and report on progress.[194]

d) ***CREATION OF COOPERATIVE GOVERNANCE STRUCTURES***:

The purpose of NEMA is to establish cooperative environmental governance by establishing principles for decision-making on matters affecting the environment. NEMA achieves cooperative governance, amongst other things, by establishing a National Environmental Forum[195] and a Committee for Environmental Co-ordination.[196] The National Environmental Forum must inform the Minister on the views of stakeholders regarding the implementation of environmental principles, as well as any other matter dealing with environmental management and governance, and appropriate methods for monitoring compliance with the principles.[197]

The purpose of the Committee for Environmental Co-ordination is to promote the integration and co-ordination of environmental functions of organs of state and to promote the purpose and objectives of environmental implementation and management plans.[198] No provision is, however, made for horizontal co-ordination at the local level by way of environmental monitoring committees.[199]

The purpose of the environmental implementation and management plans is to ensure that diverse line-function activities are aligned with NEMA principles;[200] to give effect to the concept of cooperative governance; to coordinate and harmonize environmental policies, plans, programmes and decisions that may have effect on environment; to secure the protection of the environment across the

[194] Nel and Du Plessis *op cit* at 20.
[195] Section 3-6.
[196] Section 7-10.
[197] Section 3(2).
[198] Section 7(2).
[199] Nel and Du Plessis *op cit* at 22
[200] Section 11.

country; to prevent unreasonable action by a province that may be prejudicial to environmental interests of other provinces; and to enable the Minister to monitor the achievement, protection and promotion of a sustainable environment.[201]

e) ***MANAGEMENT BY OUTSIDERS***:

NEMA provides for management by outsiders by means of civil representation in the National Environmental Advisory Forum, as well as empowerment of civil society to be involved in matters relating to protection of the environment. Stakeholders are represented in the National Environmental Advisory Forum, however, the Forum only functions as an advisory body, which in turn means that civil society is only empowered to make inputs and contributions to the Minister and not to participate directly in the decision-making process.[202]

Although NEMA, read with the constitutional rights[203]provide for empowerment of members of civil-society to be involved in and contribute to activities aimed at protection of the environment, NEMA does however, not provide for the collection, analysis and active dissemination of environmental information by the state except the Agenda 21 report that has to be published in terms of section 2(b).[204]

f) ***ENVIRONMENTAL LEAD AGENT***:

In terms of NEMA, DEAT assumes the role of a coordinator rather than that of a lead agent. This leaves government control over environmental matters still devolved between spheres of government and fragmented between various line-functions within the same sphere of government, for example, the lead agent for waste management is the DWAF, development's lead agent is the Department of

[201] Section 12.
[202] Section 3-6..
[203] Sections 24, 32, 33, 38, 2(4)(n) respectively.
[204] Nel and Du Plessis *op cit* at 24.

Land Affairs, the lead agent for mining is the Department of Mineral and Energy Affairs.[205]

g) ***ROLES, RESPONSIBILITIES AND AUTHORITIES***:

Roles, responsibilities and authorities of different environmentally related line-functionaries as well as between the various spheres of government are not clearly defined. For example both NEMA[206] and NWA[207] make provision for the control of emergency incidents.[208]

h) ***CONFLICT RESOLUTION***:

NEMA is not explicit on how to proactively make arrangements to avoid conflict between departments that have joint jurisdiction over an activity. Although NEMA does make provision for conciliation, arbitration and appeal. No provision is however, made for an environmental tribunal or an environmental ombudsperson.[209]

j) ***COMMAND AND CONTROL INSTRUMENTS AND STATEMENTS***:

Important command and control provisions, such as inspections, penalties and prosecutions are included in NEMA. However, NEMA fails to establish an integrated platform where applications for environmental authorizations are lodged, decisions are made and authorizations issued. NEMA also makes limited provision for statutory reporting on environmental performance by the private sector. Section 28(5) on reporting of pollution incidents is an example of this situation.[210]

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[205] Nel and Du Plessis *op cit* at 26.
[206] Section 30.
[207] Section 20.
[208] Nel and Du Plessis *op cit* at 27.
[209] Nel and Du Plessis *op cit* at 27.
[210] Section 28(5).

