



## **Association for Water and Rural Development**

Company Reg. No. 98/03011/08  
Private Bag X48  
Acornhoek 1360  
South Africa

Non profit org. Reg. No. 006 - 821

Tel: 015 - 793 - 7500  
Fax: 015 - 793 - 7509  
Cell: 0724984421  
e-mail: [ramin@award.org.za](mailto:ramin@award.org.za)

### **Project Title**

#### **SHARE RIVERS INITIATIVE PHASE 2**

#### **Sub-component: Legal Competence and Regulation**

**Prepared by Ramin Pejan (BA, JD, LL.M) and Marysia Emmerson (BA)**

**WRC Project K5/1920**

**A critical reflection of the criminal prosecution of  
municipal managers as a means to address the  
unlawful discharge of sewage: a case study from  
Matjhabeng Municipality**

**February 2012**

Prepared for the  
Water Research Commission

## **I. Introduction**

The idea for this case study came about during an interview with Nigel Adams, Director: Compliance Monitoring and Enforcement (CME) at the Department of Water Affairs (DWA), also known as the Blue Scorpions. AWARD was interviewing him as part of the Shared Rivers Initiative phase two legal component) (SRI 2 legal) it is undertaking on behalf of the Water Resource Commission (WRC).

During the interview, Nigel mentioned the need for case studies to reflect on the relatively nascent CME Unit so that lessons learned and experiences are not forgotten in the medium- and long-term. Nigel suggested a potential study to look at the criminal case that the National Prosecuting Authority (NPA) had brought with the help of DWA and the South African Police Service (SAPS) against the former Municipal Manager of Matjhabeng Municipality in the Free State for the unlawful discharge of sewage from the Odendaalsrus wastewater treatment plant (hereinafter the “Odendaalsrus case”). Nigel believed that this would serve as a good case study because it was the first criminal case of its kind and the benefits in light of the costs associated with it were unclear.

Because the SRI 2 legal project planned to also undertake case studies associated with compliance monitoring and enforcement issues under the National Water Act (NWA), it was possible for AWARD to undertake Nigel’s suggestion. Nigel and the legal team sketched out an initial list of participants and also agreed on a series of common questions that we would ask each participant.

### **A. Objectives of the case study**

The objective of the study was jointly developed during a discussion with representatives from DWA head office’s CME Unit and Officer Izak Fick from the South African Police Service (SAPS), the lead investigator in the Odendaalsrus case.<sup>1</sup>

The participants agreed on the following objective:

To prepare a case study to document and critically reflect on the criminal case brought against the former municipal manager in Matjhabeng Municipality for the unlawful discharge of sewage from the Odendaalsrus wastewater treatment plant to be used as:

- 1) a learning tool for the Department of Water Affairs to reflect on this case and to inform the development of future enforcement strategies;
- 2) a document to demonstrate the complexities and seriousness of the problem surrounding unlawful municipal sewage discharge; and
- 3) a guiding research document for relevant stakeholders, including SALGA, parliament, SAPS, NPA, other government departments, and others.

It is important to note that the case study does not focus on the legal details of the criminal case, such as the legal arguments made by both sides or procedural decisions, including motions and

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<sup>1</sup> 30 November 2011 discussion with Nigel Adams, Innocent Mashatja, David Thabana (DWA CME) and Warrant Officer Izak Fick (SAPS) at DWA’s offices in Pretoria (notes on file) (hereinafter “30 November group discussion”).

evidentiary concerns; instead it seeks to understand the benefits and drawbacks of these kinds of criminal cases as means to deal with a very difficult problem that persists throughout South Africa.

## **B. Methodology**

AWARD sought to develop the case study using a participatory research orientation where the researcher is typically sensitive to the perspectives of others and collaborates with participants to design and/or implement the study.<sup>2</sup> This can take the form of facilitating learning, reflections, and future action. As Patton noted, “a number of approaches have emerged that involve inquiry within organizations aimed at learning, improvement, and development. ... These problem solving and learning-oriented processes often use qualitative inquiry and case study approaches to help a group of people reflect on ways of improving what they are doing or understand it in new ways”.<sup>3</sup> Thus the idea is to support a co-learning and collaborative process where stakeholders are part of the research and learning rather than being seen as external to the research. Such a process is likely to bring about changed practice as the learning proceeds by engaging the people in the organisation in studying their own problems in order to solve those problems.<sup>4</sup>

As a result, the participants and AWARD’s legal team collectively developed the case study, and the idea was proposed by DWA head office. The participants identified the objectives, engaged in interviews, and commented on drafts. Importantly, many of the recommendations for future actions are based on actions that participants identified.

The case study conducted the following interviews: 1) Nigel Adams, Innocent Mashatja, and David Thaban from the Compliance, Monitoring and Enforcement Unit in DWA’s head office (group interview, 30 November 2011, Pretoria); 2) Officer Izak Fick from the South Africa Police Service (30 November 2011, Pretoria); and 3 ) Advocate Antoinette Ferreira, Senior Advocate, Director of Public Prosecutions: Free State National Prosecuting Authority (e-mail responses, 20 December 2011, and 18 January 2012). In addition, the research team sought to get the South African Local Government Association (SALGA) to participate in the case study as a voice for the local government perspective. However, at the time of writing, SALGA had still not responded as to whether it would participate. Except for Advocate Ferreira who responded by e-mail, interviews were not tape-recorded so as to create a more informal setting. Therefore, the following summaries of the DWA head office and SAPS’s interviews reflect notes taken by the research team.

Each participant or group of participants was asked the following questions:

- Q. What were your desired outcomes and objectives in bringing the criminal case against the municipal manager in Matjhabeng?
- Q. What has gone well?
- Q. What has not gone well?
- Q. What would you have done differently?
- Q. What lessons have you learned?
- Q. Who were your biggest allies?

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<sup>2</sup> See Michael Quinn Patton *Qualitative research and evaluation methods* 3 ed (2002) 175, citing William Foote Whyte (ed) *Action Research for the Twenty-First Century: Participation, Reflection, and Practice* (1989).

<sup>3</sup> Ibid at 175.

<sup>4</sup> Ibid at 221-22.

Q. Who was in opposition to what you are doing?

Q. Do you think that you will achieve your desired outcomes and objectives?

Responses from each individual or group is summarised in Section IV by topic.

### **C. Roadmap**

The case study first reviews the factual context and background leading to the criminal case. In doing so it gives some background around Matjhabeng Municipality and the issue of unlawful sewage pollution generally in South Africa. Section III provides a short summary of the legal context surrounding the case, focusing on the obstacles that the cooperative government framework imposes on national government to pursue administrative and criminal actions against municipalities, another sphere of government. Section IV summarises the interviews from each participants, while Section V undertakes critical reflection. The case study concludes by proposing some recommendations for future action.

## **II. Factual context and background**

The following factual background provides a brief summary of the Matjhabeng Municipality and focuses on its Odendaalsrus waste water treatment plant (WWTP), including the circumstances that led the NPA, in conjunction with DWA and SAPS, to pursue a criminal action against the municipal manager.

### **A. Municipality**

Matjhabeng Municipality is situated in the Free State Province. It came into existence on 5 December 2000, and is the result of the amalgamation of six local councils incorporating the city of Welkom and the towns of Odendaalsrus, Virginia, Henneman, Allanridge and Ventersburg, with a combined population of more than 500 000 people. The Municipal Council consists of 72 Councillors with full time municipal management consisting of an Executive Mayor supported by a Mayoral Committee.<sup>5</sup>

#### **1. Waste Water Treatment Plants and Green Drop Status**

The Matjhabeng Local Municipality has the following eleven WWTPs: Allanridge, Henneman, Phomolong, Virginia, Kutlwanong, Mbabane, Ventersburg, Thabong, Theronia, Witpan, and Odendaalsrus. All have performed unsatisfactorily during the Green Drop assessments resulting in an overall low Green Drop score of 14.2%<sup>6</sup>, and Cumulative Risk Rate<sup>7</sup> of 85% for the municipality.<sup>8</sup>

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<sup>5</sup> RSA-Overseas.com, at <http://www.rsa-overseas.com/about-sa/matjhabeng.htm>, accessed 13 February 2012.

