IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 8407/2020P

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	**APPLICANT**
and	
MSUNDUZI LOCAL MUNICIPALITY	**FIRST RESPONDENT**
HEAD OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCIAL GOVERNMENT	**SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCIAL GOVERNMENT	**THIRD RESPONDENT**

ORDER

The following order is granted:

Declaratory relief

1. It is hereby declared that the first respondent is in breach of paragraph 3.1 read with paragraphs 4.1.8 and 4.1.16 of the Revised Compliance Notice (as amended) issued by the second respondent on 18 February 2020.

2. It is hereby declared that the first respondent is in breach of the Variation Waste Management Licence issued by the second respondent on 3 July 2017, in respect of the operation of the New England Road Landfill Site on Lot 1853 of the Farm Darvill No 15036, New England Road, Pietermaritzburg.

3. It is hereby declared that the first respondent is in breach of:

3.1. Section 24 of the Constitution of the Republic of South Africa, 1996;

3.2. Section 20*(b)* of the National Environmental Management: Waste Act 59 of 2008;

3.3. Section 31L(4) of the National Environmental Management Act 107 of 1998;

3.4. Section 28(1) and (3) of the National Environmental Management Act 107 of 1998;

3.5. Section 19(1) of the National Water Act 36 of 1998; and

3.6. Its obligations in terms of international law.

Structural Interdict

4. Within one (1) month of the date of this order, the first respondent is directed to file an Action Plan with this court, which shall substantially comply with the following terms. The Action Plan shall:

4.1 be detailed and comprehensive;

4.2 address all non-compliances identified by the second respondent in paragraph 3.1 of the Revised Compliance Notice;

4.3 be designed to comply with paragraphs 4.1.8 and 4.1.16 of the Revised Compliance Notice;

4.4 explain the steps that the first respondent will take in order to comply with the Revised Compliance Notice and the Variation Waste Management License, and

4.5 set measurable, periodic deadlines for progress.

5. All the parties to this application will be entitled to comment on the Action Plan within one (1) month from the date on which that plan is filed with this court.

6. The first respondent will thereafter file with this court, and serve on the other parties to this application, monthly reports indicating its progress with regard to the implementation of the Action Plan, after its approval by the second and third respondents.

7. All the parties to the application will be entitled to comment on these monthly reports within thirty (30) days after the date on which they are filed.

8. The court may, at any stage and on its own accord, or at the instance of the applicant or the first respondent make further directions or orders it deems fit.

9. Thereafter this matter may be enrolled on a date to be fixed by the registrar in consultation with the Presiding Judge for consideration and determination of the aforesaid reports, commentary and replies.

10. Furthermore, the first respondent is directed to discharge its duty of care and remediation of environment as required by section 28(1) and (3) of the National Environmental Management Act 107 of 1998.

11. Within six (6) months from the date of this order, the first respondent is directed to file a report, under oath, with this court on the progress on the first respondent's discharge of the duty of care and remediation as referred to above.

12. There will be no order as to costs.

JUDGMENT

SEEGOBIN J

Introduction

[1] This matter concerns the New England Road Landfill Site in Pietermaritzburg (the 'landfill site') and the alleged failure on the part of the Msunduzi Municipality ('the municipality') from complying with its constitutional obligations in operating and maintaining the landfill site in a manner that causes no harm to the health and well-being of the citizens of Pietermaritzburg and surrounding areas.

The parties

[2] The applicant is the South African Human Rights Commission, a national institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 ('the Commission'). The constitutional role of the Commission is to protect

and promote the fundamental human rights enshrined in Chapter 2 of the Constitution[1] as well as to *inter alia* take steps to secure appropriate redress where human rights have been violated.[2] The Commission's founding affidavit was deposed to by Mr Jonas Ben Sibanyoni, a part time commissioner appointed as such in terms of s 193 of the Constitution and s 5 of the South African Human Rights Commission Act 40 of 2013 ('the SAHRC Act').

[3] The first respondent is the Msunduzi Municipality, a municipality[3] established under the Local Government: Municipal Structures Act 117 of 1998 ('the municipality').The municipality's answering affidavit was deposed to by its municipal manager, Mr Madodo Phumula Kathida.

[4] The second respondent is the Head of Department of Economic Development, Tourism and Environmental Affairs, Province of KwaZulu-Natal ('the Department').

[5] The third respondent is the Member of the Executive Council for Economic Development, Tourism and Environmental Affairs, Province of KwaZulu-Natal ('the MEC'). The MEC is also responsible for waste management in the province in terms of s 1 of the National Environmental Management: Waste Act 59 of 2008 ('the Waste Act').

[6] The Department and MEC do not oppose the application and the relief being sought by the Commission. Whilst they abide by the decision of this court they have, however, put up explanatory affidavits to assist the court in making a determination herein.

[7] The main explanatory affidavit on behalf of the Department and the MEC has been deposed to by Ms Kim Lea Van Heerden who is the district manager of the Umgungundlovu District at the KwaZulu-Natal Department of Economic Development,

---

[1] S 184(1) of the Constitution.
[2] S 184(2) of the Constitution.
[3] A municipality is described in section 2*(a)* the Local Government: Municipal Systems Act 32 of 2000 as 'an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998.'

Tourism and Environmental Affairs. She is also designated as a Grade 1 Environmental Management Inspector ('EMI') in terms of s 31B of the National Environmental Management Act 107 of 1998 ('NEMA'). Ms Van Heerden has been involved in past and present engagements and enforcement measures involving the landfill site with the municipality and other stakeholders.

[8] The MEC himself has deposed to an affidavit in which he records, *inter alia*, that he and his department remain committed to continue their engagements with the municipality in order to monitor, supervise and assist it and, most importantly, to ensure that there is no further compromise to the health and safety of the surrounding communities, the public and the environment.

[9] Apart from the other portfolios held by the Department and the MEC, they remain the official environmental authorities in the province.

Relief

[10] The relief being sought by the Commission is two-fold. In the first place it seeks declaratory relief against the municipality in regard to the municipality's violation of the terms of its Waste Management Licence ('WML'), its failure to comply with compliance notices issued by the Department from time to time, its blatant failure to comply with s 24 of the Constitution; its fundamental breaches of various provisions of other relevant legislation such as the Waste Act, NEMA, the National Water Act 36 of 1998 ('the Water Act'), as well as its failure to fulfil its obligations in terms of international law. In the second place the Commission seeks a structural interdict in order to allow this court to exercise some form of supervisory jurisdiction over the municipality to ensure that the order is implemented.

[11] The relief claimed by the Commission is foreshadowed in a Draft Amended Order.[4] Whether and to what extent such relief will be necessary will be considered later in this judgment.

[4] Appearing at pages 895 – 899 of the papers.

The opposed hearing

[12] At the opposed hearing on 28 May 2021, the Commission was represented by Mr Madonsela SC, the municipality by Mr Y N Moodley SC (assisted by Mr V Moodley) and the Department and the MEC by Ms A Gabriel SC. I am indebted to all counsel for their useful submissions and the professional manner in which they discharged their respective briefs herein.

[13] I point out at this stage that while the municipality sought to fully oppose this application from the outset, in argument I was informed by Mr Moodley SC that the municipality would 'welcome' the grant of a structural interdict and accordingly would no longer oppose this aspect of the relief. The municipality was, however, opposed to the grant of any declaratory relief against it. Mr Moodley pointed to a number of challenges facing the municipality in giving effect to its constitutional obligations to maintain the landfill site. I will deal with the municipality's contentions in this regard later on in this judgment. For now, however, it is perhaps convenient to sketch the relevant facts and circumstances giving rise to the Commission's involvement in this matter and the institution of these proceedings.