NEMA fails to set environmental quality standards on, amongst other things, soil, water, effluent discharge and waste, and fails to identify which standards are to be set. NEMA also fails to provide integration between various role players such as DWAF, DEAT and the Department of Mineral and Energy Affairs, Health, Agriculture and Labour.

This perpetration of a fragmented approach to environmental standard setting in South Africa is exacerbated by the absence of a uniform standard-setting and enforcement procedure. NEMA fails to arrange for operational and archival record-keeping requirements for both the private and public sector. Provisions for the operational and archival record keeping by the private sector are still fragmented and sector-specific.[211]

j) ***CIVIL-BASED INSTRUMENTS***:

NEMA contains extensive civil-based arrangements, such as empowering civil-society to influence environmental decision-making and fulfilling the role of 'co-governor'. NEMA achieves this through providing for environmental education, public awareness, access to information,[212] public participation,[213] increased locus standi,[214] protection of whistle blowers[215] *et cetera*. However, NEMA does not provide for eco-labeling and public waste and pollution inventories.[216]

k) ***ECONOMIC INSTRUMENTS***:

NEMA is completely silent on the utilization of economic instruments as modern strategy for environmental governance and management.[217]

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[211] Nel and Du Plessis *op cit* at 30.
[212] Section 31.
[213] Section 3.
[214] Section 32.
[215] Section 31.
[216] N
el and Du Plessis *op cit* at 31.
[217] Nel and Du Plessis *op cit* at 32.

l) ***ENVIRONMENTAL MANAGEMENT TOOLS***:

NEMA makes inconsistent provision for environmental management tools. It is therefore argued that the environmental management tools provided for by NEMA may not deliver sustainable improvement and environmental quality.[218]

NEMA also has a problem similar to that of section 21 of ECA, which is evident in the provision for environmental implementation plans[219]and environmental management plans in NEMA.[220]

For example, according to section11, every national department exercising functions that involve management of the environment must prepare environmental management plan, which should reflect how the functions of such department involve the management of the environment. The environment management plans must include the following:

a) A description of functions exercised by the relevant department in respect of the environment.
b) A description of environmental norms and standards, including norms and standards contemplated in section 146(2)(b)(i) of the Constitution, set or applied by the relevant department.
c) A description of the policies plans and programmes of the relevant department that are designed to ensure compliance with its policies by other organs of state and persons.
d) A description of priorities regarding compliance with the relevant department's policies by other organs of state and persons.
e) Proposals for the promotion of the objectives and plans for the implementation of the procedures and regulations referred to in Chapter 5 of NEMA.

[218] Nel and Du Plessis *op cit* at 33.
[219] Chapter 3 of the Act.
[220] Sections 11-16.

Lastly, environmental management plans should also contain a description of arrangements for cooperation with other national departments and spheres of government, which includes memoranda of understanding entered into.[221]

This provision is substantially similar to the above-mentioned concurrence provision found in the ECA and it can also be a serious limiting factor in the drawing up of such environmental management plans,[222] because there are too many government departments and spheres entitled to carry out these plans, which include the DEAT and, the Department of Trade and Industry whose respective primary concerns are obviously opposite to each other, which might lead to a destructive intergovernmental dispute due to a conflict of interest between the two departments.[223]

In addition, the Director-General is not obliged to serve a written notice to the organ of state concerned to remedy the failure of compliance with the above-mentioned plans.[224] This shows that NEMA also places no legislative mandate on either the Minister or the Director-General to enforce compliance with the environmental implementation and management plans.[225]

The NEMA also has a defect similar to the one identified in the ECA[226] with regard to the enforcement of both environmental management and implementation plans, because where such plans have not been adopted or submitted by the concerned organs of state in accordance with sections 16(1)(a) and (b), the Minister only may recommend that these plans comply with sections 16(1)(a) and (b) respectively.[227]

The NEMA also has some potentially dangerous exclusion in its definition of for example an "incident" in NEMA's provision for the control of emergency incidents, in which case the responsible person shall, among other things, report such incident

[221] Section 14(f).
[222] Section 14(f).
[223] Schedules 1 and 2 to the Act.
[224] Section16(2)(b).
[225] Act 107 of 1998.
[226] Section 21.
[227] Section 16(1)©.

through the most effective means reasonably available. In this section, an incident is defined to be such only if it leads to serious danger to the public or potential serious pollution or detriment to the environment.[228]This definition is dangerous to the extent that there is no criterion set in the Act for the determination of what constitutes serious danger to the public or serious pollution or detriment to the environment.