<sup>6</sup> Department of Water Affairs, Green Drop Report (2011) at 96.

<sup>7</sup> Ibid at 1-2. A Cumulative Risk Rate (CRR) percentage deviation is used throughout the Green Drop Reports to indicate that variance of a CRR value before it reaches its maximum CRR value. The higher the CRR percentage deviation value, the closer the CRR risk is to the maximum value it can obtain.

Example 1: a 95% CRR percentage deviation value means the plant has only 5% space remaining before the system will reach its maximum critical state (100%).

<sup>8</sup> Ibid at 75.

The risk profiles of all plants have deteriorated to the extent that as of 2011 ten out of the eleven plants are in a critical state posing a serious threat to not only the public, but also the environment.<sup>9</sup>

## **2. Green Drop Report 2011 Findings**

The following are a summary of major findings regarding Matjhabeng Municipality's WWTWs from the 2011 Green Drop Report<sup>10</sup>:

- i. Seven out of the eleven wastewater treatment plants do not meet effluent quality standards, with two plants reaching only 18% compliance. A further two plants cannot be monitored as they have been decommissioned for refurbishment. The absence of flow monitoring exacerbates the situation as the contamination load to the surrounding natural environment cannot be measured or controlled.
- ii. According to management at each plant, none of the WWTWs had plans in place to expand or refurbish their collector or treatment infrastructure. Two plants are currently under refurbishment, one of which was damaged because of flooding. The sustainability of such investment is disputed, as the infrastructure is likely to be compromised by the lack of competency within the institution itself.
- iii. None of the plants could present any evidence of design capacity or flow logging, and thus the credibility of any data provided is suspect.
- iv. Extraneous flows such as that from storm water to sewer, industrial effluent, vacuum tankers, and illegal connections are unregulated. This not only compounds previous problems, but also affects possible revenue enhancement.
- v. Finally, the absence of a risk-based approach and adoption of integrated asset management principles result in infrastructure not being valued and maintained to extend its useful lifespan. According to the report, this is bound to place an additional burden on the municipal budget when premature replacements will have to be done to ensure an acceptable service level.

Whilst performance levels were low on all aspects of the Municipality's WWTPs which were assessed, the Green Drop report found the deficiency at senior technical management level is the most concerning.<sup>11</sup>

In summary, Matjhabeng Municipality has some of the worst sewage treatment plants in South Africa, which results in a systematic violation of the National Water Act.

## **3. Pollution from the Odendaalsrus WWTP**

Sewage from the town of Odendaalsrus is drained by two WWTPs, Kutlwanong in the east, and Odendaalsrus in the north.<sup>12</sup> In the 2009 Green Drop Report only eight out of the twenty Free State

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<sup>9</sup> Ibid at 96. Thabong, the only WWTP that has yet to reach 'critical risk' status, is 0.4% away from falling within the 'high risk' threshold.

<sup>10</sup> Ibid at 98-9.

<sup>11</sup> Ibid at 97.

Municipalities participated in the certification program. The Matjhabeng Municipality was one of the twelve municipalities that did not take part in the program.<sup>13</sup> Since then although the Municipality has taken part in the certification programme, the Odendaalsrus WWTP, owing to “the plant flooding” and being “under rehabilitation” has scored a green drop rating of zero and a disturbing maximum risk rating of one hundred percent.<sup>14</sup>

The Odendaalsrus WWTP was out of commission since June 2004 and in need of upgrading.<sup>15</sup> In and around 2005, the Municipality enlisted the services of a civil engineer who drew up plans. The Municipality advertised a tender for the upgrading of the Odendaalsrus plant in December 2005.<sup>16</sup> A site inspection was also conducted at that time.

The Municipality hired Illiso Consultants to compile a tender evaluation report on behalf of the Municipality.<sup>17</sup> The consultants recommended that Pro Care Civils (Pty) Ltd be awarded the tender since it was the only firm with a Construction Industry Development Board (CIDB) classifications, which was indicated as a prerequisite in the tender document.<sup>18</sup>

Despite this recommendation, on 20 April 2006, the Tender Adjudication Committee recommended the tender to Jotina Plumbing /J Cooks JV (“Jotina Plumbing”).<sup>19</sup> On 24 April 2006, the Corporate Executive Manager: Engineering Services, informed the Acting Municipal Manager in writing that the recommendation of the Tender Adjudication Committee is of great concern since the appointed firm was not competent to do the work, particularly in the absence of the CIDB classification of the contractor.<sup>20</sup> Nevertheless, on 26 April 2006, the acting Municipal Manager awarded the contract to Jotina Plumbing.<sup>21</sup>

Despite the Municipal Manager’s actions, the Corporate Executive Manager: Engineering Services on 5 May 2006 informed the Municipal Manager in writing that the tender was awarded against the recommendation made by the evaluation committee and that it is of great concern.<sup>22</sup> In addition, Illiso Consultants also informed the Municipal Manager on 19 May 2006 that the appointed contractor has no prior experience in the construction of waste water treatment plants.

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<sup>12</sup> Department of Water Affairs and Forestry, *Briefing on Sewage Infrastructure in Matjhabeng Local Municipality to be Visited on 27 May 2008*, REF: 21/10/2/1/1116/2/7/C251/D1/4, 2.

<sup>13</sup> Department of Water Affairs, *Green Drop Report (2009)* 20.

<sup>14</sup> Green Drop Report (2011) at 97

<sup>15</sup> Excerpt from interview with Izak Fick, SAPS investigating officer, held on 29 November 2011 notes on file. See also Matjhabeng criminal case charge sheet (Charge Sheet), provided to AWARD by Advocate Ferreira by e-mail on 6 February 2012. The charge sheet is a public document as it has been filed with the court.

<sup>16</sup> Charge sheet at 2.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid; Fick Interview, 29/11/11; 30<sup>th</sup> November Group Discussion.

<sup>20</sup> Charge sheet at 3; Fick Interview 29/11/11.

<sup>21</sup> Ibid.

<sup>22</sup> Charge sheet at 3.

The existing WWTP was decommissioned when the upgrading started, and the flow was diverted to two neighbouring ponds.<sup>23</sup> From the ponds the water then flowed into a neighbouring wetland and finally into the Losdoring Spruit.<sup>24</sup> According to one source, the contractor proceeded to demolish portions of the existing plant before the plans for the new project had even been approved.<sup>25</sup> On 2 April 2007, the contractor was requested to withdraw from the site and consequently failed to complete the contract.<sup>26</sup> Sewage continues to flow through the ponds and wetland and into the Losdoring Spruit on an continuing and ongoing basis.<sup>27</sup>

Whilst the neighbouring wetland acted as a temporary natural filter, diminishing the effects of the pollution and aiding in the decomposition process, because nothing has been done since the plant was decommissioned, the ground in the wetland has become saturated and could no longer provide a reprieve.<sup>28</sup>

## **B. Criminal investigation and action**

On the 22 of January 2009 the National Prosecuting Authority initiated a legal process to prosecute the municipal managers overseeing the Odendaalsrus WWTP with regard to non-compliance with conditions of the National water Act.<sup>29</sup> This decision to prosecute was the culmination of a lengthy process described below.

