

Critical analysis of administrative measures and possibilities to reform waste management and the influence on tourism in South Africa

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Abstract

Section 24 of the Constitution or the environmental right in the South African Constitution states that everybody has the right to an environment that is not harmful to their health or well-being. S 24 comprises two important components. Firstly, it confers on “everyone” the right to an environment that is not harmful to their health or well-being”. Secondly, it places a duty on the state to prevent pollution and other damage to the environment, and to promote conservation and sustainable development. Section 24(b) has vertical application as it is the state (or its organs like municipalities) that has the capacity to take “legislative and other measures” to protect the environment.

The removal and disposal of medical waste is therefore the duty of local authority. If local authority cannot perform its duties the provincial executive must intervene to ensure and to create a co-operative government. Municipal councils must not judge their own functions; checks and balances must be controlled by another institution. The public must therefore be pro-active in order to build an environment that is sustainable in accordance with section 24 of the Constitution.

Key words:

Environment, waste management, local government, administrative measures, tourism.

List of Abbreviations

EIA Environmental Impact Assessment
IDP Integrated Development Plan
IWMSA South African Institute of Waste Management
MEC Member of Executive Council
NEMA Amendment National Environmental Management 62, 2008
NEM: WA National Environmental Management: Waste Act 59 of 2008

1 Introduction

The structure of South Africa's government is prescribed in the Constitution, which states that it comprises national, provincial and local spheres of government which are distinctive, interdependent and interrelated (Paterson and Kotzé, 2008). Government can generally be broken down into three distinct branches namely, the executive, the legislature and the judiciary. The structure of South Africa's government is prescribed in the Constitution, which states that it comprises national, provincial and local spheres of government which are distinctive, interdependent and interrelated (section 40(1) of the Constitution). These main components similarly underlie environmental law, an area of law which has rapidly in the last three decades in order to create the legal foundation for effective environmental compliance and enforcement, environmental governance and ultimately, the attainment of ecological sustainable development (Paterson and Kotze, 2008). This implies that Government must respect, protect, promote and fulfill these rights (s 7(2) Constitution, 1996). Section 24 of the Constitution guarantees "green" or environmental rights (Du Plessis, 1999) and that everyone (this undoubtedly includes every human being or in legal jargon every natural person) (Du Plessis, 1999) has the right to an environment that is not harmful to their health or well-being, and also to be maintained for current and future generations (Kidd, 2008). The meaning of the terms "health" and "well-being" is not entirely clear, because the courts has not yet had a clear opportunity to interpret them and decide on their exact meaning. It is submitted, however, that the protection of people's health

should include protection from pollution (air, water, waste material, noise and so on) and other environmental dangers, while protection of people's well-being should be wider than protection of health and should include protection from nuisances and invasions of privacy and dignity (Mubangizi, 2004).

Section 24 (b)(i) of the Constitution stipulates that measures should be implemented to prevent pollution and ecological degradation (s24 (b)(i)of the Constitution). It is a fact that pollution is difficult to prevent, but a fine line could be drawn between pollution which is acceptable and non-acceptable pollution (Kidd, 2008). The concepts of "pollution" (s1 of NEM:WA) and "waste" (s1 of NEMA) are not synonyms. Pollution may be limited, but is not necessarily caused by waste. It should be noted that if waste is properly managed, there will be no danger to the health or welfare of people being negatively influenced by pollution (Kidd, 2008). Where man is involved an environment which is not harmful to a person's health or welfare is almost impossible. If waste is properly managed the pollution that is harmful to humans and the environment is limited.

This study is specifically concerned with municipal waste management as a factor that may affect human well-beings and health. It is specifically focused on medical waste, as it will become clearer later that it is a growing challenge in South Africa. Recognized hazards of ineffective medical waste management include animals, rodents and birds that could eat medical waste and / or come in contact with diseases, germs or viruses and spread these to the environment.

In general, "waste" is defined as:

Any substance, whether or not that substance can be reduced, re-used, recycled and recovering - that is surplus, unwanted, rejected, discarded, abandoned or disposed of, which previews the generator has no scope for the use or purpose of production;

that must be treated or disposed of; or

that is identified as a waste by the Minister by notice in the Gazette, and includes waste generated by the mining, medical or other sectors, but a by-product is not considered waste; and any portion of waste, once re-used, recycled and recovering, ceases to be waste (s1 of NEM:WA).

Medical waste per se is not defined in law and existing environmental legislation, but is clearly addressed in the Cape Ordinance (Ordinance on Environmental Health 30 June 2003) while Johannesburg and Durban municipalities do not directly refer to medical waste in their Ordinances. The Western Cape municipality directly refers to medical waste. For this reason, the definition of medical waste of the Cape Ordinance will be used for further discussion (Glazewski, 2005).