Commission's involvement

[14] In February 2020 the Commission commenced with an intensive investigation of the municipality's operation of the landfill site and its failure to comply with its Constitutional obligations in terms of s 24 of the Constitution and the various other pieces of legislation referred to above. The Commission's involvement was informed by what can only be described as a desperate cry for help by the citizens of Pietermaritzburg to make the municipality account for its continued failure to maintain the landfill site in a manner that would not be injurious to their health and well-being. This cry for help resonated from a number of newspaper articles, media reports and petitions from ordinary citizens and civil society organisations.

[15] That the Commission was duty-bound to act arises from its constitutional duty to 'promote the protection, development and attainment of human rights' and to 'monitor and assess the observance of human rights'.[5] The Commission's powers to act are further fortified by the provisions of s 38 of the Constitution and s 32 of NEMA which provides that:

> 'Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act [NEMA] . . . or of any provision of a specific environmental management Act [for example, the Waste Act of the National Water Act], or of any other statutory provision concerned with the protection of the environment . . .'

[16] Specifically, in terms of s 32 of NEMA, a person seeking relief may act in his or her interests, in the interests of a group or a class of people whose interests are affected, in the public interest or in the interest of protecting the environment.[6]

[17] In its letter dated 14 July 2020, the Commission informed the municipality of its investigations and requested the municipality to furnish it with all relevant information relating to its management of the landfill site. The municipality duly complied and furnished the Commission with a voluminous amount of documents spanning a number of years.

[18] On 27 August 2020 the Commission gave the municipality formal notice of its intentions to institute legal proceedings against it for its alleged violations of the Constitution arising from its operation of the landfill site. This letter is detailed in its content. It sets out the municipality's operation of the landfill site from a historical perspective, it details the municipality's failure to comply with the terms and conditions of the licence issued by the Department of Water Affairs and Forestry in 1998, and it highlights the manner in which the municipality has simply failed to fulfil its constitutional

---

[5] Chapter 9 of the Constitution, specifically s 184(1)*(b)* and *(c)*, as well as section 2*(b)* and *(c)* of the SAHRC Act.
[6] S 32(1)*(a)*, *(c)*, *(d)* and *(e)* of NEMA.

mandate in the operation of the site. This letter forms the basis of the Commission's case against the municipality as set out in the founding papers in these proceedings.

Commission's engagements with stake holders and interested parties

[19] As part of its investigations, the Commission engaged interested and affected parties in order to solicit their views on the matter. The details of such engagements are dealt with by the Commission from paragraphs 75 to 89 of its founding affidavit. On 25 August 2020 the Commission received a petition signed by 17 122 people from a voluntary association in Pietermaritzburg known as 'Love PMB'. The petition dealt with the state of the landfill site and the fact that residents had lost faith in the municipality to protect their rights enshrined in the Constitution. The Commission also engaged with representatives of the Organised Ratepayers Association in the Msunduzi-Pietermaritzburg area on 15 September 2020 regarding its views on the state of the landfill site. On 16 September 2020 the Commission engaged with (a) representatives of Siyazuza Ngemvelo, an association of the Sobantu Township, and (b) groundWork, an organisation based in Pietermaritzburg which represents waste pickers who are affected by the municipality's operation of the landfill site. On 18 September 2020 representatives of the Commission conducted an on-site inspection of the landfill site.

Relevant background

[20] There are no material disputes of fact in this matter. For purposes of this judgment I see no need to sketch the full history of the landfill site as the Commission has laudably tried to do so in its founding affidavit. The following facts are relevant in my view to provide some context for the relief being sought by the Commission.

[21] The landfill site is located on Lot 1853 of the Farm Darvill 15036 in Pietermaritzburg, within the area of jurisdiction of the municipality. The landfill site lies approximately two kilometres south of the N3 Freeway, in an area between the Sobantu Township, the Darvill Waste Water Treatment Works and the Maritzburg Golf Course.

[22] The landfill site is used for the disposal of general waste only, including domestic waste, inert waste and garden waste. It is the primary landfill disposal site of the municipality. The waste disposed at the landfill site includes waste form other local municipalities falling within the Umgungundlovu District municipality's family of local municipalities.

[23] On 22 April 1998 the Department of Water Affairs and Forestry (DWAF) granted the then Pietermaritzburg-Msunduzi Transitional Local Council a fresh permit in terms of s 20 of the Environmental Conservation Act 73 of 1989 ('ECA') to operate the landfill site. This permit was commonly referred to as a 'section 20 permit' or a 'Replacement Permit' since it replaced the previous one. The permit was issued subject to certain 'Minimum Requirements'[7] that were published by DWAF from time to time. These Minimum Requirements dealt with every aspect of the landfill site from disposal of waste to management, to security, etc. The references to the Minimum Requirements in the permit effectively meant that the then local council was obliged to comply with them at all times.

[24] NEMA, which is a national statutory framework designed to give effect to s 24 of the Constitution, came into effect on 29 January 1999. Amongst other things, NEMA imposes a legal duty on persons in control of land or premises to take reasonable measures in certain circumstances prescribed in the Act. This duty is often referred to as the 'duty of care' towards the environment. The scope of this duty is broad and is encapsulated in s 28(2) as follows:

> '(2) Without limiting the generality of the duty in subsection (1),[8] the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of

[7] An excerpt of these requirements appears as Annexure 'JBS2' to the founding papers.
[8] Subsection 1 provides as follows:
'28. Duty of care and remediation of environmental damage.
(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.'

> land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—
> (*a*) any activity or process is or was performed or undertaken; or
> (*b*) any other situation exists,
> which causes, has caused or is likely to cause significant pollution or degradation of the environment.'

[25] The duty of the care prescribed by NEMA applied with equal force to the then local council in its operation and management of the landfill site.

[26] The municipality herein was established as such on 19 September 2000 in terms of the Local Government: Municipal Structures Act 117 of 1998. It became the owner and operator of the landfill site from that date to now.

[27] The Waste Act came into effect on 1 July 2009. The coming into effect of the Waste Act resulted in two consequences which are of significance to this matter:
(a) firstly, that for all intents and purposes, all section 20 permits were to be regarded as Waste Management Licences (WMLs) issued in terms of the Waste Act;
(b) secondly, that the regulation of the operations relating to the landfill site was transferred from DWAF to the Department and the National Department of Environmental Affairs ('DEA'). This effectively meant that the Department and the DEA became responsible for the monitoring of compliance of the municipality's section 20 permit.

[28] Section 81 of the Waste Act is of particular relevance to this matter. Its significance is that it repealed s 20 of the ECA. Despite that repeal, a permit issued in terms of s 20 of the ECA remained valid subject to s 81(2) and (3) of the Waste Act. Hence, the repeal of s 20 of the ECA did not have the effect of repealing the municipality's 'Replacement Permit' relating to the landfill site. Instead, the Replacement Permit became regarded as a WML issued in terms of the Waste Act.

[29] On 6 June 2016, the municipality made an application to the Department for a variation of the Replacement Permit. At that time the Department and the MEC had become the competent environment authorities responsible for the regulation of the municipality's operation of the landfill site.

[30] The application for a variation was granted on 3 July 2017. The Department issued a WML in terms of the Waste Act. This licence was referred to as a Variation Licence. The Variation Licence is the current instrument that regulates the municipality's operation and management of the landfill site.