The first criminal docket in the matter was registered on the 27 September 2004 by a Mr Koos Davel, and related to the Welkom WWTP. Later in April 2006 another complaint was registered by a farmer, Johan Terblanche, and incorporated into the first docket.<sup>30</sup> Terblanche's attorney referred him to Advocate Antoinette Ferreira at the NPA who, at the time, was a prosecutor at the Welkom Regional court, who assisted him with the legislation involved and in turn referred him to open a case docket with SAPS.<sup>31</sup> Whilst the situation at the Odendaalsrus WWTP did not directly affect Terblanche himself, he told one newspaper that as chairperson of Northern Free State Ecocare, he felt he was obliged to stand up when others would not, or felt they could not,<sup>32</sup> and as such opened another docket against the Odendaalsrus WWTW. This docket was registered on 25 April 2007.<sup>33</sup>

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<sup>23</sup> Department of Water Affairs and Forestry: *Briefing Notes on Sewage Infrastructure in Matjhabeng Local Municipality to be Visited on 27 May 2008*, REF: 21/10/2/1/11/16/2/7/C251/D1/4, 2.

<sup>24</sup> Ibid.

<sup>25</sup> Volksblad: *ECO Disaster Looms*, 11 November 2007, available at <http://www.volksblad.com/Xarchive/Vista/Eco-disaster-looms-20100616>, accessed on 13 February 2012.

<sup>26</sup> Charge sheet at 3-4.

<sup>27</sup> Ibid; DWAF 27 May 2008 briefing notes.

<sup>28</sup> Charge sheet at 3-4.

<sup>29</sup> Department of Water affairs and Forestry: *Update of Matjhabeng Directive*, REF: 16/2/7/C404/D1/4, p2

<sup>30</sup> As per Email Interview with Advocate Ferreira and Officer Fick ( 31 Jan. 2012) on file.

<sup>31</sup> Ibid.

<sup>32</sup> Carte Blanche, *Water Crisis*, 8 February 2009, available at [www.puresa.co.za/SAWater/CarteBlanche.aspx](http://www.puresa.co.za/SAWater/CarteBlanche.aspx), accessed on 13 February 2012.

<sup>33</sup> Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

Officer Fick began to investigate the Odendaalsrus docket filed with SAPS, and during the process he took down the statements of the farmers near Odendaalsrus WWTP.<sup>34</sup> Officer Fick also contacted Advocate Ferreira for guidance in the investigation.<sup>35</sup>

In and around May 2007, Advocate Ferreira put Officer Fick in contact with Nigel Adams from DWA so as to help him with the technical aspects of his investigation. Advocate Ferreira met Mr Adams at the first Environmental Meeting in Cape Town during 2006 where they realised they have mutual interest in water cases, and that their respective departments needed to co-operate on the issue.<sup>36</sup>

Officer Fick proceeded to investigate the Odendaalsrus docket in conjunction with DWA and the NPA. This involved collecting water samples, gathering the necessary documentation, and gathering other evidence relevant to the criminal case.<sup>37</sup> The water samples were taken on 31 of August 2007 by SAPS in conjunction with DWA.<sup>38</sup> Water samples were taken of the immediate effluent from the WWTP into the spruit. Further samples were taken downstream.<sup>39</sup>

The purpose of the samples was to ascertain the extent of the pollution to the spruit, and based on the information the samples provided, there was some agreement between DWA, SAPS, and the NPA to pursue the criminal action in court.<sup>40</sup> There were discussions as to whether action should be taken against the Tender Adjudication Committee and/or the Municipal Manager for allowing a contractor who did not possess the necessary qualifications to proceed with the refurbishment contract. Although initially the Tender Adjudication Committee members were chartered together with the municipal managers – as they were also responsible for awarding the tender to the alleged incompetent contractor - it was ultimately decided that because the final decision to appoint a contractor lay with the municipal manager as the accounting officer in all respects, it should be the municipal manager who is held accountable for the decision which directly added to the pollution, and as such action should be taken against him in his personal capacity.<sup>41</sup> This decision was also influenced by the obstacles rooted in cooperative government requirements that prevented the NPA to prosecute the Municipality itself.<sup>42</sup> This issue is briefly discussed in Section III which deals with the legal context surrounding cooperative government.

The NPA received the docket on 18 August 2008. After investigations were finalised, the subpoenas were issued and the first court date was on 18 August 2009.<sup>43</sup> The NPA has charged several Municipal Managers who served in their respective positions during the period from when the tender was awarded until when the criminal case was initiated.<sup>44</sup> The charge sheet includes the following charges: 1) pollution of water resources under the National Water Act ( section 151(1)(i));

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Fick Interview, 30 Nov. 2011.

<sup>38</sup> Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid; Advocate Ferreira e-mail, 6 Feb. 2012.

<sup>42</sup> Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

<sup>43</sup> Ibid.

<sup>44</sup> Charge sheet at 2.



non-compliance with a directive (discussed below) served pursuant to the NWA (section 151(1)(d)); and various violations of the Municipal Finance Management Act, Act 56 of 2003 (MFMA), including section 173(1)(a)(i) and (iii).<sup>45</sup>

At the time of writing, the defendants have yet to plead and the criminal action has still not gone to trial due to several adjournments requested by the lawyers involved and due to other unforeseen circumstances.

## C. Administrative Action

DWAs regional office in the Free State initiated administrative actions concerning the Odendaalsrus WWTP subsequent to registration of the criminal cases. It remained independent from the criminal action.<sup>46</sup>

### 1. Pre Directive

On the 31 October 2007, DWA regional office Free State sent a notice of intention to issue a directive in terms of Section 53(1) of the National Water Act<sup>47</sup> to the Matjhabeng Municipality.<sup>48</sup> The notice requested that the Municipality provide DWA with action plans detailing how they intended to prevent further pollution to the Losdoring Spruit by effluent from the Odendaalsrus WWTW, as well as supporting documentation on the expenditure for the upgrading of the facility. The Municipality was afforded until 7 November 2007, in accordance with Section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA), to make representations to DWA as to the existence of compelling reasons why further action should not be taken.<sup>49</sup>

### 2. Directive

The Municipality failed to make representations or provide the information requested by the Minister in the pre-directive within the prescribed time period. Thus on the 27 May 2008 DWA issued a directive to the Matjhabeng Local Municipality.

The directive related to the contravention of the provisions of Chapter 4 of the NWA, specifically section 22,<sup>50</sup> as investigations revealed that the Municipality was allowing untreated, or at best,

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<sup>45</sup> Ibid at 4-6.

<sup>46</sup> Ibid.

<sup>47</sup> S53(1) A responsible authority may, by notice in writing to a person who contravenes-

- (a) any provision of this Chapter;
- (b) a requirement set or directive given by the responsible authority under this chapter; or
- (c) a condition which applies to any authority to use water, direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority

<sup>48</sup> Department of Water Affairs and Forestry, *Directive in Terms of Section 53(1) of the National Water Act, Act No 36 of 1998*, Ref: 16/2/7/C251/D1/4, pp1-2

<sup>49</sup> Ibid.