The provision for a general duty of care in NEMA also applies to significant pollution or degradation of the environment only, not to all pollution.[229] This in turn leads to a possibility of polluting incidents not being regulated by this section on the grounds that they do not fall within the above-mentioned definition, the effect of which would be the same as that of the above-mentioned ECA[230] in this regard.

3.5. ENFORCEMENT OF ENVIRONMENTAL POLLUTION CONTROL LEGISLATION IN SOUTH AFRICA

It is argued that insufficient enforcement has been the main reason for the ineffectiveness of environmental protection through legislative measures in South Africa.[231]The most common methods of enforcing environmental laws are through criminal sanction, administrative action and civil litigation.[232]None of the above was effectively implemented before the establishment of the democratic South Africa, and the situation has not improved even in the present democratic South Africa.[233]These are discussed in 3.5.(A) and (B) below with reference to specific enforcement methods.

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[228] Section 30(1)(a).
[229] Section 28(1)
[230] section 21.
[231] Feris (2000) '*The Conceptualization of Environmental Justice Within the Context of the South African Constitution*' at 182, Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 16 AT 17, Kidd (1997) '*Environmental Law: A South African Guide*' Fuggle RF, Rabie MA (1992) 'Environmental Management in South Africa' at 493.
[232] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 16 at 17.
[233] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 16 at 17.

(A) *ADMINISTRATIVE PROCEDURES*

Rabie argued that there seemed to be a tendency, evidenced in the ECA of 1982, and perpetuated in the 1987 Amendment to the Act, and further extended in the ECA 73 of 1989, to relegate the treatment of almost the whole field of environmental law to an administrative level through the issuance of ministerial regulations.[234]Almost all our environmental statutes endowed administrative officials and bodies with the power to enforce their provisions by way of regulatory procedures.[235]

Activities which are a potential threat to the environment are usually controlled by issuing of permits and licenses, for example, while the ECA 73 of 1989 renders littering and waste disposal criminal offences,[236]and providing for control over waste disposal sites,[237]it leaves all other control of waste to be exercised by the Minister through regulations,[238] while administrative enforcement of pollution control laws has been criticized for being equally lax on the other hand[239]This is because of the fact that, although administrative officials are given extensive powers, they do not use those powers effectively. Administrative enforcement of pollution control laws is also fragmented because scheduled industries fall under national control, while local authorities control those that are not scheduled.[240]

When enforcing environmental law administratively, the administrative officials of the various departments who have authority with regard to the issue of licenses, abatement notices and warnings seem to adopt a conciliatory rather than a confrontational approach to polluters.[241]The administrative bodies have not been given a legislative mandate to take account of environmental impacts in their decision making, one possible implication of this is that, where the officials might have

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[234] Andre Rabie '*Environmental Conservation Act and its Implementation*' (1994) 1 SAJELP at 18.
[235] Rabie op cit at 18.
[236] Section 19(1) read with section 29(3), and section 20(6) read with section 29(4).
[237] Section 20(1)-(5).
[238] Section 24.
[239] Feris *op cit* at 183.
[240] Feris *op cit* at 183.
[241] Loots *op cit* at 23.

wanted to support a conservational objective, their actions could be taken aside on review for pursuing an unauthorized purpose.[242]

In this regard, Rabie argued that while the provisions for effective overall control at national level over waste is to be welcomed, it may be questioned whether such control should be exercised administratively through regulations, rather than through the Parliament itself. In addition, since regulations that would affect the activities of local authorities would only be promulgated with their concurrence in terms of the ECA 73 of 1989.[243]The Minister was likely to encounter considerable difficulty in establishing regulations that were uniformly applicable.[244]

A further undesirable feature about regulations as enforcement procedures in the pollution control legislation is that they are subordinate legislation which can be declared void by the courts if they are ultra vires, vague or unreasonable, but no such unstable and subordinate status is attached to parliamentary legislation.[245] The point raised above is one of the reasons why main pollution control matters should be dealt with legislatively and not administratively.[246]

Another criticism of the administrative enforcement of pollution control laws is that the concerned administrative departments are generally understaffed and that makes it almost impossible to control scheduled processes, also as a result of the responsibility for regulating the environment that is divided between national departments, provincial administrations and local municipalities, and uncoordinated.[247]