[31] The holder of a WML is required to operate a landfill site lawfully within the prescripts of the prevailing legislation and in accordance with certain Norms and Standards set by the Minister of Environmental Affairs from time to time. The Commission amplifies these obligations as follows:

(a) Firstly, in terms of s 20[9] of the Waste Act, an operator of a landfill site must be a holder of a WML if that operation involves the disposal of general waste to land covering an area in excess of 200 square metres with a total capacity exceeding 25 000 tons. This is because operating a landfill site of such dimensions is a listed waste management activity which requires to be undertaken in accordance with a WML.

(b) Secondly, s 16(1)*(d)* of the Waste Act provides that:

> 'A holder of waste must, within the holder's power, take all reasonable measures to—
>
> . . .
>
> (*d*) manage the waste in such a manner that it does not endanger health or the environment or cause a nuisance through noise, odour or visual impacts.'

(c) Thirdly, an operator of a landfill site is required to comply with the National Norms and Standards for Disposal of Waste to Landfill, 2013.[10] On the same date the Minister

---

[9] S 20 of the Waste Act provides that:
'No person may commence, undertake or conduct a waste management activity, except in accordance with—
. . .
(*b*) a waste management licence issued in respect of that activity, if a licence is required.'

[10] National norms and standards for disposal of waste to landfill, GN R636, *GG* 36784, 23 August 2013, issued by the Minister of Environmental Affairs in terms of s 7(1)*(c)* of the Waste Act.

issued the Waste Classification and Management Regulations.[11] By issuing both the regulations and the Norms and Standards, the Minister had effectively incorporated the Norms and Standards into law.

(d) Fourthly, in addition to the requirements imposed by the Waste Act, an operator is required to discharge a duty of care in terms of s 28 of NEMA, as already alluded to above.

(e) Fifthly, section 19[12] of the Water Act contains a duty of care towards water resources which is similar to the duty of care contained in s 28 of NEMA.

History of non-compliance by municipality

[32] The Commission's founding affidavit proceeds to sketch a long history of non-compliance on the part of the municipality in respect of its WML and constitutional obligations. While this history has been broken up into various periods commencing in about 2000, it will serve no purpose to delve too deeply into this for present purposes. It suffice in my view to have regard to the period 2015 to 2017 and from 2017 to date in order to assess the nature and effect of such non-compliance. I deal with this period here below.

[33] On 10 March 2015 officials of the Department undertook a comprehensive audit of the municipality's operations of the landfill site. Representatives of the municipality as well as the DEA were also present. The team leader representing the Department was Mr Ian Felton who, like Ms van Heerden, is also a duly appointed EMI. These officials found numerous instances of non-compliance by the municipality of its s 20 permit.

[34] On page 9 of the audit report[13] Mr Felton itemised the following areas of non-compliance relating to the disposal area under the heading 'Key Non-Compliances':

---

[11] Waste Classification and Management Regulations, GN R634, *GG* 36784, 23 August 2013.

[12] Section 19(1) of the Water Act provides that:

'An owner of land, a person in control of land or a person who occupies or uses the land on which—

(*a*) any activity or process is or was performed or undertaken; or

. . .

which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.'

[13] Annexure 'JBS7' to the founding papers.

‘1. Observations were made that hazardous chemical containers, paint containers and paint products, whole tyres and motor oil containers have been disposed of at the site indicating that the waste assessment and classification system was not adequate.

2. Large numbers of people using the disposal area in circumstances that pose significant health hazards. Observations were made that people have access to the site and are using stagnant and contaminated surface water on the site. Structures have been erected on the disposal area that includes beds and sleeping areas which indicated that people may be permanently living within the waste disposal site, being exposed to extremely hazardous situations.

3. There was limited or no access control to the site and an unmanned gate at the rear of the landfill site. Vehicles and pedestrians entering the site through this gate and the numerous pedestrian accesses, were unchecked and no record of waste entering or leaving the site through these gates/openings was taken.

4. The vehicle maintenance area is being used for the servicing and repair of vehicles and plant. Extensive areas of oil contaminated soil exist within the area. Storm water washing off this area flows directly to the Msunduzi River.

5. Leachate was seeping into the environment from the dysfunctional leachate area and the toe of the landfill area.’

[35] Under the heading ‘Working Face Leachate Storm Water Management’[14] the following key-non-compliances are recorded:

‘1. No effective leachate management system is in place with the landfill site. The leachate collection and disposal system are currently dysfunctional.

[a contravention of section 16 (1) (a), (b) and (c) of the Waste Act, section 21 G and section 19 (1) of the Water Act, and section 28 (1) of NEMA.]

2. No repairs or maintenance work was currently taking place on the leachate system in spite of the system being in a state of disrepair.

[a contravention of 16 (1) (a) of the Waste Act and section 28 (1) of NEMA]

3. There is inadequate operation of the site in accordance with the Minimum Requirements. The working face of the landfill was not being effectively compacted and covered.

[14] Ms van Heerden has reproduced these violations in the founding affidavit, and in parenthesis correspondingly annotated the relevant provisions of the statute breached.

[a contravention of section 20 of the Waste Act, section 28 (1) of NEMA and section 19 (1) of the Water Act]

4. Excessive waste is stored at the transfer station which was providing condition for flies and odours arising from the landfill site. The transfer station area is not lined and there is no storm water management of contaminated water.

[a contravention of section 20 of the Waste Act, section 28 (1) of NEMA and section 19 (1) of the Water Act]

5. Informal waste recovery and recycling is taking place on the site and this is posing significant human health and safety risks.

[a contravention of 16 (1) (a), (b) and (c) of the Waste Act, sections 21 (g) and 19 (1) of the Waste Act and section 28 (1) of NEMA].'

[36] Following upon the above site inspection and audit report, the Department issued a warning letter to the municipality drawing its attention to the areas of non-compliance identified in the report. A year later, on 6 June 2016, the municipality applied to the Department for a variation of its s 20 permit. While this request was acceded to by the Department on 3 July 2017, most of the conditions of the s 20 permit were retained in the revised WML.

[37] The period from mid-2015 to mid-2017 was marked by what the Department considered to be 'an improvement' in the management of the landfill site. This was noted by the Department in its letter to the Commission dated 7 September 2020.[15] It recorded, however, that the site still required continued financial and human resource capital investments by the municipality to move towards and achieve compliance with its WML.

[38] The period from 3 July 2017 to date was marked by the end of what the Department previously referred to as 'substantively improved . . . management operation' of the landfill site. According to the Department, the municipality had abandoned the steps taken by it during the period from mid-2015 to mid-2017.

[15] Annexure 'JBS8' to the founding affidavit.

[39] On 25 October 2017 officials of the Department and the municipality jointly undertook a further comprehensive audit of the operations of the landfill site. The Department produced an audit report[16] which sets out the findings made. The report records, *inter alia*, that the municipality was found not to have complied with a substantial number of conditions contained in the WML.

[40] Between August 2018 and November 2018 several meetings were held between officials of the Department and those of the municipality with a view to ensuring the latter's compliance with the WML. At a follow up inspection at the site on 13 December 2018 officials of the Department observed that the state of the site had deteriorated further.

[41] Thereafter the Department held a series of meetings, site inspections and other engagements with the municipality to ensure compliance with the relevant legislation and the terms of the WML. The Department asserts that all this was done in accordance with the principles of co-operative governance and in conjunction with the Department's monitoring, oversight and supervision role over municipalities in the province.

[42] Following a series of fires that occurred at the landfill site and with no significant corrective action taken by the municipality, the Department issued the municipality with a Notice of Intention to Issue a Compliance Notice, otherwise known as a Pre-Compliance Notice. Further meetings were held with municipal officials but a lack of adequate progress at the landfill site led the Department to issue a compliance notice in terms of s 31L[17] of NEMA on 15 May 2019.