Medical waste is defined as:

Medical waste includes –
(1) Any waste whether it is or not, due to a medical, surgical, veterinary or laboratory procedure on humans or animals, such as blood, body fluids, tissues, organs, body parts, extracted teeth, corpses (excluding corpses for burial in terms the Law on Registration of Births and Deaths, 51, 1992);
(2) Used medical equipment and other medical material which is capable or is reasonably likely to be able to cause disease or spread of infection, such as used surgical dressings, swabs, blood bag, laboratory waste, blood, colostomy and catheter bags, gloves, drip bags, administration lines and spatulas.
(3) Contaminated and uncontaminated sharp objects, including clinical items which can cause a cut, puncture or injection, such as needles, syringes, blades and microscope slides;

(4) Pharmaceutical products that are outdated or contaminated or improperly stored or no longer needed, such as human and animal vaccines, medicines and drugs;

(5) Geno-toxic chemical waste and radio isotopes from experimental or diagnostic work or any other source (s 1 Ordinance on Environmental Health 30 June 2003).

All waste generated by medical practices is regarded as a consequence of the above definition and its components. Any reference to medical waste in this paper must be understood within the context of this definition.

The inclusion of an environmental clause in the South African Bill of Rights represents an important step in the recognition and protection of socio-economic rights (Mubangizi, 2004). Disputes concerning the management of medical waste will always be adjudicated within a specific matrix of constitutional facts. Schedules 5 (B) of the Constitution provides that municipalities are responsible for waste management in general (Schedules 5(B) of the Constitution, 1996). Municipalities are also responsible to respect section 24 of the Constitution, because ineffective medical waste management could adversely affect the public health and welfare of people. It appears that medical waste management in South Africa is not effectively managed, on the grounds of inadequate controls, and thus indicates the absence of government supervision as discussed at the 2009 Health Care Waste Summit (Furter, 2009).

This study critically examines the role of local government (municipalities) in medical waste management in South Africa. The study sought to determine which local authorities are responsible of the disposal and management of medical waste. As part of the investigation in this study focus will be on the obligations of municipalities in the management of risks related to medical waste management. The study examined, as part of the foregoing, what the legal consequences would be for damages arising due to municipalities' inadequate management of medical waste, including cases where the function is outsourced.

The study will focus mainly on literature where statute law, case law, academic literature and the functions and objectives of local government as in the Local Government Municipal Systems Act 32 of 2000 (the Systems Act) is determined. The following section will include reference to the significance of and risks related to medical waste. The constitutional and legislative role of government in the management of medical waste will be investigated.

2 Meaning of and risks related to medical waste

2.1 Introduction

This section looks at the legal classification of waste in South Africa and the possible impact of ineffective management of waste (especially medical waste) on the environment.

2.2 Hazardous waste

Healthcare waste is divided into dangerous and less dangerous wastes. The Cape Ordinance emphasizes the view that there are different types of waste.

(2) any waste under subsection (a), including but not limited to, the following categories of waste (Ordinance of the Cape, 30 June 2003).

2.2.1 Hazardous waste is defined as waste that poses health risks and or may depend on the circumstances of the production, use, quantity, concentration or inherent physical, chemical toxicological properties, a material with adverse effect on the environment, or the health of a person or any other living organism (s 1 of the NEM:WA). A hazardous waste generator who generates waste and the owner where the hazardous waste was generated, must contract with an accredited service provider for waste removal and waste to dispose of at a licensed hazardous waste facility owned by provincial and national legislation, licensed or allowed. The person who is the hazardous waste transporter must be knowledgeable of the facility to which he/she transported hazardous waste and authorized to accept waste until the waste from

the vehicle is downloaded (Ordinance of the Cape, 30 June 2003).

Another definition of hazardous waste for which a reference to the adverse impact on health and the environment takes place, is:

Hazardous waste means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, has a detrimental impact on health and the environment; (S 1 of the NEM:WA).

2.3 Less hazardous waste

The classification of less hazardous waste is waste that is not directly classified as medical waste, but usually found with this waste. It is important to discuss less hazardous waste, because it comes in contact with hazardous medical waste and as such can be dangerous if not properly handled.

2.3.1 General waste is a generic term for waste because of its composition and characteristics that are not a significant risk to public health or the environment if properly managed, such as plastic, paper, food, liquids not with hazardous chemicals or radioactivity contaminated deemed to be (s 1 of the NEM:WA).