The above-mentioned situation is undesirable as it changes the functions of the pollution control legislation to those of an enabling statute that only creates the

[242] Rabie *op cit* at 18.
[243] Section 28 (i)-(iii).
[244] Rabie '*Environmental Conservation Act and its Implementation*' (1994) 1 SAJELP at 18.
[245] Rabie *op cit* at 19.
[246] Rabie *op cit* at 19.
[247] Feris *op cit* at 183.

framework for the issuing of administrative regulations with regard to a wide variety of environmental issues.[248]

(B) CIVIL LITIGATION

Civil action can also be used to claim compliance with the law and can therefore be very useful for the purpose of enforcing environmental legislation. An order frequently claimed in civil actions concerning the environment is the prohibitory interdict. This is an extremely important remedy as it can be used to interdict the harmful activity and therefore prevents or at least limits, damage to the environment, unlike a criminal sanction, which punishes the offender for damage, which is already done.[249]

The civil remedy has many advantages over the criminal sanction, including that one can proceed by way of an urgent application where this is warranted and obtain an interdict and, can recover the costs of litigation if the application is successful. However, the most serious obstacle in the way of utilization of civil actions to enforce pollution control legislation is that, the party claiming relief must show that he has an interest in the matter in that he has been adversely affected by the breach of legislation.[250]

For example, section 32 of the ECA, which deals with publication of regulations and declarations or determinations of policy in the gazette prior to their issue, provides for the interested parties to comment. This provision is, however, criticized on the grounds that it does not go far enough because the discretion still remains with the Minister in this regard, the Administrator or the local authority concerned. This criticism is being strengthened by the fact that in this Act there is no provision for

[248] Glavovic *op cit* at 114.
[249] Rabie '*Environment Conservation Act and its Implementation*' (1994) 1 SAJELP at 27.
[250] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP at 27.

challenging the decision by the government institutions, except by persons whose interests are affected in terms of section 36.[251]

With regard to the disclosure of information pertaining to activities threatening the environment,[252]the ECA only gives the persons whose interests are being affected by the administrative decisions the right to request reasons.[253] There is no provision in this Act for full public disclosure to any concerned organization or citizen regardless of whether one is adversely affected by an administrative decision or not.

Although the NEMA[254] and the Promotion of Access to information Act[255] took a different route and provided whistle-blowers a right of access to information, there is still another problem in this regard, because many ordinary members of the public are not aware of these rights and they consequently do not utilize the above-mentioned provisions and that makes such provisions seem useless. This situation undermines the fact that South Africa's environmental resources that are being protected, are the heritage of the entire nation.[256]

The ECA also does not make provision for locus standi by concerned persons seeking to prohibit an activity that is likely to pollute the environment.[257]This is a serious omission in this Act, as there does not appear to be sufficient cogent reasons why responsible organizations should not be given locus standi in both interdict and review proceedings.[258]

The problem with the above-mentioned situation is that most parties likely to want to claim for example, interdicts related to pollution control are persons and organizations that are only concerned about the environment, without being

[251] Glavovic *op cit* 1 at 112.
[252] Section 36 (1).
[253] Section 32.
[254] Section 31.
[255] Act 2 of 2000 in section 6.
[256] Loots op *cit at* 29.
[257] Glavovic *op cit* at 113.
[258] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 17 at 29.

motivated by the desire to benefit themselves. The unfortunate part about our law in this regard was that it did not recognize actions in the public interest on grounds that such parties had no legal standing.[259] Our courts had always not recognized actions in the public interest and had always held that such parties had no *locus standi*.[260]

Van Reenen noted in this regard that the systematic and, in principle, sound distinction has been made between the private and public law (subjective) rights in academic circles. Our courts however, have never made that distinction and had in all cases demanded that the interest sufficient to confer legal standing had to be such that it could be equated to a breach of one of the subjective rights recognized in private law.[261]

The implications of the above-mentioned attitude of our courts towards public law cases are that it is impossible to achieve effective judicial control of public (administrative) actions that harm the environment, because in only a very few cases will it be possible for a concerned individual to indicate a simultaneous direct invasion of his subjective private law rights. It is seldom that individuals are directly involved in legal relationships with the environment.[262]

Despite the Constitutionally guaranteed right to good administration, government agencies will still be unable to take action against themselves while the opportunities of concerned individuals and organizations are still not fully recognized. This is also because our courts have consistently held that an association has no standing to represent its members and where the interests of the members are adversely affected, the members should come to the court themselves.[263]

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[259] Feris op *cit at* 185-186.
[260] Van Reenen '*Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective*' (1995) 2 SAJELP 121 at 122.
[261] Van Reenen *op cit* at 122.
[262] Van Reenen *op cit* at 126.
[263] Van Reenen *op cit* at 126.