[43] Section 31L of NEMA empowers an environmental management officer (such as Ms van Heerden or Mr Felton) to issue a compliance notice. The section provides as follows:

> '31L. Power to issue compliance notices

[16] Annexure 'JBS9' to the founding affidavit.
[17] Annexure 'JBS17' to the founding affidavit.

(1) An environmental management inspector, within his or her mandate in terms of section 31D, may issue a compliance notice in the prescribed form and following a prescribed procedure if there are reasonable grounds for believing that a person has not complied—

(*a*) with a provision of the law for which that inspector has been designated in terms of section 31D; or

(*b*) with a term or condition of a permit, authorisation or other instrument issued in terms of such law.

(2) A compliance notice must set out—

(*a*) details of the conduct constituting noncompliance;

(*b*) any steps the person must take and the period within which those steps must be taken;

(*c*) any thing which the person may not do, and the period during which the person may not do it; and

(*d*) the procedure to be followed in lodging an objection to the compliance notice with the Minister or MEC, as the case may be.

(3) An environmental management inspector may, on good cause shown, vary a compliance notice and extend the period within which the person must comply with the notice.

(4) A person who receives a compliance notice must comply with that notice within the time period stated in the notice unless the Minister or MEC has agreed to suspend the operation of the compliance notice in terms of subsection (5).

(5) A person who receives a compliance notice and who wishes to lodge an objection in terms of section 31M may make representations to the Minister or MEC, as the case may be, to suspend the operation of the compliance notice pending finalisation of the objection.'

[44] According to the Department there was no response from the municipality to this compliance notice. Officials of the Department met with officials of the municipality again on 20 June 2019 to elicit a response, however, none was forthcoming.

[45] The Department eventually received the municipality's response to the compliance notice on 26 July 2019 together with a draft action plan. None of this was

effectively implemented by the municipality, with significant fires breaking out at the landfill site on 2, 24 and 25 August 2019.

[46] Given the deteriorating situation at the landfill site and the fires mentioned above, the Department registered a criminal complaint against the municipality on 27 August 2019. That matter is still pending.

[47] The Department received another report of a major fire at the landfill site in the period 5 to 9 October 2019. The extent and duration of this fire compromised air quality and resulted, amongst others, in the closure of schools due to health and safety concerns in the surrounding communities.

[48] On 7 October 2019 an urgent meeting was held between representatives of the municipality, officials of the Department as well as officials of the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs. Due to the severity of the situation the MEC himself undertook a site inspection on 8 August 2019. Following upon this meeting a further compliance notice in terms of s 31L of NEMA was served on the municipality which undertook once again to submit an action plan. The action plan that was subsequently received did not address the concerns raised in the compliance notice.

[49] Reports of further fires at the landfill site were received on 17 October 2019, 28 October 2019 and 23 December 2019 and the gravity of the situation was discussed at Provincial Cabinet level. On the basis of legal advice sought and obtained at the time, the option of pursuing an interdict against the municipality was not followed due to the existing provincial intervention set out in section 139(1)*(b)*[18] of the Constitution.

---

[18] In relevant part section 139(1)*(b)* provides:
'139. Provincial intervention in local government
(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
. . .
(*b*) assuming responsibility for the relevant obligation in that municipality to the extent necessary to—

[50] The continued deterioration of the landfill site in early 2020 compelled the Department to issue a Revised Pre-Compliance notice on 7 February 2020. In response the municipality submitted its 'Action Plan' on 14 February 2020. On 18 February 2020, after considering the municipality's representations, the Department issued a Revised Compliance Notice.[19] This Revised Compliance Notice is important as it not only details the historical non-compliance by the municipality with the numerous compliance notices issued by the Department from time to time, but it also calls upon the municipality to rectify its breaches within specified time-frames.

[51] For the most part of 2020 the municipality simply failed to comply with its own undertakings and revised variations issued by the Department at the municipality's request from time to time. On 2 July 2020 a major fire occurred at the landfill site. Site inspections conducted by officials of the Department with those of the municipality achieved very little or nothing at all. On 20 July 2020 another fire broke out and continued until 24 July 2020. The smoke from this fire enveloped major parts of the City and also resulted in the closure of the N3 freeway due to a complete lack of visibility on that road.

[52] On 5 August 2020 the municipality itself informed the Premier of the KwaZulu-Natal that, for a variety of reasons, the landfill site was a high risk facility and that, if not managed in compliance with all relevant legislation, it can pose a serious health and environmental risk.

[53] In a letter to the Commission dated 7 September 2020, the Department advised the Commission that while the municipality has made considerable efforts to meet key actions identified in the Revised Compliance Notice of 17 August 2020, there were still

---

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
(iii) maintain economic unity.'

[19] Annexure 'JBS 19' to the founding affidavit.

areas of non-compliance as well as a complete failure to provide an acceptable and comprehensive action plan.

[54] The present application was brought as a matter of urgency on 26 November 2020.

Municipality's opposition

[55] The municipality has no real defence to this application. While it attempts to answer the Commission's case, it provides no response whatsoever to the allegations contained in the explanatory affidavits put up by the Department and the MEC. These affidavits no doubt serve to amplify and support the Commission's case against the municipality regarding its constitutional obligations and apparent failure to comply with the relevant legislation and its own WML.

[56] While the Commission's *locus standi* to institute these proceedings and whether the dispute should not be referred to mediation in terms of rule 41A of the Uniform Rules were some of the issues that were raised by the municipality, none of these were pursued in argument.

[57] At paragraph 39 of its answering affidavit, the municipality concedes 'that there was a substantial deterioration of the landfill site and that there was historical non-compliance with its operations'. It goes on to contend, however, that recent events are of greater significance to determine this application and that it is committed to improving the landfill site's operations and to ensure strict compliance with legal requirements. In essence, it accuses the Commission of instituting these proceedings in circumstances when it was aware of the steps being taken by the municipality to improve its obligations.

[58] The municipality averred that the Commission had failed to prove any violation of the provisions of s 24 of the Constitution. It contended that the non-compliance with conditions in a permit or licence is not an automatic violation of the rights envisaged in

s 24 unless the facts prove that the violation caused unacceptable levels of pollution and ecological degradation as envisaged in s 24*(b)*(i). It went on to aver that pollution can simply not be considered harmful or be at unacceptable levels in the absence of any objective scientific and/or medical evidence. Once again, however, neither of these defences were pursued in argument.

[59] As I mentioned already, while the municipality was no longer opposed to the grant of a structural interdict, it was vehemently opposed to any declaratory relief. It contended in this regard that such relief was incompetent and served no lawful purpose. Mr Moodley submitted that the declaratory relief of the nature being sought by the Commission served only to duplicate and/or reinforce the existing penal and other sanctions found in the various pieces of legislation.

[60] Mr Moodley argued that although the municipality was trying its level best to comply with its constitutional obligations, it faces huge budgetary and procurement challenges in its management and operation of the landfill site. However, despite these challenges, substantial steps have been taken by it since September 2020 to comply with the terms of its WML and constitutional obligations.

Roles of the Department and the MEC in these proceedings

[61] The explanatory affidavits put up by the Department and the MEC provide useful insight into the municipality's failure to comply with the terms and conditions of its WML. As the environmental authorities in the province, the Department and the MEC point out that they have had extensive interactions with the municipality over a period of many years with regard to its operation of the landfill site.