From the above there are also exceptions that are not discussed in the definitions. The legislature could add words in the Cape Ordinance "not limited" use, implying that all medical waste is included, although not explicitly mentioned (Ordinance of the Cape 30 June 2003). This implies that the words "not limited" could be added in most of the definitions, and therefore all waste is defined.

Section 1 of the National Environmental Management: Waste Act (hereinafter NEM:WA) does include medical waste in the definition. The definition of hazardous waste together with the definition of waste must be read together, because there are cross-references in both definitions.

2.4 Risks associated with dumping

The risks of waste dumped, causing fungi that growth and could harm the environment. Where medical waste is dumped and comes into contact with the atmosphere it is possible that harmful bacterial infections such as tuberculosis can be spread among humans. Under favourable conditions, harmful micro organisms double when in contact with a person as a result of a needle prick or an open wound, every 20 minutes (Furter, 2003). Another way of spreading dangerous medical waste is when rainwater comes into contact with medical waste, flowing to the rivers and dams and causing underground water pollution (Glazewski and Bradfield, 1999).

Other risks associated with the medical waste are containers that are not safe for transportation to the nearby kilns. As the necessary protection such as masks and gloves are not always available, the workers who transport medical waste are exposed because the risk exists those needles could puncture staff causing infections (Furter, 2003).

Not enough kilns are available across South Africa for the burning of medical waste, and sometimes the medical waste is just burn in ordinary furnaces. Ordinary furnaces allow gases to escape which in turn can contaminate the atmosphere. The transportation of the waste in ordinary cars, ambulances or rental cars that is not suitable for transporting medical waste.

This may have concluded that several environmental risks associated with mismanagement of medical waste in South Africa happen because of ineffective management. Such an approach is in line with the precautionary principle in Section 2 of NEMA, and will thereby reduce the risks associated with medical waste (Otto and Clements, 2009). The next section will address the legal aspects of municipal management of medical waste which regulated and managed it.

The obligation is therefore on municipalities to comply with section 24 of the Constitution for hazardous and non hazardous waste removal, which also include medical waste. Given the

risks that arise with medical waste, if not effectively managed, it creates no obligation laid down in section 24 of the Constitution.

3 The constitutional and statutory role of local government in the management of medical waste

3.1 Constitution of the Republic of South Africa

3.1.1 Bill of Rights

It can be argued that section 24 of the Constitution imposes two goals. Firstly, the Constitution guarantees that everyone has the right to an environment that is not harmful to their health or welfare. Secondly, section 24 (b) impose that a specific mandate from the State (including municipalities) to accept the obligation to provide services referred to in subsection (a). And suppose subsection (b) that there is a negative duty on the state, the state is obliged to dispose him to actions that degrade the environment or have a negative impact on subsection (a) (Brand and Heyns, 2005).

The Bill of Rights contains no hierarchy of rights as far as competing fundamental rights are concerned. It is therefore envisaged that section 7 (2) and section 24 of the Constitution are on an equal footing. Section 7 (2) stipulates clearly that the State in the Bill of Rights must respect, protect, promote and achieve the rights. Section 8 of the Constitution stipulates that the Bill of Rights applies to legislative, judicial and executive powers, which include all State organs and therefore may apply to section 24. There is a vertical obligation on the State, and therefore, on municipalities and individuals, to provide an environment that is not harmful for present and future generations.

With regard to the fundamental rights mentioned above, medical waste also has an impact on the right to life (section 11 of the Constitution) and the right to adequate food and water (section 27 of the Constitution). These rights must be balanced in line with section 24 of the Constitution. As discussed earlier, medical waste could cause underground water pollution,

which could lead to not enough clean water to drink which infringes on an individual's rights (Glazewski, 2005).

3.1.2 Section 36: limitation

Section 36 of the Bill of Rights is a general limitation clause for all rights, and a general limiting instruction on how the process should work when rights should be limited under a general or specific limitations provision (Rautenbach, 1995). Given the constraints themselves in section 24 that must be read together with section 36 to the ideal application of how the law should be interpreted.

Section 36 of the Constitution provides that if there is no internal modifier on section 24, then the general limitation clause (section 36) applies. All rights are potentially limitable (du Plessis, 1999). The nature of section 24 cannot be limited; because there is always contamination that will occur, regardless of hazardous or less hazardous waste. There will always be pollution therefore it is more advantageous to interpret section 24 in a less restrictive way to explain the purpose of section 24 to achieve.