<sup>50</sup> S22 (2) A person who uses water as contemplated in subsection ( 1 )—

- (c) in the case of the discharge or disposal of waste or water containing waste

inadequately treated water containing sewage, to be disposed of a manner not approved of, and such a way that water resources within the Municipality were detrimentally impacted.<sup>51</sup>

The Municipality was directed to:

- provide DWA with a detailed Action Plan, focusing particularly on municipal infrastructure, and addressing the areas of noncompliance that fall within the municipality's responsibility;
- specify the financial breakdown in the Action Plan according to the actions required;
- set short, medium and long term goals specifying the timeframes for the specific actions to be completed; and
- address the lack of human resources to sustain waste management in accordance with the requested action plan.<sup>52</sup>

The Municipality submitted the Action Plan to DWAF on the 26 June 2008 as requested by the directive.<sup>53</sup> The Action Plan, however, failed to address the requirements as set out by the department in the directive. In order to remedy this, DWA provided the Municipality with a template, addressing all requirements as set out by the department, which they were required to report monthly on.<sup>54</sup>

At the time of writing, there have been several complaints against the Municipality since the criminal charge laid due to the continual ponds overflowing at Witpan, another WWTP.<sup>55</sup> DWA conducted follow up site inspections during January 2012 and water samples were taken and sent to the lab for analysis.<sup>56</sup> The lab report reveals that the Odendaalsrus treatment plant is still not operating, sewage from the surrounding residential areas is not being treated at all the entire area is flooded with sewage which eventually goes to water resources.<sup>57</sup> Although Municipality submitted their rectification plan, the lab report indicates that they are failing to implement it.<sup>58</sup>

### III. Legal context related to cooperative government

As mentioned, the decision to criminally prosecute the Municipal Manger in lieu of the Municipality was due to the legal requirements related to cooperative government in South Africa. The legal context has created a situation where it is extremely difficult, if not impossible, for one sphere of government to bring a judicial action against another sphere or against another department within

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*contemplated in section 2 l(j), (g), (h) or (j). must comply with any applicable waste standards or management practices prescribed under section 26( l)(h) and (i). unless the conditions of the relevant authorisation provide otherwise.*

<sup>51</sup> Department of Water Affairs and Forestry: *Directive in Terms of Section 53(1) of the National Water Act, Act No 36 of 1998*, REF: 16/2/7/C251/D1/4, p1

<sup>52</sup> Ibid.

<sup>53</sup> Department of Water Affairs and Forestry: *Report on Progress Made After Directive to Matjhabeng Local Municipality*, REF: 21/14/D3/L4/6/8/1, p1

<sup>54</sup> Ibid,

<sup>55</sup> E-mail from Innocent Mashatja to AWARD, 12 November 2012, on file.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

the same sphere of government. Although, it is beyond the scope of this case study to present an in depth overview of the cooperative government requirements in South African law, a good understanding of this legal context, particularly as it relates to the protection of water resources, is essential to appreciate the peculiarities of this criminal case. It also highlights the potential need to revisit the stringent procedures in place to resolve disputes between and within spheres of government.

### **A. Powers and duties of the different spheres of government related to pollution control**

The Constitution states that “government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated”.<sup>59</sup> The promotion of local government to a position of equal importance to that of national and provincial government was a novel concept of the 1996 Constitution. This new position of equal partner is entrenched in the ‘principles of co-operative government and intergovernmental relations’ under chapter three of the Constitution which provides that all spheres of government have a duty to:

- Preserve the peace, national unity and the indivisibility of the Republic;
- Provide effective, transparent, accountable and coherent government for the Republic as a whole;
- Respect the constitutional status, institutions, powers and functions of government in the other spheres;
- Not assume any power or function except those conferred on them in terms of the Constitution;
- Exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- Co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another.<sup>60</sup>

Whilst each sphere remains autonomous, and separate from the other two, they are also connected and rely on each other to both fulfil their Constitutional mandates, and not to encroach on the duties of the other spheres.<sup>61</sup> Thus the system requires an appropriate balance between autonomy and supervision.<sup>62</sup> In this way the Constitution moves away from a competitive form of federalism where executive and legislative powers are assigned exclusively to either the national or regional government, and towards a co-operative form of federalism where each sphere of government is

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<sup>59</sup> S 40(1)

<sup>60</sup> S 41(1)

<sup>61</sup> Nico Steytler and Jaap de Visser *Local Government Law in South Africa* (2007) 16-16.

<sup>62</sup> Anel Du Plessis ‘Local Environmental Governance’ and the Role of Local Government in Realising Section 24 of the South African Constitution’ (2010) 21 *Stell LR* 265 at 274.

allocated both legislative and executive powers concurrently and operates under a system of shared responsibilities.<sup>63</sup> It is generally provincial and local government who take responsibility for implementing national and provincial laws where executive responsibilities are concerned.<sup>64</sup> Even in areas of concurrent competence, where national government has full authority to execute laws, it usually refrains from doing so.<sup>65</sup> This has the advantage of allowing the uniform rules of the country to be adapted by local authorities to best fit local implementation of these rules. In other words laws and policies that were made centrally can be moulded to best be executed at regional level.<sup>66</sup>

‘Environment’ and ‘pollution control’ fall under functional areas of concurrent national and provincial legislative competence.<sup>67</sup> Municipalities, however, also have executive authority in respect of local government matters listed in Part B of Schedule 4, and Part B of Schedule 5, which includes water services, sanitation services and sewage disposal systems. According to the Local Municipal Structures Act,<sup>68</sup> sewage disposal falls within the functions and powers of a district municipality.<sup>69</sup> This Act further stipulates that both the district municipality and the local municipalities, within the area of that district municipality, must co-operate with one another by assisting and supporting each other in the fulfilment of their obligations.<sup>70</sup>

Section 152 of Constitution sets out that the objectives of local government are, to among other things, to ensure the provision of services to communities in a sustainable manner,<sup>71</sup> and to promote of a safe and healthy environment.<sup>72</sup> It is the responsibility of both national and provincial governments to “support and strengthen” municipalities to enable them to manage their own affairs and fulfil their obligations.<sup>73</sup>

Should a municipality be unable to fulfil its functions, the Constitution allows for intervention from the provincial government. This intervention can extend to the relevant province to assume the municipality’s obligations to maintain essential national standards or meet established minimum standards, should the municipality fail in its obligation to do so.<sup>74</sup>

According to section 139(5) of the Constitution, if a municipality, owing to a crisis of financial affairs, breaches its obligation to provide basic services (such as sewage disposal), a recovery plan must be imposed by the relevant provincial authority. This recovery plan must aim to rehabilitate the municipality to the extent that is it able to meet its obligations to provide basic services. The provision also requires the provincial executive to assume responsibility for the recovery plan should

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<sup>63</sup> Iain Currie and Johan De Waal *The New Constitutional and Administrative Law Volume 1. Constitutional Law* (2001) 119.

<sup>64</sup> Du Plessis, op cit note 62 at 266.

<sup>65</sup> Currie and De Waal, op cit note 63 at 121.

<sup>66</sup> Ibid at 120.

<sup>67</sup> Schedule 4, part A, of the Constitution

<sup>68</sup> Act 117 of 1998

<sup>69</sup> S 84(1)(d)

<sup>70</sup> S 88(1)

<sup>71</sup> S152(1)(b)

<sup>72</sup> Ibid s 152 (d)

<sup>73</sup> S154(1)

<sup>74</sup> S 139(1)(b)(i), See also Section 105(1) of the Municipal Systems Act.

the municipality be unable, or fail to implement the plan.<sup>75</sup> Should the provincial executive fail to correctly exercise its powers in relation to the provisions above, it is the duty of the national executive to intervene.<sup>76</sup> This is supported by section 155 which provides both national and provincial governments with the legislative and executive authority to see to it that municipalities perform their functions effectively.<sup>77</sup>

In addition to the Constitutional requirements set forth above, the Municipal System's Act,<sup>78</sup> requires municipalities to exercise their legislative and executive authority within the parameters of co-operative government as set out by section 41 of the Constitution.<sup>79</sup> Furthermore, the act sets out objectives that municipalities and local government must seek to fulfil in order to obtain effective co-operative governance:

- The development of common approaches for local government as a distinct sphere of government;
- Enhancing co-operation, mutual assistance and sharing of resources among municipalities;
- Finding solutions for problems relating to local government generally; and
- Facilitating compliance with the principles of co-operative government and intergovernmental relations.