[62] After the huge fire that broke out at the site on 20 July 2020, the Department went to the extent of commissioning an independent Air Impact Report in terms of the National Environmental Management: Air Quality Act 39 of 2004 to assess the impact of the fire on air quality and related socio-economic, public health and safety impacts. Since then, the Department has continued to closely monitor the municipality's

response and actions in order to ensure that the terms of the Revised Compliance Notice of 17 August 2020 are implemented.

[63] The Department records that its environmental management inspectors have conducted more than 22 scheduled and unscheduled inspections of the site, facilitated 16 further meetings with officials of the municipality, and issued warning letters in instances where there has been a failure to comply with the Revised Compliance Notice. While these continued inspections, administrative enforcement actions and engagements did result in substantial improvement in the management of the site, an unscheduled site inspection on 26 November 2020 revealed that the situation at the site had deteriorated once more. A further warning letter was issued to the municipality on 11 December 2020.

[64] In response to this warning letter, the municipality implemented certain emergency measures. It even appointed a contractor to repair and upgrade the access ramp and roads and it moved the unlawfully disposed waste into the approved waste cell. By January 2021, most of the waste which had not been dumped within the approved landfill site had been moved to approved areas and repair work on the access ramp had begun. However, the Department maintains that problems continue to persist with maintaining effective management of the site and securing adequate equipment to move, cover and compact waste disposed at the site.

[65] To illustrate the full extent of the municipality's non-compliance with the Revised Compliance Notice, the Department has incorporated a table in its affidavit setting out the areas of such non-compliance. There is no need in my view to detail every aspect of the non-compliance, suffice it to state that it ranges from the repair and maintenance of the road network at the site to issues relating to the disposal of waste within the site, maintaining proper security and access to the site, appointing a suitably qualified specialist/engineer to assess the storm water management systems and to provide recommendations to ensure that all leachate emanating from the site, including contaminated run-off water, is treated and disposed of in a lawful manner.

[66] The MEC was made aware of the municipality's non-compliance as set out above. The MEC instructed the municipality to submit its plans and remedial measures within the time frames provided for in the table referred to above. A draft action plan which was submitted by the municipality on 15 December 2020 was found not to be comprehensive enough and lacked detail. The plan was accordingly not accepted by the Department.

[67] Finally, while the Department and the MEC acknowledge that the municipality has made some effort to implement the terms of the Revised Compliance Notice, the reality is that its historical mismanagement of the landfill site means that the remedial action will take time to achieve and will continue to require sustained intervention.

[68] Against this background, I now turn to consider the essential issue that requires determination in this application in terms of the prevailing legislation.

The issue

[69] The issue (as put by the Commission) is whether the municipality's violation of its WML, the compliance notices issued by the Department and the MEC, the applicable legislation, that is, NEMA, the Waste Act and National Water Act, constitutes a clear violation of s 24 of the Constitution. Or as succinctly put by Ms Gabriel, whether the municipality has discharged its duty of care in terms of the relevant legislation.

The Legislative scheme

[70] Section 24 of the Constitution provides that:

> 'Everyone has the right—
>
> (*a*) to an environment that is not harmful to their health or wellbeing;
>
> and
>
> (*b*) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[71] In *Fuel Retailers*[20] Ngcobo J (as he then was) pointed out that:

'Section 24 of the Constitution guarantees to everyone the right to a healthy environment and contemplates that legislation will be enacted for the protection of the environment. ECA and NEMA are legislation which give effect to this provision of the Constitution.' (Footnote omitted.)

[72] That NEMA and the Waste Act are part of a suite of legislative measures contemplated by s 24 of the Constitution was recognised more recently by Petse DJ in *ArcelorMittal South Africa*[21] as follows:

'. . .

The NEMA and the NEM:WA are two legislative measures contemplated in s 24 of the Constitution.

[5] The preamble to NEMA, after acknowledging that "many inhabitants of South Africa live in an environment that is harmful to their health and well-being", recognises the right of everyone "to an environment that is not harmful to his or her health and well-being". It imposes an obligation on the State to "respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities".

[6] On the other hand, the long title of the NEM:WA describes its overarching purpose as being to reform the law regulating waste management. This, it continues, is "in order to protect health and the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development". To this end, the NEM:WA makes provision for, *inter alia*, "the licensing and control of waste management activities"; "the remediation of contaminated land"; and for "compliance and enforcement" measures.'

---

[20] *Fuel Retailers Association of Southern Africa v Director=General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and other*s [2007] ZACC 13; 2007 (6) SA 4 (CC) para. 40.

[21] *Minister of Environmental Affairs and another v ArcelorMittal South Africa Limited* [2020] ZASCA 40 paras 4-6.

[73] The operation and management of any landfill site is a highly regulated and licensed activity. This is because landfill sites deal in waste and the disposal of waste. Waste, the handling of and the disposal of waste are regarded as inherently polluting activities. For this reason the definition of 'pollution' in NEMA includes 'the storage or treatment of waste substances'. Further, the Waste Act requires specific approval and authority to dispose of waste to a landfill site, such as the landfill site herein.

[74] The long title to the Waste Act recognises that the purpose of the Act is to regulate waste management to achieve the protection of the environment and 'for the prevention of pollution'.

[75] Accordingly, the Waste Act provides statutory recognition that activities such as waste disposal sites require licensing and approval through a statutory regulatory environment, precisely because of the potential or actual adverse environment impacts associate with such activities.

[76] The concept of 'regulatory offences' in regulatory statutes was recognised by the Constitutional Court in *S v Manamela (Director-General of Justice Intervening*),[22] as those dealing with licensed activities in the public domain which 'frequently impose duties on responsible persons' which 'put pressure on the persons responsible to take pre-emptive action to prevent harm to the public'.

[77] The Water Act[23] came into effect on 1 October 1998. The term 'waste' in section 1 of the Water Act includes

---

[22] *S v Manamela and another (Director-General of Justice Intervening*) 2000 (3) SA 1 (CC) paras 28-29.
[23] The purpose of the Act is described in s 2 as:
'The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—
(*a*) meeting the basic human needs of present and future generations;
(*b*) promoting equitable access to water;
(*c*) redressing the results of past racial and gender discrimination;
(*d*) promoting the efficient, sustainable and beneficial use of water in the public interest;
(*e*) facilitating social and economic development;
(*f*) providing for growing demand for water use;
(*g*) protecting aquatic and associated ecosystems and their biological diversity;

'any solid material or material that is suspended, dissolved or transported in water (including sediment) and which is spilled or deposited on land or into a water resource in such volume, composition or manner as to cause, or to be reasonably likely to cause, the water resource to be polluted.'

[78] Part 4 of Chapter 3 of the Water Act deals with pollution prevention, and in particular, the situation where pollution of a water resource occurs or might occur as a result of activities on land. The person who owns, controls, occupies or uses the land in question is responsible for taking measures to prevent pollution of water resources. If these measures are not taken, the catchment management agency concerned may itself do whatever is necessary to prevent the pollution or to remedy its effects, and to recover all reasonable costs from the persons responsible for the pollution.