3.1.3 Chapter 7 and Schedules 4 (B) and 5 (B): Local Government

A duty is placed on local government by the Constitution to act (including environmental obligations contained in the environmental law) where the duties and responsibilities are defined. Within the sphere of local government, South Africa has 284 municipalities. As the sphere closest to communities, local government has an essential role to play in promoting not only socio-economic development and the provisions of basic services, but also environmental compliance and enforcement (Paterson and Kotzé, 2008). It can therefore be concluded that section 24 of the Constitution compels the municipalities to provide services that include the removal and disposal of medical waste. We can thus come to the conclusion that Chapter 7 of the Constitution supports the obligations of the municipalities. The principle of democracy must be respected by all spheres of

government and therefore the principle of democracy to live, the objects of local government must be watched (Currie and De Waal, 2005).

In terms of 152. (1) The objects of local government are inter-alia–

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government (section 152, Constitution).

The success and the purpose of local government are to ensure a safe and healthy environment. It depends on the size of the local government and the financial contribution that local government can give for the removal of medical waste. Another point to consider is that although a local government is independent and responsible for its own duties and responsibilities, the local government still depends on the national and provincial governments for support and assistance. One of the goals that a local government must provide is a safe and healthy environment including medical waste removal. If medical waste is not removed, it creates an unsafe and unhealthy environment.

The Constitution provides just the basic guidelines for the performance of duties and responsibilities of local authorities. Those local authorities' powers and functions are ranked into two categories namely executive and legislative. An executive authority of municipalities has the power to make laws while other laws impacted on municipalities are divided between all three spheres of governments. Both legislative and executive duties are vested in the Municipal Council (Bekink, 2008). The danger of this principle is that legislative and executive responsibilities of the Municipal Council are based in the same body, and that checks and

balances cannot be performed, because the same body is the supervisor of its own proceedings (Bekink, 2008). The Constitution stipulates clearly what powers a local authority executive and administrative has. As listed in Schedule 4 (B) and Schedule 5 (B) of the Constitution. The schedule provides a clear explanation of what services the local authority must provide. The schedules cannot be expanded or reduced (Bekink, 2008).

Schedule 4 (B) places the following obligations on the local authority; the regulation of air pollution, municipal health services, water and sanitation services limited to a system for waste water and sewage. The conclusion that could be made is that waste management is the responsibility of the municipality.

Under Schedule 5 (B) the local government has more direct obligations to be performed. The local authority must maintain public places which includes the cleaning of public places, and the removal of refuse, garbage dumps and disposal of solid wastes. A definite requirement by local authorities is the removal of medical waste removal, because the definition of medical waste also includes solid waste (Bekink, 2008).

The difference listed between Schedule 4(B) and 5(B) is that listed activities in Schedule 4(B) under both the national and provincial legislature. Schedule 4 (B) do not directly discuss the principle that waste must be removed but Schedule 5 (B) does. Therefore waste removal is not under the obligation of national legislation but under provincial legislation. The activities required therefore cooperative governance between the different spheres of government; in other words, municipalities have the sole mandate to manage waste in South Africa (Bekink, 2008).

3.1.4 Support from national and provincial government to municipalities

Section 155 (6) (a) of the Constitution provides that each provincial government must institute municipalities in the province in such a manner that it is consistent with the legislation under subsection (2) and (3). The legislative of other

measures must provide for the monitoring and support of each local government in the province (s 155(6) (a), Constitution, 1996). Therefore, the province has a supervisory role over the local authorities to perform their obligations. The national government as well as the provincial government has legislative and executive authority to ensure that municipalities exercise their functions as listed in Schedule 4 (B) and Schedule 5 (B). To determine whether the municipalities perform their functions every municipality's executive functions must be monitored as provided for the respective Schedules (s 155(7) of the Constitution, 1996).

3.2 Local Government: Municipal Systems Act 32 of 2000

3.2.1 General

As previously determined in the new dispensation of the Constitution, the Republic is divided in three spheres, there is an attempt to determine the local sphere's obligation in respect of medical waste management (Bekink, 2008).

3.2.2 Section 4

Section 4 sets out the duties of a municipality (s 4 Municipal Systems Act, 2000). Under subsection 2 (d) the municipality has an obligation to provide municipal services and the appropriate disposal of medical waste, in a financial and environmentally sustainable manner to the community (s 4 (2)(d) Municipal Systems Act, 2000). Another requirement is that the municipality has the obligation to consult the local community on the level, quality, range and impact of municipal services that the municipality must provide. If the municipality cannot remove medical waste, the community must be notified that the service is outsourced and to whom the contract will be given (s 4 (2) Municipal Systems Act, 2000). In exercising its executive and legislative authority the municipality must promote a safe and healthy environment (s 4 (2) (i) Municipal Systems Act, 2000). Finally the municipality together with the other organs of state must promote the fundamental rights in the Constitution and other

rights that are directly related to the fundamental right in section 24 of the Constitution.