## **B. The obligation to avoid legal proceedings**

Arguably the most contentious principle of co-operative government as laid out by the Constitution is the obligation for spheres of government, and the bodies that they comprise of, to avoid legal proceedings against one another.<sup>80</sup> Support of the principle of cooperative governance and the obligation of government bodies to avoid legal proceedings is continuously emphasised in case law. In the *First Certification* case,<sup>81</sup> the Constitutional Court confirmed that the division of powers amongst the spheres of government supports a co-operative, rather than competitive, system of federalism.<sup>82</sup> As such intergovernmental disputes should not be settled judicially, but rather at a political level via appropriate mechanisms that negate the need for legal proceedings.<sup>83</sup>

Section 41 (4) of the Constitution reaffirms the importance of the duty to avoid legal proceedings. It confirms upon courts the power to refer a matter before it back to the organs of state involved if the court feels that the possible alternatives to legal action have not been exhausted. Courts take this matter seriously and “on a number of occasions have refused to entertain a matter because the

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<sup>75</sup> S 139(1)(b)

<sup>76</sup> S 100(1)

<sup>77</sup> S 155(7)

<sup>78</sup> Act 32 of 2002

<sup>79</sup> *Ibid* s 3(1)

<sup>80</sup> S 41(1)(h)(vi)

<sup>81</sup> 1996 (10) BCLR 1253 (CC)

<sup>82</sup> *Ibid* para 287.

<sup>83</sup> *Ibid* para 291.

parties have not complied with this obligation".<sup>84</sup> This was, for example, the result in *Premier of the Western Cape Province v George Municipality*.<sup>85</sup>

In that case, the Premier of the Western Cape had printed posters containing invitations to the opening of a new facility at a provincial hospital in George. Shortly before the event, provincial government approached the George Municipality requesting authorisation to display the posters in the town. Owing to a policy in place forbidding the display of political posters outside of the official election period, the municipality refused the provincial government's request. The Premier applied to have this decision set aside.<sup>86</sup> In denying the Premier's application, the court was not satisfied that the Premier had exhausted all other remedies before seeking legal action<sup>87</sup> and it therefore referred the matter back to the parties involved.<sup>88</sup> The court raised the issue that in circumstances where government is involved in litigation it is paid for by public funds. In the event of an intergovernmental dispute, public funds are used to cover the costs of litigation for both the prosecution and the defence. This is against the interest of the public, on behalf of which, government bodies are required to act<sup>89</sup>. Furthermore it could be equated to an abuse of public funds.

The High Court Judgment of *Blue Mountain Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* (currently awaiting Constitutional Court Judgment),<sup>90</sup> is another example of court's reaction to a government body's failure to take reasonable measure to avoid legal proceedings regarding an intergovernmental dispute. There, the Applicant, a private landowner, sought the eviction of occupants from its property. The occupants claimed protection from eviction under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act,<sup>91</sup> until such time as the City of Johannesburg Metropolitan Municipality (the City) provided them with adequate temporary accommodation.<sup>92</sup> The City contended that it was not responsible for providing housing and that the occupiers were obliged to join the Provincial Government to proceedings.<sup>93</sup>

The court found the joinder to be a violation of the principle of co-operative government. It set out the principles according to section 41 of the Constitution, placing emphasis on, and confirming, the obligation of government bodies to avoid legal proceedings amongst one another.<sup>94</sup> The court held

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<sup>84</sup> Local government law in SA, op cit note 61 at 16- 30. With reference to: *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 (CC) at para 41, which states parties should "try and resolve their dispute amicably"; *Uthekela District Municipality and Others v President of the Republic of South Africa and Others* 2002 (11) BCLR 1220 (CC) para 19, which stated that all alternative remedies should be exhausted before court is approached to resolve the dispute; and *In re Minister of Health and Others v Treatment Action Campaign* 2002 (1) BCLR 1028 (CC) amongst others

<sup>85</sup> Unreported judgement of the Cape High Court, case no. 8030/2003 as per Chapter 16

<sup>86</sup> Ibid at 30.

<sup>87</sup> S 41(3)

<sup>88</sup> S 41(4)

<sup>89</sup> Local government law in SA, op cit note 61 at 16-30.

<sup>90</sup> (2006/11442) [2010] ZAGPJHC 3 (4 February 2010)

<sup>91</sup> Act 19 of 1998

<sup>92</sup> *Blue Moonlight Properties*, supra note 90 para 1.

<sup>93</sup> Ibid para 37, with full justification at para 51.

<sup>94</sup> Ibid paras 76-82.

that the City had not taken reasonable measures to resolve the dispute before joining provincial government. As a result the court dismissed the application for joinder.

### C. Intergovernmental Relations Framework Act

The object of the Intergovernmental Relations Framework Act (IGFRA)<sup>95</sup> is to provide (within the principles of co-operative government as set out by Chapter 3 of the Constitution) a framework for national government, provincial government and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation.<sup>96</sup>

Section 35 of IGRFA recommends implementation protocols to coordinate government action. It states:

Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol

Some of the aims of an implementation protocol are to: identify challenges, describe the roles and responsibilities of parties involved with regards to policy implementation, determine the resources available; and provide for dispute-settlement procedures and mechanisms should disputes arise in the implementation of the protocol.<sup>97</sup> IGFRA also provides for instances where such a protocol “must be considered”,<sup>98</sup> these include three instances relevant to this paper: firstly, where an implementation protocol will materially assist the national government or a provincial government in complying with its constitutional obligations to support the local sphere of government or to build capacity in that sphere;<sup>99</sup> secondly where an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area;<sup>100</sup> and finally where an organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity.<sup>101</sup>

The constitutional duty to avoid intergovernmental disputes is also enshrined in Chapter four of the Act (‘Settlement of intergovernmental disputes’), and places a positive duty on all organs of state to make every reasonable effort to firstly, avoid intergovernmental disputes when exercising their powers or performing their respective statutory functions;<sup>102</sup> and secondly, if such a dispute should arise – to settle it without resorting to judicial proceedings.<sup>103</sup>

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<sup>95</sup> Act 13 of 2005.

<sup>96</sup> S 4

<sup>97</sup> S 35(3)(a-i)

<sup>98</sup> S 35(2)

<sup>99</sup> S 35(2)(b)

<sup>100</sup> S 35(2)(c)

<sup>101</sup> S 35(2)(d)

<sup>102</sup> IGRFA s 40(1)(a)

<sup>103</sup> Ibid, s 40(1)(b)

IGFRA lays down certain criteria before an organ of state can resort to judicial proceedings to resolve a dispute against another organ of state. The Act forbids any organ of state from instituting legal proceedings unless all efforts, made in good faith, to settle the dispute outside of court, including direct negotiations, have been made;<sup>104</sup> and that the dispute has been declared a ‘formal intergovernmental dispute’ in terms of section 41.<sup>105</sup>

An organ of state may unilaterally declare a formal intergovernmental dispute with another organ of state or government by notifying the other party in writing. However, before declaring a formal dispute, the organ of state making such a declaration, must in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.<sup>106</sup> Once a formal dispute is declared, the parties involved are required to meet, either by their own accord or by order of a Minister or local MEC if local government is involved,<sup>107</sup> to determine the nature of the dispute including the issues that are in dispute, and those that are not.<sup>108</sup> In addition, the parties must agree on appropriate mechanisms or procedures that would be required to settle the dispute.<sup>109</sup> It is only when all of the above efforts to settle the dispute are unsuccessful, that an organ of state may resort to judicial action.