In the current constitutional dispensation, the question of legal standing in environmental law litigation has been ameliorated by section 38. This section provides for anyone acting in his or her own interest,[264]anyone acting on behalf of another person,[265]a member acting in the interest of a group or a class of persons,[266]anyone acting in the public interest and,[267]an association acting in the interest of its members,[268]to approach the Constitutional court alleging that a right in the Bill of Rights has been infringed or threatened.

The implications of the above-mentioned section are that if the right to an environment that is not harmful to one's health or well-being,[269]has been infringed or threatened, anyone falling under the above-mentioned categories of persons automatically has the standing to challenge such infringement without having to first prove that he has a direct legally recognized interest in the infringement.

An example of this situation is the case, Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another.[270]In this air pollution case, the respondent's defence was that the applicant lacked the necessary *locus standi* on the grounds that the Atmospheric Pollution Prevention Act 45 of 1965, provided for criminal sanctions and not for civil remedies as was the case before the court. However, Judge Hurt specifically held that the applicant could rely on the public interest clause in the interim Constitution (now section 38(d) of the final Constitution) for *locus standi* to apply to the court for an interdict.

However, the above-mentioned relaxations of the *locus standi* requirement by section 38 of the Constitution are likely to cause more problems than they are purportedly solving. In the Constitutional context, most of these likely problems will arise from the deficient conceptualization of the environmental right and the persisting

[264] Section 38(a).
[265] Section 38(b).
[266] Section 38(c).
[267] Section 38(d).
[268] Section 38(e).
[269] Section 24(a).
[270] 1996 (3) SA 155 (N).

uncertainty of the extent of recognition of the public interest in environmental matters. Van Reenen supports this view.[271]

The extent to which section 24 in conjunction with section 38 will be effective in environmental actions will therefore depend on how widely the courts interpret the two sections.[272]Van Reenen supports this view as well.[273]Section 38 also creates a possibility for rights not included in the Bill of Rights section of the Constitution[274] to be subjected to the common law restrictive locus standi requirement,[275] because of the restrictive wording of this section,[276]which refers only to the infringement or threatened infringement of rights contained in the Bill of Rights.

Although NEMA extends the scope of application of section 24 of the Constitution, through extending matters for which relief may be sought under this clause,[277]in order to include the protection of the environment,[278]this will still make a very little difference from the original constitutional position in this regard. This is because the provisions of NEMA themselves are also subject to the interpretation by the Constitutional Court.

Another problem with section 24 is that, although it will certainly be useful for the protection of the environmental pollution, which generally affects people's health or well-being, it may however, not be helpful in circumstances where no person's health or well-being is threatened.[279]Loots shares the same view in this regard.[280]

The judicial denial of public suit undermines the importance of citizen suit in enabling the state and the private sector to share responsibility for enforcement of

[271] Van Reenen *op cit* at 146.
[272] Loots '*Making Environmental Law Effective*' (1994) 1 SAJELP 17 at 33.
[273] Van Reenen *op cit at 146.*
[274] Act 108 of 1996.
[275] Kidd (1997) '*Environmental Law: A South African Guide*' at 30.
[276] Section 38.
[277] Section 132.
[278] Section 170.
[279] Van Reenen *op cit* at 147.
[280] Loots *op cit* at 33.

pollution control laws, while the government seldom has resources to enforce environmental laws effectively. It therefore makes sense to allow concerned persons to assist with the enforcement of pollution control laws by bringing civil actions against violators. This is because of the fact that there are few individuals, especially within the South African context, who can afford to undertake litigation of this nature in their personal capacities.[281]