Section 4 and section 6 must be read together, where the obligations of municipal administration are proposed. Section 6, together with section 196 (1) of the Constitution are read together to respect the democratic values and principles of the Constitution. Section 6 (2) (e) provides that the administration of the municipality must provide complete and accurate information to the local community about the level and standard of municipal services which the community is entitled to (s 6(2) Municipal Systems Act, 2000). Because the municipality is responsible for removing waste, and particularly medical waste, the community must be informed as to how the municipality will remove and manage the medical waste.

3.3 Amendment of the National Environmental Management Act 62, 2008

In order to determine which areas are suitable for a waste dump, one must consider the environmental management plans of the local authority. An EIA (Environmental Impact Assessment) should be compiled to determine the impact on the surrounding environment with the proposed dumping. If an EIA is prepared, alternative ways may be found to reduce the environmental damage caused as a medical waste disposal.

3.3.1 Section 2

Section 2 of NEMA will directly apply to the State and especially the municipality to respect, protect, promote and fulfill the responsibility of the social and economic rights in Chapter two of the Constitution. Therefore, a municipality is bound by the NEMA, as seen in section 2. This will also apply to the local community, previously disadvantaged by unfair discrimination.

In order to fulfill the above objective and to promote sustainable development, there are certain factors that should be practiced to achieve it (s2 (4) (a) of the NEMA). This includes that pollution and degradation of the environment should be avoided. If not entirely avoided, the impact must be at the minimum

level of degradation and corrected. Pollution is part of the modern lifestyle, and total avoidance of contamination and pollution is almost impossible. Therefore, it must be kept to a minimum if possible. It should also be noted that if pollution could be reused or recycled, it must be done. If it could not be reused or recycled, it must be totally removed (s 2 (4) (a)(iv) of NEMA). In the case of medical waste, some waste could be recycled, such as needles, cotton wool and so on. There is also medical waste, such as fetuses and placentas which must be destroyed. Medical waste has a negative impact on the environment and local communities, and where it cannot be prevented; the impact must be kept as small as possible. If medical waste is not properly removed, it creates a bad impression of the local authority because it does not fulfill the objective in the Constitution. The fact remains there will always be medical waste and therefore an obligation exists to remove it correctly.

3.3.2 Section 28

Section 28 of NEMA creates that if anyone who causes pollution or plays a significant role in the degradation of the environment, causes or may cause to take steps to prevent the continuance thereof or the repetition of the negative impact on the environment. If pollution is authorized or not avoided and could not be stopped, the decline must be limited and include plans to recover the environment (s 28(1) of NEMA).

To comply with section 28 of NEMA local government must fulfill its obligations as set out by Schedules 4 (B) and 5 (B) of the Constitution and Article 4 of the Local Government Municipal Systems Act, to ensure the dumping of medical waste at any dumping site. The section clearly stipulates that where pollution occurs, it must be reduced for sustainability of the environment. If a municipality or any member of the local community do not perform its obligation, they will be criminally liable.

In South Africa, however, some local authorities outsource their obligation to the Health Care Waste Forum of Southern Africa (HCW). According to the requirement in section 4 (2) (i) of the Systems Act, the local authority must

ensure that services continue to be rendered and the executive function of accountability rests with the local authority.

3.4 National Environmental Management: Waste Act 59 of 2009

The following section will investigate of how liable municipalities will be if they do not fulfill their obligations. Several sections of the NEM:WA will be evaluated to determine the liability of municipalities.

3.4.1 Section 3

“In fulfilling the rights contained in section 24 of the Constitution, the State, through the organs of state responsible for implementing this Act, must put in place uniform measures that seek to reduce the amount of waste that is generated and, where waste is generated, to ensure that waste is re-used, recycled and recovering in an environmentally sound manner before being treated safely and disposed of” (s 3 of NEM:WA).

Section 3 of the NEM:WA determine to whom the above law applies. The law clearly sets out that it was created for the purpose of fulfilling its obligations under section 24 of the Constitution by the Government and all organs of state to implement the law. There is an obligation on a municipality under the NEM:WA act for medical waste removal. Moreover, the law aims to reduce waste generated, or where waste is generated, the reuse of waste or the recovery of the waste where the waste is then treated and disposed of it is not harmful to the environment not.