#### **D. Municipal manager liability**

As mentioned, the Odendaalsrus criminal case was brought against several municipal managers spanning the period of alleged illegal activity. This is motivated in large part because the municipal manager plays a critical role as the accounting officer for a municipality.

According to the Municipal Structures Act,<sup>110</sup> a municipal manager is the head of administration and also the accounting officer for the municipality,<sup>111</sup> and as such the person holding this position is to be held accountable for the overall performance of the administration of the municipality.<sup>112</sup>

Support for the personal prosecution of a municipal manager can also be found in the Municipal Finance Management Act,<sup>113</sup> which also recognises the municipal manager as the accounting officer of a municipality and allows for liability for “fruitless and wasteful expenditure”. This includes any expenditure that was made in vain, and would have been avoided had reasonable care been exercised.<sup>114</sup>

Section 173 holds municipal manager criminally liable if he or she, among other things, “deliberately or in a grossly negligent way contravenes or fails to comply with a provision of section 62 [of the

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<sup>104</sup> S 41(2)

<sup>105</sup> S 45(1)

<sup>106</sup> S 41

<sup>107</sup> S 42 (3) & (4)

<sup>108</sup> S 42(1)(a)(i) & (ii)

<sup>109</sup> S 42(1)(c)

<sup>110</sup> Act 117 of 1998

<sup>111</sup> S 82

<sup>112</sup> Section 51(i) of the Local Government Municipal Systems Act 32 of 2000

<sup>113</sup> Act No 56 of 2003

<sup>114</sup> Ibid s 1.



MFMA] ... or fails to take reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure”.<sup>115</sup>

Section 62 of the MFMA recognises that the municipal manager is responsible for managing the financial administration of the municipality, and “must for this purpose take all reasonable steps to ensure that (a) that the resources of the municipality are used effectively, efficiently and economically ... [and] (d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented”.<sup>116</sup>

## **IV. Summary of interviews**

The responses to the questions listed under Section I above are summarised below by topic. Information has been taken from the following interviews, all of which are on file: Nigel Adams, Innocent Mashatja, and David Thaban from the Compliance, Monitoring and Enforcement Unit in DWA’s head office (group interview, 30 November 2011, Pretoria and e-mail, 12 February 2012); 2) Officer Izak Fick from the South Africa Police Service (30 November 2011, Pretoria); and 3 ) Advocate Antoinette Ferreira, Senior Advocate, Director of Public Prosecutions: Free State National Prosecuting Authority (e-mail responses, 20 December 2011, 18 January 2012, and 6 February 2012); 4) Advocate Ferreira and Officer Fick (e-mail responses, 30 January 2012).

### **A. Desired objectives and outcomes**

DWA head office responded that it had four main objectives and outcomes from the criminal action: 1) to have compliance with the NWA; 2) to have improved service delivery; 3) to entrench the Bill of Rights so as to ensure the rights of the people around the environment; and 4) to create precedent so as to make future cases easier.

Officer Fick was seeking 1) to set an example so as to act as a deterrent for future violations; 2) to get the correct and competent people to work on municipal projects in the future; 3) to have the WWTW up and running so that there is no pollution; and 4) to protect our children, the future generations.

Advocate Ferreira sought 1) to have the waste water treatment plant become fully operational and to ensure that the full-scale pollution of the pan and rivers would cease; 2) to bring to book those people in positions of power who make the decisions that impact on society as a whole and which impact on the environment; 3) to demonstrate to municipal managers that there will be repercussions to the decisions that they make and to hold them accountable; and 4) to ensure that municipalities consider the environment in their decision-making.

### **B. What has gone well?**

DWA head office believes that the cooperation between SAPS, the NPA, and DWA as demonstrated by this case actually moving to the court proceedings stage has gone well. Furthermore, the investigation was professional and well-conducted in light of the fact that they were dealing with highly political defendants and a politically sensitive situation. Finally, DWA head office noted the good cooperation from SALGA.

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<sup>115</sup> Ibid, s 173(1)(a)(i) and (iii).

<sup>116</sup> Ibid, ss 62(1)(a) and (d).

Officer Fick mentioned that having no political pressure on or interference with his investigation was helpful. Furthermore, he noted that the municipal manager was cooperating initially until he retained legal counsel by providing statements and agreeing to meet. Finally, he noted that DWA gave good back-up and assistance by providing air photos, samples, and expertise.

Advocate Ferreira noted the cooperation between DWA, SAPS, and the NPA and the initial awareness raised for this critical issue in the media. However, she mentioned that since the “problem persists, I cannot with a clear conscience state that anything went well.”

### **C. What has not gone well?**

DWA mentioned the following had not gone well: 1) We’ve opened a case with criminal charges, but sewage is still being dumped; 2) there has been some political interference which required the DWA to proceed with caution; 3) a delay in court proceedings that has caused a loss of momentum and energy and a loss of media attention; 4) the high human resource costs, which may not justify the potential outcome.

Officer Fick complained of time delays due to the court proceedings and that despite the investigation and action, the continued discharge of sewage from the plant was a negative outcome.

Advocate Ferreira complained of the legal proceedings taking too long because “the lawyers have managed to drag out this case for such a long time” and they “are allowed to postpone the matter with flimsy excuses”. The result is that “justice is not being done”, the pollution from the plant persists. She further stated that initially, the police were “at a loss as to how to investigate” the case because it was the first case of this type that they had come across and they still do not have the requisite technical knowledge to investigate such matters. Finally, Advocate Ferreira expressed her frustration that as mentioned in open court “the municipality will carry the legal costs of the managers (who are not even in the employ of the municipality any more)”. She explained that this “will come out of the taxpayer’s pocket” and “defeats the purpose of punishment for those who do not carry their own legal costs”.

### **D. What would you have done differently?**

DWA head office would like to have seen the administrative actions leading up to the criminal case being handled by head office because they felt that they would have been more removed from the municipality, and consequently more independent and objective.

Officer Fick would not have changed anything.

Advocate Ferreira mentioned that she has considered “approaching the High Court for an interdict ordering the municipality to fix the water works and stop the pollution”. However, she acknowledged that with the “facts of our peculiar case ... there was no other way to handle the matter”.

### **E. Lessons learned**

DWA head office has learned that the directive must be well-designed and well-written, and that the administrative process must be followed to the T. In this connection, DWA head office expressed the need for a team of internal legal experts to advise them. DWA head office also mentioned that moving forward, the process by which municipalities hire staff for wastewater treatment plants must

be changed to so that DWA should play a role in the hiring process. Finally, head office would like to have a mandate to appoint its own contractor to fix the situation at the treatment plant; it was head office's contention that it is the Department's position that it cannot do this.

Officer Fick indicated that he has learned that the investigation needs to understand the origins of the problem; in this case the reason for the sewage discharge. He explained that one cannot expect change without doing so.

Advocate Ferreira made several proposals as a result of her experience in prosecuting this case. It is worth quoting her exact language.

"I think it is prudent that those departments in government responsible for our healthy drinking water should host an Indaba and attempt to find solutions to this ever increasing problem. Projections are that we will have no fresh water by 2015 in our rivers. I think it will be a good idea to start an 'adopt a sewage works programme' whereby systematically all sewage works are upgraded (and especially those where major problems exists in order of priority). It is important that there must be some type of watchdog to ensure that the allocated budgets are indeed used to upgrade the plants instead of buying office furniture and new cars."

#### **F. Will the desired outcomes or objectives be achieved through this criminal case?**

DWA head office responded that they case will partly achieve the desired objective and outcomes to the extent it will show that the CME unit has teeth.