This in turn opens an unacceptable possibility that environmental polluters could escape claims for damages brought by those concerned about the environment. Another criticism in this regard is that although an interdict is principally a private law remedy, administrative bodies often use it as well, but such bodies are however not automatically entitled to seek interdicts for securing compliance with pollution control regulations, and that they should be authorized by legislation to do so.[282]

A lot needs to be done with regard to the implementation and administration of pollution control legislation in South Africa's urban and industrial areas.[283]This is because of the fact that South Africa has no comprehensive statute that deals with pollution control. Effective control of pollution will be best achieved if all available enforcement mechanisms are fully utilized, and all persons willing to participate in the enforcement process are allowed to do so.[284]

Our courts should not deny the environmental organizations an opportunity to use the law to protect or improve the environment. Administrative agencies should also be able to use both criminal sanctions and civil actions to enforce compliance with pollution control provisions, for environmental pollution control to be effective.[285]

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[281] Feris (2000) '*The Conceptualization of Environmental Justice Within the Context of the South African Constitution*' at 186-187.
[282] Andre Rabie '*Environment Conservation Act and its Implementation*' (1994) 1 SAJELP 17 at 25.
[283] Glazewski (1999) '*Environmental Justice and the new South African Democratic Legal Order*' at 30.
[284] Kidd *op cit* at 62.
[285] Loots *op cit* at 34.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSION

Waste is the root cause of pollution. In order to control pollution caused by waste therefore, waste must be controlled in a manner that encompasses the waste generation cycle from cradle to grave-including generation, transportation, treatment, and final disposal of waste. In addition, waste management and pollution control laws must be enforced in a holistic and integrated manner if they are to be effective.

There is a necessity for waste management to receive comprehensive treatment at the highest level of government in order to control pollution that it causes, through the avoidance of waste production as far as possible to facilitate greater use of degradable packaging material and; the sorting of waste at source in order to facilitate disposal, recycling, and utilization of waste in an environmentally acceptable manner.

This research project has attempted to show however that, waste management and pollution control legislation in South Africa's urban and industrial areas fails to contribute adequately to the achievement of the above-mentioned objectives, because it is not aimed at avoidance, source separation, or at stimulating recycling of waste in order to control the pollution that waste causes.

Waste management and pollution control laws in South Africa lack the provisions for the encouragement of the optimum use of waste. It also lacks provisions for the encouragement of proper disposal of waste, probably because of the fact that, among other things, insufficient account has been taken in the legislation of the underlying economic factors involved in waste generation, recycling and disposal.

Waste management and pollution control legislation in South Africa is fragmented and diffuse. Its subject matter is controlled by a multitude of Acts of Parliament, a

number of provincial ordinances, and numerous by-laws. The result of this situation is that waste and pollution are controlled in an uncoordinated manner by the South African waste management and pollution control legislation.

Although the ECA[286] is regarded as an important legislation because of its slight move towards a comprehensive approach to waste management, through having a separate provision that is only devoted to waste management, this Act is also defective in the sense that in this provision,[287] there is no attempt made to compile a comprehensive list of all the other existing legal provisions dealing with waste management and the control of the pollution that waste causes.

With regard to the national policy for the protection of the environment, which should direct the public officials on the objectives to be achieved through the waste management and pollution control legislation, there has been a historical lack of a clear waste management and pollution control strategy in many public and private sector organizations in South Africa, which has resulted in the devastating effects of poor waste management and pollution control.

This paper has attempted to show that, although a number of policy and other related initiatives have been entered into, to formulate a comprehensive waste management and pollution control policy and strategy for South Africa, no definitive waste management policy has emerged, but a number of further initiatives has been in progress, the latest of which is the White Paper on Integrated Pollution and Waste Management for South Africa,[288] and The National Integrated Waste Management Bill.[289]

Despite these policy and other related initiatives, there still seems to be a lack of overall direction and identification of responsibilities for waste management and

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[286] Act 73 of 1989.
[287] Section 20.
[288] *Government Gazette* No 20978-17 March 2000.
[289] Draft 8.0, June 2002.

pollution control in South Africa. Although the ECA[290] came very close to doing the right thing, through its provision for the determination of the general policy,[291] it however also has a serious defect in this regard in the sense that the power to determine such national policy is vested in the Minister, not in the democratically elected legislature.