4.2 Section 9

A municipality must use executive authority for the delivery of waste services. This includes the removal, storage and disposal of waste. The services must be in line with national and provincial standards and also the local government's IDP. The municipality must ensure access for the general public with the delivery of services to enable the public to know what services are provided by the municipality. The

services must be affordable and excessive prices should be avoided. A municipality must ensure that their service is delivered in a sustainable manner. The financial statements must be kept up to date and a balance sheet for the services provided by the municipality must be drawn up.

Since the municipality has executive authority, the municipality should also establish standards for separation, compaction and storage of solid waste collected, as part of the municipality's services. This means that municipalities can set alternative standards for medical waste, but the final goal of disposal of medical waste must be achieved. They may also set standards for the management of solid waste, where waste minimization and recycling should be, recycled of solid waste. There should be specific waste disposal facility where waste treatment and then removed. Standards must be established for pollution and the disposal of medical waste. Section 9 clearly stipulates that there is an obligation on a local authority to remove waste. Medical waste is also defined as waste and places this obligation on the local authority. The law must be read with NEMA which includes the Constitution. A local authority foster a statutory offense if medical waste was not properly removed or burned / destroyed, as these obligations are clearly included under Section 4 of the Local Government Municipal Systems Act. If a municipality does not perform its obligation, the municipality is charged with a statutory offense.

3.4.3 Section 21

Any person storing waste must take reasonable steps, or as is otherwise in the statute required, or take the necessary steps to ensure that the container in which the waste is stored, remain intact and not destroyed, and that the container is suitable for the safe custody of the waste. It should further take measures to prevent accidental spillage or leaking from the apparatus and the content of waste is prevented. The person concerned should also avoid unkind odors, visual impacts and prevents the wearer from diseases. The prevention of pollution of the environment and causing damage to the

community's health is part of the responsibility of the person responsible for the safekeeping of waste.

3.4.4 Section 58

A Waste Management Officer must strive to develop clean production technology and thus to minimize waste. Furthermore, the officer must also identify measures and implement actions where waste will be minimized also join the minimization, reuse and recycling of waste and thereby notifying the authority in charge of waste licences. This assumes that the necessary controls will be available to check whether a municipality's responsibilities delegated and to whom, and thus the party responsible once identified. The officer must take all reasonable steps to ensure that the licensee meets the requirements under the conditions and requirements of the above act and if the licensee does not comply, the officer should submit a non-compliance report to the appropriate authority (s 58(2) of NEM:WA).

If local government delegates its obligations, the delegated organization must first get a license stipulating where the organization will work according to the contract.

3.4.5 Schedule 1 of the National Environmental Management: Waste Act

Schedule 1 of the Act contains the listed activities for which a license is required before action may be taken. The activities include (but are not limited to) the storage and placement of waste for which a minimum of three tones of waste containers are stored or the recycling of waste where a weight of 100 kilograms per day is exceeded. It could thus be concluded that the organization that remove the medical waste, treated or incinerated require a license with regard to Schedule 1 of the Act (Schedule 1 of NEM:WA). Therefore, if licenses are used in order to exert control, the management will be more in control of who dump illegally. With the granting of licenses places could be set out where legal dumping may occur, thus also that medical waste may be burned without a negative impact on the environment. If illegal

dumping occurs one can immediately come to the conclusion, which municipality is liable, then so if the municipality has delegated its duties.

The following discussion will indicate the causes when a local authority does not fulfill its obligations.

3.5 Additional public and private role players in South Africa's environmental governance effort

The Environmental Management Inspectorate (EMI) is a body of environmental management inspectors appointed from different government departments in all three spheres of government (Chapter 7 of NEMA). They monitor and enforce compliance with a range of South Africa's environmental laws. Their powers range from routine inspections to administrative functions, such as issuing compliance notices. Environmental practitioners play also a key role in educating and assisting their clients

4 Municipal liabilities in the event of non-proper regulation of medical waste management

4.1 Introduction

An attempt will be made to highlight the consequences of a local authority where a local authority did not regulate medical waste management in terms of NEM:WA, NEMA, the Constitution and the Local Government Municipal Systems Act. The discussion will include focus on the polluter pays principle as well as the criminal liability of local government.

4.2 Delictual liability

It is assumed with delictual liability that an action may be instituted with the *actio legis Aquilia* of Roman law (Burchell, 1998). The law of delict assumes that the respondent is responsible for the inconvenience that he intentionally or negligently caused and supposes that the five elements of a delict should be there, namely action, illegality, negligence, damage, causality to be delictual liable (Schedule 1 of NOBAW). Delictual liability for pure environmental damage will arise only where

harm is contemporaneously occasioned to individual interest. Harm to the person caused by environmental pollution would fall, therefore, within the realm of delictual liability (Paterson and Kotzé, 2008).