Officer Fick said no. He mentioned that it would give satisfaction if a conviction was achieved and serve as an example for other municipalities. However, he said that "nothing is coming to solutions" and that he has not faith in the system.

Advocate Ferreira said that the outcome of the case will not solve the existing problem because it will not fix the wastewater treatment plant. She further explained that "this problem exists in hundreds of municipalities country-wide. The sewage works are all outdated and need to be upgraded otherwise they will continue to pump raw sewage into the nearest water resources." However, she acknowledged that some justice would be done if the accused were punished severely for their actions.

#### **G. Allies?**

DWA head office made it clear that institutions were not allies in this case, but individuals within those institutions. In this case it was Officer Fick and Advocate Ferreira. They also reiterated that the public can be a good ally and act as watchdogs. In this case farmers served as a watchdog. Nigel Adams also mentioned that his experience is that allies are typically formed through personal connections and networking, and not through formal channels, such as inter-department committees.

Officer Fick said that the NPA and DWA were allies.

Advocate Ferreira mentioned that Nigel Adams from DWA was her biggest ally and was always willing to assist and respond quickly, and that Officer Fick served as a dedicated investigator who was a key person.

## **H. Obstructors?**

DWA head office said that municipalities, including in this case, are not cooperating and arrogant. He also mentioned politicians on the provincial level often to do not listen to the Department and maintain their own views. Finally, he explained that people are scared to get involved in these cases because of the political consequences. "It is potentially career suicide."

Officer Fick cited municipalities as being obstructive. He also questioned why other departments, such as Environmental Affairs are not involved in water resource cases.

Advocate Ferreira said that the Municipality itself "was not forthcoming with requested information and since a lot of our witnesses are employed by the municipality there is a degree of fear that if they testify it might have implications for their future employment". She also mentioned that the biggest obstructers "must be lawyers who have no conscience ... and frustrate the legal process by fighting all the side issues and not the merits of the case". In general, she expressed a high level of discontent with the legal process, which she described as a "very slow turning wheel".

## **V. Discussion**

Although the pool of individuals interviewed was relatively small for this case study, various themes and issues emerge after reviewing the facts and representations made by participants. This section seeks to identify some of the more salient themes and issues as a means to reflect on the process surrounding the criminal case.

### **A. Similar and divergent perceptions**

There are some similarities and differences between the representatives from the various departments interviewed. Looking at common and divergent responses helps highlight the extent to which the various participant stakeholders have aligned and divergent perceptions of the Matjhabeng criminal case. In other words, do the major players have a common understanding of what they are seeking and how they have evaluated the case? A more difficult question is to then understand why or why not.

The following discussion seeks to highlight key commonalities and differences in the participants' perceptions. Wherever possible, it seeks to discuss the significance of these trends.

#### **1. Desired Outcome**

With respect to desired outcomes or objectives, the NPA and SAPS both mentioned setting an example for other municipalities. DWA similarly mentioned the objective of ensuring compliance with the NWA. We believe that these statements overlap because it rests on the well-established theory that open enforcement will lead to deterrence of unlawful activity and compliance with the

law.<sup>117</sup> We believe that having a similar perception of the role of the criminal case within the broader concept of compliance implies a good understanding of the long-term strategic purpose of the lawsuit.

In addition, all participants mentioned the importance of protecting the environment. In the case of DWA, they mentioned the need to meet the environmental rights enshrined in the Constitution, while Officer Fick discussed protecting future generations, an aspect of sustainable development. Advocate Ferreira discussed the need to consider the environment in the decision-making process. The stress on the importance of protecting the environment is extremely positive; sustainability of natural resources is indeed a key tenet of South Africa's constitutional framework and it must motivate government action.

Advocate Ferreira was the only person to state that one of her objectives is to hold accountable those who make bad decisions that impact society and the environment. Although this might seem like an obvious purpose of bringing a criminal law suit against an individual decision-maker, the absence of identifying this as a desired objective within DWA and SAPS should be discussed internally.

## **2. What has gone well and not well?**

All participants mentioned that the cooperation between the NPA, SAPS, and DWA was a positive element in this case. What is notable though is that DWA head office believes that the cooperation is not between departments as such, but between individuals in departments. Moreover, these individuals are not connected through formal departmental channels, but through personal connections. Indeed, Officer Fick contacted Nigel because Advocate Ferreira introduced them, and Officer Fick contacted Advocate Ferreira through a private citizen's lawyer. Advocate Ferreira seems to agree with DWA head office on this point, as she mentioned individuals within various departments as her allies, rather than the departments themselves. Cooperation between departments in these actions seem to be the exception rather than the norm<sup>118</sup>; this is probably why DWA head office identified as a positive the fact that this case had proceeded to court. This supports the need to create better channels of communication between departments that have overlapping mandates over natural resources so that departments are not connected by virtue of personal connections, but by well-established official or formal channels of communication.<sup>119</sup>

All participants have agreed have agreed that the delay in court proceedings has had a significant impact on meeting their objectives. DWA and the NPA both alluded to the loss of media attention as a result of the delay. Naturally, Advocate Ferreira was more vocal about the role of lawyers and the legal process in causing the delay. Although it is not the role of this case study to propose sweeping changes to the judicial process, the delay in this case is a prominent theme that has had negative impacts and can serve as a basis for further discussion on judicial reform in this regard.

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<sup>117</sup> See Barbara Schreiner et al 'Survey of Approaches to Water Resource Regulation' Report to WRC, 1001472, Aug. 2009; Mark A. Cohen 'Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement' (2000) 30 *ELR* 10245.

<sup>118</sup> AWARD, 'Regulatory support focusing on enforcement: progress report', Draft unpublished report prepared for the Water Resource Commission, Project K5/1920 (12 Aug. 2011), on file.

<sup>119</sup> *Ibid.*

Only Advocate Ferreira spoke strongly to the overall lack of police support, competence and will with regard to investigating environmental cases. She mentioned that this investigation was steered by a devoted officer within SAPS, and would likely have not happened had Officer Fick not been involved. She expressed frustration around this issue and highlighted the need to have environmental officers play a more prominent role in taking the lead in criminal investigations. This issue has been raised repeatedly in other contexts through AWARD's SRI legal project.

Officer Fick has a different perception of the role of political pressure in this case from DWA head office and Advocate Ferreira. Officer Fick said that he did not experience any political pressure when conducting his investigation. In contrast DWA head office complained that political pressure made the investigation difficult, and creating a perception that supporting the case might result in "career suicide". Advocate Ferreira complained that fear of repercussion from the municipality caused witnesses to fear testifying in court. Moreover, she implied a lack of "political will from the powers that be" to support address environmental crimes. Notwithstanding Officer Fick's representations, the reference to political pressure with respect to municipal actions is troubling and has stifling consequences for independent investigations of wrongdoing; a strategy must be developed to tackle this issue.

### **3. Things done differently**

Although there were many negative statements about what has not gone well during the investigation and criminal prosecution, the participants did not offer many suggestions or thoughts around what should or could have been done differently. Advocate Ferreira mentioned that this case presented peculiar facts that resulted in "no other way to handle the matter than we have done". There may be several reasons for the overall lack of discussion around what could have been done differently despite the many negative perceptions surrounding the criminal case. It may reflect a general lack of reflexivity by the practitioners around their actions; in other words, the participants have not created the space to critically evaluate their practice. This could be caused by feelings of disempowerment where the participants feel overwhelmed by the situation at hand. It also might be explained by a manifestation of fatigue; there simply is too much on the table at one time to truly allow practitioners the time and space to reflect. Whatever the reason for the lack of reflexivity, it is important that the participants recognise the need to create a reflexive practice and develop the means to incorporate reflexivity into their practice.