In addition, the above-mentioned provision does not even oblige the minister to determine the national policy but gives him or her discretion. This relegation of the determination of the national policy to the administrative level of governance is undesirable due its less enduring and less effective character.

Van Reenen observes for example that political decision-making in South Africa has always been characterized by rigid, centralized authoritarianism and, suffers from what he calls a 'bureaucratic' syndrome, which results in the unquestioned and servient acceptance of the norms and values imposed by the powerful centralized pro-government bureaucratic institutions. This leaves no room for pluralistic group interaction processes from which normatively sound resources policies and programmes can emerge.[292]

These on-going policy initiatives in South Africa are defective in the sense that they ignore other recent policy statements. For example, Glazewski[293] notes that the 1999 Waste Management Strategy[294] refers to integrated pollution and waste management, like the White Paper on Integrated Pollution and Waste Management[295] does, but the 1999 Waste Management Strategy does not seem to be integrated to the above-mentioned White Paper.[296] Van Reenen supports this view.[297]

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[290] Act 73 of 1989.
[291] Section 2.
[292] Van Reenen '*Environmental Policy-making and Effective Environmental Administration*' (1994) 1 SAJELP 35 at 37.
[293] Glazewski (2000) '*Environmental Management in South Africa*' at 670.
[294] *National Waste Management Strategy, Strategy Formulation Phase*, Version C, PMG 103 PSC 69, June 1999.
[295] N1686/1998 *Government Gazette* No. 19161 dated 19 August 1998.
[296] These white papers are available at <http://www.gov.za.whitepaper/>.

The government's policy initiatives for the protection of the environment generally lack normative quality and, they are neither judicially enforceable nor persuasive in terms of their status. The available policy initiatives in South Africa are also not judicially enforceable and,[298] the administrative decision-making pertaining to the environment is not being properly controlled both administratively and judicially due to the inadequacy and ineffectiveness of the available judicial and administrative remedies.[299]

4.2. THE VIEWS OF LOCAL GOVERNMENT WASTE MANAGEMENT OFFICIALS

From the point of view of the local government officials who are also experts in the field of waste management by virtue of their practical involvement in waste management issues, there are currently many laws in all the three levels of government in South Africa. These laws are, however, not integrated with one another although a huge drive is underway to integrate them for a maximum benefit.[300]

In the Western Cape, however, according to Mr Stephan Morkel,[301] the only waste management piece of legislation enacted since the inception of the new City of Cape Town municipality is the Dumping and Littering by-law of 21 June 2002.[302]Section 2 of this by-law prohibits littering and, causing or permitting littering of waste.[303]

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[297] Van Reenen '*Environmental Policy-making and Effective Environmental Administration*' (1994) 1 SAJELP 35 at 41.
[298] Van Reenen '*Environmental Policy-making and Effective Environmental Administration*' (1994) 1 SAJELP 35 at 42.
[299] Kidd *op cit* at 62.
[300] Information from Wouter Loots, Head of the Department of Waste Management in the City of Cape Town municipality.
[301] Solid Waste Manager in the City of Cape Town.
[302] Provinsie-Weskaap: *Provisiale Koerant* 5894.
[303] Section 2(1)(a).

This by-law also prohibits dumping, causing or permitting dumping of waste.[304] Any person who contravenes either of these two sections is guilty of an offence.[305]Fines for these offences range from R300.00 to R1000.00 respectively.[306] In my view, this presence of only one waste management by-law reveals the current lack of waste management legislation in the City of Cape Town at the moment.

Although the City of Cape Town's local government waste management laws, such as the by-law relating to the Dumping of Material[307], the By-law for Control of Dumping of Refuse[308]and, including the current Dumping and Littering by-law[309] are not once-off laws, as they are regularly reviewed to assess any strengths and weaknesses in them. It seems however that there is no clear by-law in the City of Cape Town municipality, which pertains to waste separation and recycling, and these are important issues that should be covered by local waste management legislation if it is to be effective.

The local government officials agree that these laws can be very effective when applied but that does not happen, because the fines imposed by the courts for contravening local government waste management laws are too low, to the extent that the waste makers prefer dumping illegally and pay the subsequent fines than paying the prescribed legal dumping fee. This problem is exacerbated by the lack of knowledge about the environmental crimes on the part of the public prosecutors.