4.2.1 Polluter pays principle

The underlying requirement that this principle (which is still relatively new and is not referred to in legislation), assume is that any person involved in any pollution activity is responsible for the cost involved to prevent pollution or else the total cost to cover for damages and recovery for the impact of the pollution caused. Thus this principle has a proactive (prevention) and reactive (compensation) aspect. Although municipalities do not need to have a direct cause of medical waste, they are indirect involved for medical waste management and therefore just as guilty as the polluter.

This principle is exactly the same as section 2 of NEMA (section 2(4) of NEMA). The problem arises, however, that South African legislation does not provide proper mechanisms for the principle to be realized. It can be argued that section 28 of NEMA applies the principle, but the article does not refer to the responsibilities of the polluter (Kidd, 2008).

4.3 Criminal liability

Section 34 of the NEMA stipulates the penalties that an entity could expect when the environment was polluted. The article states that where a crime was committed under Schedule 3 of the act, and convicted it seems that crime loss or the damage to an organ of state or other person was caused, including the costs involved by the state who will be incurred for environmental restoration; the court may summarily and without pleadings investigate the amount of loss or damage. If a person is convicted of a crime in Schedule 3 as listed, the court may summarily assess the monetary value to determine any advantage gained, the court may claim damages or award compensation award or a fine equal to the amount determined.

Whenever any manager, agent or employee commits an act or omits to act, what action he / she must perform on behalf of the employer and he / she were withheld to do, under a provision in Schedule 3 is listed as a crime and would be treated for the employer to perform or fail to perform, and the act or omission of the manager, agents or employees has occurred because the employer failed to take all reasonable steps to take the action or omission in question was to occur. Then the employer is guilty of said crime, except that no penalty other than a fine may be imposed if the conviction based on this subsection, liable on conviction to a penalty in the law mentioned including an order under subsections (2), (3) and (4) and proof of such act or omission by a manager, agent or employee set prima facie evidence that the employer under this subsection is guilty (section 34 of NEMA).

In the evaluation of section 34 of NEMA, you can come to the conclusion, that if a local government delegate its powers, the local authority remains responsible for ensuring that the services are rendered. The local authority remains accountable first, and there may be a fine, following the damage caused of the environment.

4.3.1 Local Government: Municipal Systems Act 32 of 2000

A local authority is defined in section 2 of the above law (section 2 of Local Government: Municipal Systems Act 32 of 2000). The definition assumes that a local authority is a separate legal entity. Therefore, a local authority can sue and be sued.

Section 106 of the above law applies when a municipality does not fulfill its obligations or if maladministration occurred. The MEC may issue a written notice to the municipality, municipal council or municipal manager to provide information required in the notification if the MEC believes that the municipality in the province does not implement a statutory obligation or is unwilling to implement the obligation. The MEC can appoint a person to investigate the matter, as to how the municipality

does not execute its obligations. If the MEC gives a notice to the municipality, then the MEC has 14 days to submit a written statement to the National Council of Provinces to submit justification for giving response to the notice (section 106 of Local Government Systems Act 32 of 2000).

4 4.3.2 Constitution

The above article should not be interpreted separate, but together with the Constitution, to determine what further steps could be taken if the local authority does not fulfill its obligations. Section 139 of the Constitution provides that when a municipality cannot or do not comply with its executive obligations, the provincial executive may intervene to take action to ensure that the obligations are met. An order may be issued to the Municipal Council which described the failure to fulfill its obligations, and the necessary steps that are needed to fulfill these obligations. The provincial executive must take the responsibility that national standards are maintained to establish the minimum standard of services. The provincial executive must also ensure that the Municipal Council does not take unreasonable steps thus contradicting the interests of other municipalities and still need to maintain economic unity. Therefore this is an obligation of a municipality to remove medical waste and to dispose it, and if it could not be done, the provincial executive may intervene to ensure that the services are rendered without to harm the municipality.

If the provincial executive intervene with the services of the municipality this intervention must be within 30 days after the first session is terminated. The Board must review the intervention regularly and make recommendations to the provincial executive that services, in which case the removal of medical waste properly facilitated.

Considering the above two sections it could be understand that if the local authority cannot execute or could not execute its provincial authority the provincial executive may intervene by performing the duties of local authorities.