### **4. Have the objective been met?**

All participants agreed that the criminal case would not solve the sewage pollution emanating from the water treatment plant. Indeed, the only two outcomes that the participants identified were that a conviction would result in some sense of justice and that it would demonstrate that the regulator has teeth.

This implies a lack of belief that the criminal case will have any impact with regard to solving the environmental problem of pollution. In our opinion, the participants should strongly evaluate whether the benefits achieved in this case are acceptable in light of the costs.

### **5. Allies and obstructers**

All participants agreed that the Municipality was the biggest obstructer to progress in this case. Advocate Ferreira, however, provided more detail by explaining that the municipality was not forthcoming with information requested and that witnesses employed by the municipality feared

implications for their job security if they cooperated. It is no surprise that the participants in this case did not feel that the Municipality was their ally as they are engaged in an adversarial process against them. However, the deeply held negative perceptions held by the participants about municipalities are troubling against the backdrop of the principles of cooperative government espoused in the Constitution. Obviously, the problems associated with municipalities is far bigger than the criminal case at issue here; however, it seems that until the larger issues associated with municipalities are resolved, the principles of cooperative government will fail to be met.

## **B. Extreme comments and constructive comments**

Some participants have noted what we call extreme comments. These are comments that are striking in the candour or depart deeply from what other participants have said. We believe that these comments are important because they can spur important dialogue and discussion, and often lead to thinking “outside of the box” about how to address a difficult issue. Moreover, the participants provided many constructive comments about the case. These are also important because they provide a space for reflection to re-evaluate the strategy that has been taken.

DWA head office made an interesting statement that head office should have handled this municipal administrative action rather than the regional office. It is not clear whether this statement would apply to all investigations against municipalities. Nonetheless, DWA head office raises an important issue, and perhaps a policy should be discussed whereby politically sensitive cases should be handled by head office rather than regional office.

Officer Fick also indicated that he had learned that the investigation needs to understand the origins of the problem; in this case negligence and alleged wrongdoing by the municipality. He explained that you cannot expect change without doing that. *This raises an important point around systems thinking and complexity theory.* Systems approaches call for a holistic understanding of real-world issues such as the management of water asserting that such issues do not fall within the domain of single disciplines. Rather the ‘real world’ reflects the interaction between multiple socio-economic, political and environmental drivers and hence a need to understand socio-environmental systems. Flowing from this, complexity theory holds that socio-environmental systems are inherently complex and dynamic, as opposed to linear ones (like a car engine), where outcomes are predictable. Instead, because of the complex interaction of socio-economic, ecological and political factors which operate differently at different scales (temporal and spatial) the outcomes are often unpredictable.<sup>120</sup> For example, some five years ago few would have predicted the increased demand on local water resources due to the international scale impacts of the 2008 economic crises which, due to job losses, forced people back into rural areas and put an unpredicted strain on the water resources. Nonetheless by striving to see the system holistically, with all systems as sub-systems of bigger systems to which they relate<sup>121</sup>, one has a better sense of potential outcomes. In other words, one must manage a system keeping in mind its complex characteristics. The implication of adopting such an approach is discussed in more detail in our recommendations under section VI.

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<sup>120</sup> See Sharon Pollard and Derick du Toit ‘Integrated water resources management in complex systems: how the catchment management strategies seek to achieve sustainability and equity in water resources in South Africa’ (2008) 34(6) Water SA 671.

<sup>121</sup> Ibid.

Advocate Ferreira also made some extreme comments and provided many constructive suggestions. Her suggestions for future action were quoted in full above, and include a DWA hosted indaba to tackle the problem of municipal sewage pollution, a systematic programme to upgrade sewage works, perhaps similar to Working for Water or Working for Wetlands, and to create a public watchdog with regard to municipal spending. These are all important suggestions that DWA and government should seriously consider.

Advocate Ferreira also mentioned her discomfort around the fact that the municipality is paying for the legal costs associated with the municipal manager's defence in the criminal lawsuit. Her main criticism was with the fact that the public was essentially paying for the costs emanating from the pollution of water resources caused by the municipality. In other words, by having the public pay for the criminal law suit, the *polluter pays* principle espoused in NEMA is turned on its head, that essentially requires that the polluter pay for the costs of preventing and controlling pollution, not the public. The polluter pays principle is encapsulated in NEMA section 2 (p) which states:

The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

Certainly, it seems unjust to the public to have the municipality pay for the legal costs associated with a municipal manager who is being tried in his or her personal capacity.

## **VI. Concluding recommendations**

Although this case study was undertaken on a relatively small scale, the participants were able to identify interesting issues and it created a space for reflection that may not otherwise have taken place. It highlights the need for additional case studies as a tool to reflect on difficult enforcement related cases brought pursuant to the NWA and to plan future strategies and action. In addition, with respect to this particular case study, it would be ideal to have a larger net of participants, such as regional DWA Free State, the Matjibeng Municipality, the defendants, the public, including the farmers who filed the initial criminal complaint. It will also be beneficial to revisit the case once the criminal process is complete.

Moreover, as we suggested above, building on Officer Fick's comments, we believe that systems approach rooted in complexity theory is necessary to truly evaluate effective actions and strategies to deal with difficult enforcement issues like the one at hand. Given this thinking, there has been a gradual recognition for the need to manage things differently such as through a process of strategic adaptive management that fundamentally embraces learning by doing.<sup>122</sup> Learning is taken to be a social process where engagement, communication and dialogue provide the basis for reflecting on and responding to system feedbacks – such as the influx of people in the above example - in a way that is open to change and that encourages creative and innovative responses to an ever evolving

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<sup>122</sup> Ibid; Harry Biggs and Kevin Rogers, 'An adaptive system to link science, monitoring and management in practice' in: JT du Toit, KH Rogers and HC Biggs (eds), *The Kruger Experience: Ecology and Management of Savanna Heterogeneity* (2003).



context.<sup>123</sup> SAM integrates research, planning, management, and monitoring in repeated cycles of learning that seek to improve on, and active, objectives.<sup>124</sup> The Inkomati Catchment Management Agency (ICMA) in developing its catchment management strategy and the Kruger National Park (KNP) have each utilized SAM, and their efforts provide a valuable window into how to manage complex systems.<sup>125</sup>

The issue raised by Advocate Ferreira regarding the polluter pays principle being flouted by the Municipality's decision to cover the costs of the municipal manager's criminal law suit is a serious one. We suggest that this issue be addressed urgently. It also begs the larger question: will not any enforcement action against the municipality, regardless of who the defendant might be, implicate the polluter pays principle? If that is the case, perhaps new strategies must be developed, or perhaps a system for penalising municipalities by limiting their ability to access allocated budgets. These are just some suggestions, but the issue itself must be addressed by government with consultation from civil society.

Finally, and perhaps most important, it is clear from the participant's representations and the facts in this case that the only reason this case has proceeded forward is due to the informal connections between the individuals involved from the various departments. A formal forum to foster coordination and cooperation in these kinds of cases must be created so that administrative and criminal actions are not based on happen chance but a clear and well-established system.

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<sup>123</sup> Sharon Pollard and Derick du Toit, 'Recognizing heterogeneity and variability as key characteristics of savannah systems: The use of Strategic Adaptive Management as an approach to river management within the Kruger National Park, South Africa' (2007) UNEP/GEF Project No. GF/ 2713-03-4679.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid; Pollard & du Toit, *IWRM in complex systems*, op cit note 120; ICMA, *The Inkomati Catchment Management Strategy (ICMS)* (2010).