[79] In *Really Useful Investments 219*[24] Navsa JA carefully analysed the regulatory nature of some of the provisions of the now repealed ECA and those contained in NEMA and how such regulatory authority extends beyond listed activities, thus broadening the powers of an environmental authority to regulate the activities of owners of land or holders of real rights in land. In the quoted passages herebelow the learned judge deals with the duty of care imposed upon owners of land or holders of real rights in land and the provisions that are aimed at preventing their activities from causing environmental harm:

> '[27] Even at common law no person could use property owned by him or her in a manner that harmed the rights of others. Nuisance involves the unreasonable use of property by one neighbour to the detriment of another. Examples include repulsive odours, smoke and gases drifting over the plaintiff's property from the defendant's land, water seeping onto the plaintiffs property, leaves from the defendant's trees falling onto the plaintiff's premises, slate being washed down-river onto a plaintiff's land, causing a disturbing noise, causing a common wall to become unstable by piling soil up against it,

---

(*h*) reducing and preventing pollution and degradation of water resources;
(*i*) meeting international obligations;
(*j*) promoting dam safety;
(*k*) managing floods and droughts . . .'

[24] *Minister of Water Affairs and another v Really Useful Investments 219 (Pty) Ltd and another* [2016] ZASCA 156; 2017 (1) SA 505 (SCA).

overhanging branches and foliage, an electrified fence on top of a communal garden wall, blue wildebeest transmitting disease to cattle on neighbouring ground, and occupants of structures on neighbouring land allegedly causing a nuisance.

[28] In an increasingly ecologically sensitive world the emphasis shifted beyond the interests of immediate neighbours to the protection and preservation of the environment for the benefit of present and future generations. This shift has been given added emphasis by our Constitution. That idea was already evident, even if only in nascent form, in the provisions of ECA, which dealt not only with the regulation of dangers posed to the environment but also provided for the declaration of protected natural environments, special nature reserves and limited development areas.

[29] NEMA was enacted after the advent of our new constitutional order. It is legislation envisaged in s 24 of the Constitution. It almost completely replaced ECA. Only certain provisions of ECA remain, including ss 21, 22 and 23. Significantly, ss 31A, 34 and 37 also continue in existence.

[30] NEMA was enacted to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state and to provide for certain aspects of the administration and enforcement of other environmental management laws.

[31] Section 2 of NEMA sets out applicable national environmental management principles, inter alia, that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably. Section 2(3) of NEMA states that development must be socially, environmentally and economically sustainable. Section 2(4)*(a)* provides, amongst others, for the following factors to be taken into account when considering what constitutes sustainable development:

> "(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
>
> (ii) that pollution and degradation of the environment are avoided, or, where they cannot altogether be avoided, are minimised and remedied;
>
> . . .

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised.

. . .

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."

[32] Like ECA, NEMA sets out "listed activities" that require authorisation as well as the identification of an authority to grant it. Section 24F of NEMA prohibits the commencement of listed activities without the requisite authorisation. Section 28 of NEMA provides that persons who cause or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

[33] There are provisions in NEMA which oblige people engaged in prospecting, exploration, mining or production to make provision for remediation of environmental damage. Section 31L of NEMA empowers environmental management inspectors to issue compliance notices. NEMA also has a number of enforcement provisions.

[34] What is clear from the regulatory provisions of ECA and NEMA set out above, is that they are distinct provisions that regulate the activities of owners of land or of holders of real rights in land, and are aimed at preventing such activities from causing environmental harm. Sections 21 and 22 of ECA, which continue in existence, are such measures.

[35] Insofar as authorisations are required from environmental authorities to engage in such activities, either in terms of ECA or NEMA, these are not unusual. There are other statutes that require authorisations to undertake particular activities. Town planning schemes and legislation affecting particular undertakings, requiring licences and specific authorisations, are examples.

[36] Section 23 of ECA, as stated above, also remains in existence. However, it deals with the creation of limited development areas. Section 23 and the repealed sections, 16 and 18, were not primarily regulatory but sought to preserve, for posterity, areas considered to be ecologically important. When an authority invoked its powers in terms of those sections, it curtailed real rights in land. The invocation of those powers did not

arise from the dangerous activities of the land owners or of persons having a real right in the affected areas. They were invoked to protect and preserve the environment of South Africa for the benefit of all its people and for that purpose restricted or subtracted from the rights of the owners of the land concerned and others having real rights in it.'(Footnotes omitted.)

International agreements

[80] The Constitution contains four provisions that regulate the impact of international law on the Republic. One concerns the impact of international law on the interpretation of the Bill of Rights.[25] A second concerns the status of international agreements.[26] A third concerns customary international law. The Constitution provides that it 'is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[27] A fourth concerns the application of international law. It provides that when interpreting any legislation 'every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.[28] In this judgment I deal primarily with section 39(1)*(b)* and section 231(4) of the Constitution.

[81] The Commission submits that the Republic is a signatory to several international agreements which have been ratified or approved by Parliament. Amongst these are the

---

[25] Section 39(1)*(b)* provides that, when interpreting the Bill of Rights, a court, tribunal or forum 'must consider international law'.

[26] Section 231 of the Constitution provides that:

'(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

[27] Section 232 of the Constitution.

[28] Section 233 of the Constitution.

following agreements that are relevant to the present dispute and are binding on the municipality as an organ of State: the African Charter on Human and People's Rights (1981); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the International Covenant on Economic, Social and Cultural Rights.

[82] The African Charter is relevant to this matter as it gives everyone the right to 'enjoy the best attainable state of physical and mental health'[29] and the right to 'a general satisfactory environment favourable to their development'.[30] On the other hand, it imposes an obligation on State Parties to 'take the necessary measures to protect the health of their people. . .'[31]

[83] While the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal primarily deals with transboundary wastes (and, in particular, hazardous wastes), it also imposes an obligation on State Parties which deals with other wastes. Article 4(2)*(c)* provides that State Parties shall take appropriate measures that:

> 'Ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment.'

[84] The International Covenant on Economic, Social and Cultural Rights imposes important responsibilities on States Parties. In article 12.1 thereof, it is recorded that the States Parties recognise 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. It obliges States Parties to achieve the full realisation of this right by taking steps that are necessary for the 'improvement of all aspects of environmental . . . hygiene'.[32]

---

[29] Article 16.1.
[30] Article 24.
[31] Article 16.2.
[32] Article 12.2(b).

Findings

[85] From the myriad legislative provisions referred to throughout this judgment there can be no doubt whatsoever that the operation and management of the New England Road Landfill Site by the municipality is a highly regulated activity. These provisions are clearly aimed to prevent such an activity from causing environmental harm thereby ensuring that the health and well-being of ordinary citizens is not compromised.

[86] Throughout its operation of the landfill site which spans a period of about 18 years, the municipality was legally obliged to comply with the terms and conditions of (a) the Replacement Permit from 2000 to 2 July 2017; (b) the Variation Licence from 3 July 2017 to date; (c) the provisions of s 20 of the ECA (now repealed) from 2000 to 30 June 2009, and (d) the provisions of the Waste Act from 1 July 2009 to date.

[87] Section 16[33] of the Waste Act imposes an onerous duty on the municipality in respect of its waste management. It is required, *inter alia*, to ensure that waste is treated and disposed of in an environmentally sound manner. It is also required to

---

[33] Section 16 provides as follows:
'(1) A holder of waste must, within the holder's power, take all reasonable measures to—
(*a*) avoid the generation of waste and where such generation cannot be avoided, to minimise the toxicity and amounts of waste that are generated;
(*b*) reduce, reuse, recycle and recover waste;
(*c*) where waste must be disposed of, ensure that the waste is treated and disposed of in an environmentally sound manner;
(*d*) manage the waste in such a manner that it does not endanger health or the environment or cause a nuisance through noise, odour or visual impacts;
(*e*) prevent any employee or any person under his or her supervision from contravening this Act; and
(*f*) prevent the waste from being used for an unauthorised purpose.
(2) Any person who sells a product that may be used by the public and that is likely to result in the generation of hazardous waste must take reasonable steps to inform the public of the impact of that waste on health and the environment.
(3) The measures contemplated in this section may include measures to—
(*a*) investigate, assess and evaluate the impact of the waste in question on health or the environment;
(*b*) cease, modify or control any act or process causing the pollution, environmental degradation or harm to health;
(*c*) comply with any norm or standard or prescribed management practice;
(*d*) eliminate any source of pollution or environmental degradation; and
(*e*) remedy the effects of the pollution or environmental degradation.
(4) The Minister or MEC may issue regulations to provide guidance on how to discharge this duty or identify specific requirements that must be given effect to, after following a consultative process in accordance with sections 72 and 73.
(5) Subsection (4) need not be complied with if the regulation is amended in a non-substantive manner.'

manage waste in such a manner that it does not endanger health or the environment or causes a nuisance through noise, odour or visual impacts.