If the local government chose not to render a service, any private contractor, municipal entity or private sector dumping manager can provide the service (ordinance on Environmental health 30 June 2003). If the waste management officer issued a notice for violating any provision of the Regulation and such person fails to follow the regulation to achieve, such a person will be guilty of an offense. A penalty may be imposed for a maximum of R5 million or imprisonment for not more than five years as a first offense. If a second offense occur, the penalty will be a maximum of R10 million or imprisonment for not more than 10 years (section 46 of the NEM:WA). If the pollution is more than 10 cubic meters, the penalty is determined by the court's discretion according to section 300 of the Criminal Procedure Act (section 300 of the Criminal Procedure Act 51 of 1977). The court may also determine in certain circumstances that a penalty shall be imposed and the cost of the penalty would be the cost and expenses to remove the waste and to rehabilitate the environment (Ordinance Environmental Health of 30 June of 2003).

In the next section an attempt to reach a conclusion as to what the objective to be pursued to reduce medical waste should be.

5 Observations, recommendations and conclusions

5.1 Introduction

The executive and legislative authority of the national, provincial and local spheres of government all have a key role to play in environmental governance and accordingly environmental compliance and enforcement (Paterson and Kotzé, 2008). Each of these spheres has its own powers, duties and responsibilities which include the removal and disposal of medical waste. The problem that arises however is that Section 24 of the Constitution is a fundamental right that enables respect, protect, promote and fulfill needs. Another significant aspect of s 24(b) is that legislation and other measures should be

“reasonable”. The right to have the environment protected is curtailed in that measures must be “reasonable”. Seen from the state perspective, it may well be the lack of resources for the state failing to take the desired measures to protect the environment. (Mubangizi, 2004). Local authorities have the objectives provided in section 24 of the Constitution. A problem that arises is that checks and balances within a local authority are not successfully carried out, since the municipal council has a definite interest in the matter, because they have a view about their own duties. Consequently, several legislative and regulations were promulgated to ensure a sustainable environment.

A finding that clearly emerges is that the removal and disposal of medical waste is the duty of the local authority. If this obligation, however, is delegated with the approval of the Minister it remains the obligation of the contractor and the authority delegated the duty to ensure that the duty is executed.

In South Africa the obligation to remove and destroy medical waste from certain municipalities is outsourced to IWMSA and therefore IWMSA’s must first obtain a license, and upon approval of the license IWMSA must perform according to the contract and the obligations. The problems arising from the liability of local authorities with the non-proper regulation of medical waste is that South African legislation does not provide proper mechanisms to realize it.

5.2 Recommendations

The importance of local government to ensure a safe and healthy environment cannot be over emphasized. If a local authority cannot perform the above duties, then the provincial executive may intervene to ensure and to create a co-operative government. There are several new laws such as NOBW and NOBAW which was established to protect the environment and the fundamental rights as defined in Section 24 of the Constitution. The problem when applying the law that is it is still relatively new and the polluter is not directly addressed. No case law and precedents have been created regarding the problem of medical waste management.

South Africa's criminal sentence and penalty will be determined according to the court's discretion. The punishment should be permitted to the extent that it is reasonable and justifiable and that the neighborhood should be rehabilitated. If medical waste was dumped, there are various risks involved. A further result is that groundwater contamination may be caused and then the environment will be adversely affected. The contamination has already spread and thus the area must also be rehabilitated.

5.3 Conclusion

Section 24 is a fundamental right provided in the Constitution, and protected by the State. This section is very complex. Medical waste per se is not defined, but the term is mainly supported by "waste," "health care waste", and "hazardous waste", in an effort to find a definition for medical waste.

The effort towards sustainability in South African tourism, and the increasingly common practice of “greenwashing”, is resulting in a proliferation of eco-labels and buzzwords when what is needed is real concern for the environment. Travellers go to where they feel a real concern exists for the environment. Consequently, any administrative measure to reform waste management as it impacts on tourism in South Africa must have a positive effect on the country’s tourism industry, as it will establish a set of credible, objective standards for tourism sustainability.

By promoting carefully thought out environmental and social practices, tourism businesses will be able to make greater efforts to improve their performance and offerings to tourists. As the government leads waste management initiatives, it will set the standard for the maintenance of high technical and ethical standards in tourism enterprises. Such initiatives will benefit by being officially recognized and their use in marketing South Africa and integrating with the National Strategy for the Development of Sustainable Tourism may be realized.

In order to achieve the desired goal, a solution must be to ensure that the municipal councils may not judge their own functions. Checks and balances must be controlled by another institution and can be accomplished with the preparation of each local government's EIA report to determine what is legal and may be deposited.

The public must pro-actively participate in order to build an environment that is sustainable in accordance with section 24 of the Constitution. Prevention of pollution and reporting of medical waste disposal to local government must be addresses.

The legislation as NOBW and NOBAW should be studied to ensure a sustainable environment for present and future generations. Pollution cannot be totally prevented, but the above legislation can be used to regulate pollution, especially medical waste.

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