Although the City of Cape Town waste management officials are made aware of legislation pertaining to waste management through training courses given to them, the problem is, however, that when most of these officials were appointed, no single waste management by-law for the City of Cape Town existed, but only a number of

[304] section 2(1)(b).
[305] section 3(1).
[306] Schedule 3 to the By-law at page 665.
[307] P.N. 352/1985.
[308] P.N. 346/2000.
[309] Provinsie-Weskaap: *Provinsiale Koerant* 5894, 11 June 2002.

by-laws enacted by different municipalities in the province. Now such officials still have to be trained about the new Dumping and Littering by-law.[310]

In addition, although such officials were previously trained, such training was never coordinated, and that results in incorrect enforcement of the by-laws by the local government officials, which often ends up in the loss of cases against offenders in court.

Waste management laws in the Western Cape can be effectively enforced, especially for permitted sites, because violations could cost the dumping site operator its permit. The problem in this regard, however, has always been that the local government law enforcement authorities did not deal with dumping and littering matters only, but with the enforcement of all the City of Cape Town by-laws. This effectively shifted their focus from the enforcement of waste management legislation.

Finally, the reduction of waste, and the treatment methods for medical waste, tyres and household hazardous waste have not been dealt with in the by-laws themselves. This is a significant omission in the by-laws, because if the above-mentioned issues, including waste sorting at source, could be provided for legislatively, that could help to change the attitudes of the people as to how to handle waste, and therefore make waste management easier for the local government service providers.[311]

4.3. RECOMMENDATIONS

4.3.1. LEGISLATION

In order to overcome the problems of fragmentation and lack of coordination in the waste management and pollution control legislation, it might help to have onepiece of legislation, which must do away with the media specific approach to the regulation of environmental pollution, which regulates the pollution of different environmental

[310] Provinsie-Weskaap: *Provinsiale Koerant* 5894, 11June 2002.
[311] Information from Mr Stephan Morkel, Solid Waste Manager in the City of Cape Town.

media separately from each other. This is because of the fact that pollution travels across all these different media.[312]

The different media through which pollution occurs must be dealt with in different sections of this ideal Act.

Such a dedicated piece of legislation must have more substance in it in order to diminish the importance of delegated legislation and its weaknesses in the enforcement of pollution control and waste management legislation and, it must supplement and coordinate all the relevant legislation that exists at all levels of government, and confer powers on regional and local authorities to regulate the aspects that require a particular regional or local approach.[313]

4.3.2. ADMINISTRATION

There should be one government department, which should administer the above-recommended piece of legislation. This government department must have an official, at the level of a Chief Director, who should oversee the administration of this piece of legislation, which should be devoted to the regulation of waste management and pollution control issues, and matters incidental to these core functions only.

4.3.3. GENERAL POLICY FOR ENVIRONMENTAL PROTECTION

With regard to the general policy for environmental protection, South Africa needs a policy, which must be implemented by means of focused legislation, not administratively, in order to make it more effective and enduring than an administratively determined policy.

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[312] Fuggle, Rabie (1992) '*Environmental Management in South Africa*' at 521.
[313] Fuggle

4.3.4. ENFORCEMENT AND UTILIZATION OF PRIVATE REMEDIES

With regard to the enforcement of waste management and pollution control laws, the concerned department should have an amount in its budget earmarked for spending in educating the public about their environmental rights and the role they can play in protecting the environment in order to secure their cooperation and participation in enforcing relevant legislation.

Regarding the utilization of private remedies to enforce compliance with the environmental legislation, all members of the public and public organizations, irrespective of whether they are personally affected or not, must be enabled to utilize all the judicial remedies. This will help to eliminate the obstacles caused by the locus standi requirements to the utilization of civil remedies.

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4.3.9. INTERVIEWS

56. Mr. Wouter Loots, Head of the Department of Waste Management in the City of Cape Town, in an interview with him in the City of Cape Town offices in the Fintrust Building, room 204, Mazzur Street, Bellville, Cape Town, 8000, at 2 o'clock, on Friday the 22nd of November 2002.

57. Mr. Stephan Morkel, the Solid Waste Manager in the City of Cape Town, in an interview conducted with him in the City of Cape Town offices, in the Fintrust Building, room 214, Mazzur Street, Bellville, Cape Town, 8000, at 9'clock, on Wednesday the 4th of December 2002.