[88] The strong body of evidence presented by the Commission as well as the Department and the MEC persuades me that there has been an abject failure on the municipality to comply with its WML and to fulfil its constitutional duties to the citizens of Pietermaritzburg and surrounding areas. When numerous fires break out at the landfill site, when thick smoke and dust engulf the City, when schools have to be closed, when sections of the N3 freeway have to be shut down and when citizens start complaining about their health and well-being due to the pollution, then there has to be something seriously wrong with the municipality's operation of this landfill site. It is no answer for the municipality to merely say that it is 'trying' in circumstances when the overall evidence suggests the opposite.

[89] The legislative framework enacted by the State since 1994 provides for a comprehensive set of protective measures designed to give effect to the environmental rights enshrined in s 24 of the Constitution. One of the most important protective measures is that provided for by s 31L of NEMA. This is the power given to environmental authorities to issue compliance notices. Despite a clear legal obligation imposed by s 31L(4), there has been a dismal failure on the part of the municipality to comply with the terms of these notices. The following instances of non-compliance are relevant:

(a) The municipality simply failed to comply with the notice issued to it by the Department on 15 May 2019. The Department's attempts to ensure that the municipality complied failed. A further compliance notice was issued by the Department on 18 February 2020, effectively replacing that of 15 May 2019.

(b) Once again, the municipality failed to comply with the notice of 18 February 2020. One of the key failings by the municipality with regard to the third variation notice of 17 August 2020 was that it failed to provide the Department with a detailed and comprehensive action plan referred to in the compliance notice of 18 February 2020 in terms of item 4.1.16 of the notice. What is concerning about this non-compliance is that

it continued up to the time of the Commission's filing of its replying affidavit in March 2021.

(c) Other critical areas of breaches of the notice of 18 February 2020 related to the municipality's failure to comply with the terms of the WML as itemised in paragraph 3.1 of the notice and in paragraph 4.1.18 of its failure to ensure that appropriate landfill plant, required to cover and compact the disposed waste, is functioning and serviced within seven (7) days of the issuing of the notice.

[90] The municipality's failure to comply with compliance notices issued by the Department has simply rendered the invoking of s 31L futile. This consistent and blatant failure by the municipality has resulted in a complete violation of the various provisions of the Waste Act,[34] the Water Act,[35] NEMA[36] and the municipality's own WML. Ultimately, these violations constitute a violation of s 24 of the Constitution.

[91] The citizens of Pietermaritzburg, including the highly disadvantaged community of the Sobantu Township, are justifiably aggrieved at the manner in which the municipality has conducted itself in relation to its operation of the landfill site over such a long period of time. They have had to contend with an environment that is significantly compromised by the presence and operation of the landfill site in a manner that violates their rights to this degree. The municipality seems oblivious of the serious risk posed to the water resources of the Msunduzi River. The Commission correctly points out that the risk posed by the landfill site to the citizens of Pietermaritzburg is known to all the parties to this application. As I already mentioned above, the municipality has in fact acknowledged this risk in its presentation to the Premier of this Province on 5 August 2020.

[92] While the municipality was of the view that 'if not managed in compliance with relevant legislation the landfill site can pose a health and environmental risk', the engagements conducted by the Commission with interested and affected parties prior to

---

[34] Section 16.
[35] Sections 19(1) and 21*(g)*.
[36] Section 28(1).

the launch of these proceedings, reveals that the municipality's operation of the site has already compromised the health, negatively affected the livelihoods, and compromised the well-being of some of its citizens, and negatively affected the environment within the municipality's area of jurisdiction.

[93 The flagrant disregard by the municipality of its constitutional obligations is most concerning. The municipality's complaints about budgetary and procurement constraints are just not good enough. Citizens of Pietermaritzburg may well excuse the municipality's conduct where it struggles to comply with its constitutional obligation for a short period of time but where this has persisted and continues unabated for more than 15 years, it is unacceptable.

[94] What the municipality seems to forget is that its operation of the landfill site is a highly regulated activity and as such is part of a regulated community. It is therefore expected that the municipality will act in an exemplary manner at all times by complying strictly with the relevant legislation and permits which regulate its conduct.

[95] Our courts have consistently emphasised the need for organs of state (such the municipality herein) to be exemplary in the manner in which they comply with their constitutional obligations. In *Merafong*[37] for instance, the Constitutional Court held that a municipality must act as a 'good constitutional citizen' and its conduct should be in compliance with the Constitution. A similar observation was made by the Constitutional Court in *Lesapo*[38] where it held that an organ of state 'should be exemplary in its compliance with the fundamental constitutional principle . . . Respect for the rule of law is crucial for a defensible and sustainable democracy'. In *Kirland,*[39] the Constitutional Court (per Cameron J) made the following observation:

---

[37] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC) paras 60 and 61.
[38] *Lesapo v North West Agricultural Bank and another* [1999] ZACC 16; 1999 (12) BCLR 1420 (CC) para 17.
[39] *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC).

> '…To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.' (Footnote omitted.)

[96] Following from the above, the facts of this matter demonstrate adequately in my view the vulnerability of the municipality's citizens where the municipality fails to act in an exemplary manner with respect to its obligations to comply with the law and the applicable permits. As a regulatory authority in the province, the Department may be criticised for not acting swiftly and decisively against the municipality whenever it violated the terms of its WML. While the Department may have been constrained in this regard because it had to adhere to the principles of co-operative governance and inter-governmental relations, the same does not apply to the Commission. The citizens of Pietermaritzburg can be grateful to the Commission for bringing this sorry tale to the fore.

[97] A contention raised by the municipality on the papers (but not pursued in argument) was that the Commission has failed to put up any scientific or medical evidence to establish that unacceptable levels of pollution were caused by the operation of the landfill site and that it caused unacceptable levels of pollution to the environment or a community. In my view, this contention is misconceived. As Mr Madonsela has correctly pointed out, apart from the body of judicial authority, there is also academic support for the Commission's propositions. The author G E Devenish of *The South African Constitution*[40] points out that:

> 'The composite nature of this right is apparent from the fact that a healthy environment is linked to section 24 to the issues of pollution, ecological degradation and conservation. The notion of the environment has become less

[40] G E Devenish *The South African Constitution* (2005) para 111 at 123.

> technical and more sociological as is evident from a recent United Nation's report on Human Rights and the Environment in which it was stated: "[W]e have moved from an environmental right to the right to a healthy and balanced environment." This consolidation and synthesis is a comparatively recent development. Section 24*(a)*, apart from minor differences, is identical to the corresponding provision in the interim Constitution, that is, section 29. The new section 24*(b)* accommodates some of the concerns expressed by experts in this field. This section imposes a general duty on the state to protect the environment, and unlike the position in terms of section 24*(a)*, it is not essential to prove that the activities affecting the applicant's environment result in harm to his or her well-being.'

[98] Apart from the serious violations committed by the municipality in respect of the various provisions of the legislative framework as found above, I further consider that it has also acted in breach of the relevant environmental provisions contained in the international instruments referred to above. Since these instruments have been ratified by Parliament, they are binding on the municipality as an organ of state.

[99] Finally on this aspect, I deal briefly with the role of the courts in environmental litigation of the nature herein. In *Fuel Retailers*[41] Ngcobo J (as he then was) pointed out that the role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. He emphasised that

> 'The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out.'

---

[41] *Fuel Retailers supra* para 102.

[100] Against the findings made herein, I turn now to consider the nature of the relief being sought by the Commission in these proceedings.

Relief to be granted

[101] As I pointed out at the commencement of this judgment, in the first place the Commission seeks a range of declaratory relief, the aim of which is to clarify to the municipality that its conduct in operating the landfill site has violated s 24 of the Constitution. The declaratory relief will also serve to inform the citizens of Pietermaritzburg that the municipality's operation of the landfill site has violated their rights as enshrined in s 24. For these reasons I agree with Mr Madonsela that the declaratory relief sought will serve a lawful and useful purpose.

[102] Given that the Commission has established that the municipality has violated s 24 of the Constitution and the reasonable measures contemplated in that section, this court has no discretion but to order the declaratory relief sought.[42] Section 172(1)*(a)*[43] of the Constitution enjoins this court in peremptory terms to declare any law or conduct that is inconsistent with the Constitution invalid.

[103] The Commission contends, however, that the granting of a declaratory would not be enough. Something more is required. Under the rubric of 'just and equitable' relief this court has a wide discretion to provide the citizens of Pietermaritzburg with an effective relief that will ensure compliance by the municipality of its constitutional obligations. The remedy sought by the Commission in this regard is a structural interdict which will allow this court to exercise its supervisory jurisdiction as a vanguard of citizen's human rights.

---

[42] *Bengwenyema Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* [2010] ZACC 26; 2011 (3) BCLR 229 (CC).

[43] Section 172(1)*(a)* provides that:

'(1) When deciding a constitutional matter within its power, a court—

(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

[104] Judicial support for the Commission's contentions for this type of relief is to be found in *Fose v Minister of Safety and Security,* where the Constitutional Court held:[44]

> '. . . I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'[45]

[105] The Constitutional Court also stated in *Treatment Action Campaign* that:

> 'South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may - and, if need be, must - use their wide powers to make orders that affect policy as well as legislation.'[46]

[106] As I mentioned, the municipality considered it prudent not to oppose the grant of a structural interdict, albeit in a slightly amended form to one being sought by the Commission. Neither Mr Madonsela nor Ms Gabriel objected to the terms of a draft order proposed by Mr Moodley in this regard. As to the issue of costs, the parties were agreed that no order be made in respect thereof.

Concluding remarks

---

[44] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[45] Ibid para 69.
[46] *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 113.

[107] The manner in which the municipality has conducted itself thus far in its operation of the landfill site is disturbing. It shows scant regard for the health and well-being of its citizens and the environment. The environmental harm caused by violating the terms of its WML and failing to fulfil its constitutional duty constitutes, in my view, a harm to its citizens. This conduct should not be allowed to continue. Hopefully the terms of the order set out herebelow will serve to ameliorate and/or put an end to this continuing wrong.

[108] In conclusion I believe that the Commission, its team of investigators and legal representatives should be commended for taking up and highlighting the issues surrounding the landfill site in the public interest in order to vindicate the constitutional rights of the citizens of Pietermaritzburg. The issue of the landfill site is but a microcosm of the many other problems facing the citizens of Pietermaritzburg. This municipality like so many others in the country has simply lost touch with its citizens. The officials who are in charge of the municipality seem to forget that they are there only to serve the interests of everyone who live and work within the municipality's jurisdiction. This is why they are employed. Hardworking taxpayers and ratepayers expect nothing more and nothing else. From a 'City of Choice' the municipality and its largely incompetent, inefficient and inept officials have literally turned this city into one of filth, grime and degradation. This has to stop. Any expected changes can only be achieved not by political will which is sadly lacking but by the efforts of civil society and organisations such as the Commission herein.

Order

[109] In the result, I make the following order:

Declaratory relief

1. It is hereby declared that the first respondent is in breach of paragraph 3.1 read with paragraphs 4.1.8 and 4.1.16 of the Revised Compliance Notice (as amended) issued by the second respondent on 18 February 2020.

2. It is hereby declared that the first respondent is in breach of the Variation Waste Management Licence issued by the second respondent on 3 July 2017, in respect of the operation of the New England Road Landfill Site on Lot 1853 of the Farm Darvill No 15036, New England Road, Pietermaritzburg.

3. It is hereby declared that the first respondent is in breach of:

3.1 Section 24 of the Constitution of the Republic of South Africa, 1996;

3.2 Section 20*(b)* of the National Environmental Management: Waste Act 59 of 2008;

3.3 Section 31L(4) of the National Environmental Management Act 107 of 1998;

3.4 Section 28(1) and (3) of the National Environmental Management Act 107 of 1998;

3.5 Section 19(1) of the National Water Act 36 of 1998; and

3.6 Its obligations in terms of international law.

Structural Interdict

4. Within one (1) month of the date of this order, the first respondent is directed to file an Action Plan with this court, which shall substantially comply with the following terms. The Action Plan shall:

4.1 be detailed and comprehensive;

4.2 address all non-compliances identified by the second respondent in paragraph 3.1 of the Revised Compliance Notice;

4.3 be designed to comply with paragraphs 4.1.8 and 4.1.16 of the Revised Compliance Notice;

4.4 explain the steps that the first respondent will take in order to comply with the Revised Compliance Notice and the Variation Waste Management License, and

4.5 set measurable, periodic deadlines for progress.

5. All the parties to this application will be entitled to comment on the Action Plan within one (1) month from the date on which that plan is filed with this court.

6. The first respondent will thereafter file with this court, and serve on the other parties to this application, monthly reports indicating its progress with regard to the

implementation of the Action Plan, after its approval by the second and third respondents.

7. All the parties to the application will be entitled to comment on these monthly reports within thirty (30) days after the date on which they are filed.

8. The court may, at any stage and on its own accord, or at the instance of the applicant or the first respondent make further directions or orders it deems fit.

9. Thereafter this matter may be enrolled on a date to be fixed by the registrar in consultation with the Presiding Judge for consideration and determination of the aforesaid reports, commentary and replies.

10. Furthermore, the first respondent is directed to discharge its duty of care and remediation of environment as required by section 28(1) and (3) of the National Environmental Management Act 107 of 1998.

11. Within six (6) months from the date of this order, the first respondent is directed to file a report, under oath, with this court on the progress on the first respondent's discharge of the duty of care and remediation as referred to above.

12. There will be no order as to costs.

_____

SEEGOBIN J

APPEARANCES:

COUNSEL FOR THE APPLICANT:	G Madonsela SC (instructed by Ndlovu de Villiers Attorneys)
COUNSEL FOR THE 1ST RESPONDENT:	Mr Y N Moodley SC assisted by Mr V Moodley (instructed by Matthew Francis Inc)
COUNSEL FOR THE 2ND & 3RD RESPONDENTS:	Ms A Gabriel SC (instructed by State Attorney, KZN)
DATE OF HEARING:	28 May 2021
DATE OF JUDGMENT:	17 June 2021