

5 No time to waste. Reflections on waste management in South Africa during Covid-19

Lessons to be learned?

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Abstract

There is more and more evidence that environmental crises are reaching unsustainable levels which require urgent and drastic action. As one example, the United Nations Environment Programme's report—"Making Peace with Nature"—which was released in mid-February 2021, again, reveals that the impacts of climate change are already more severe than thought and that there is more need than ever for governments to "up their game" and expand the international legal regime to include new and meaningful, binding rules. Similarly, news headlines regularly report on the alarming rates of biodiversity loss and the scourge of plastic waste in the oceans, with predictions being that there will be more plastic than fish in the oceans by 2050. Yet government leaders have been unwilling to take the hard decisions that are necessary to stop the current trajectories of these crises.

The COVID-19 pandemic is the most immediate reminder of the consequences of taking a leisurely approach to addressing environmental issues. Early statistics showed the aggravated effects of the virus experienced by people living in polluted cities and linkages between poverty and higher death rates. This is in addition to the fact that an underlying environmental issue lies at the heart of the outbreak—namely the destruction of habitats.

Responses to the COVID-19 pandemic during 2020 and 2021 resulted in what was unthinkable two years ago as economies shut

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down across the globe. Ironically, these responses have created an opportunity to reset our thinking, not to return to business-as-usual and to tackle inequality. This resonates with international calls such as “system change, not climate change” and the UN’s Intergovernmental Panel on Climate Change’s report that if dire impacts on people across the planet are to be avoided, the time for treating environmental issues as negotiable has long passed and that the window for implementing responses is urgently narrow.

Although mainstreaming the environment into economic and social decision-making has been a requirement of international law for nearly 30 years, the facts show that we are a long way off this being a reality. In practice, environmental issues are kept in the margins of political priorities. If the discourse doesn’t change then neither will the outcome. The COVID-19 situation has demonstrated that people can and have changed their behaviour and it is these types of changes that must be implemented in response to environmental issues. Systemic change, however, must be based on policy and sound implementation practices. This chapter provides a snapshot insight into waste management activities in the period after the pandemic emerged. It explores both direct and indirect links and considers how responses to the pandemic with associated implications for waste management could have ironically triggered public health impacts. It also shows how these responses significantly impacted on a sector comprising the poorest of the poor—waste pickers—and how responses were misaligned with environmental waste management policy. It is noted that litigation related to waste management service delivery was a stark reminder of the state of environmental injustice and that it is the type of rapid intervention that occurred in response to the pandemic which is required to disrupt the disproportionate environmental burden that the poor currently experience.

1 Introduction

The COVID-19 pandemic that emerged in December 2019, triggered widespread responses which were unthinkable even a few months before. Countries across the globe implemented urgent and far-reaching measures including lockdowns, border closures and the curbing of activities in many economic sectors. These have had enormous impacts on almost every aspect of how we live, whether it be the shutting of businesses and job losses or the way in which we interact and communicate.

There is an interconnectedness and some common denominators between the pandemic and the environmental crises that we are facing¹ which raise questions as to whether the unprecedented responses to the pandemic can yield insights for much needed responses to environmental crises. With regards to the interconnectedness, both Covid and the environmental crises have come about because of people's disregard for the interdependence between humans, animals and the natural world. In the case of COVID-19, the risk was anticipated. Most emerging infectious diseases—as much as three out of four—emerge as a result of the impact that humans have on the environment where activities such as deforesting, illegal trafficking of wildlife, overharvesting and habitat encroachment increase the risk of the spread of zoonotic diseases.² In 2018, a group of experts attached to the World Health Organisation coined the term “Disease X” and predicted that the next pandemic would emerge as a result of interactions between human economic activities and wildlife.³ Daszak, one of the members of that group of experts, has pointed out that while COVID-19 is Disease X, more pandemics will follow unless they are not treated as a disaster-response issue and proactive prevention measures are implemented.⁴

In the case of the environment on the other hand, the risks are also clear. There is more evidence than ever before that current environmental crises are reaching unsustainable levels which require urgent and drastic action. Of the nine planetary boundaries that have been identified as being necessary to maintain the delicate balance of Earth's functioning ability, we are outside the safe zone of four—including climate change and biodiversity loss.⁵ This has led to

1 Armstrong, Capon and McFarlane “Coronavirus is a wake-up call: Our war with the environment is leading to pandemics” *The Conversation* <https://theconversation.com/coronavirus-is-a-wake-up-call-our-war-with-the-environment-is-leading-to-pandemics-135023> (08-10-2020).

2 United Nations Environment Programme *Making Peace with Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies* 2021 110 and “Zoonotic diseases” *Centers for Disease Control and Prevention* <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> (09-11-2021).

3 “We knew Disease X was coming. It's here now” *New York Times* <https://www.nytimes.com/2020/02/27/opinion/coronavirus-pandemics.html> (09-11-2021).

4 Ibid.

5 The concept of planetary boundaries was proposed in 2009 by research led by the Director of the Stockholm Resilience Centre, Stockholm University involving 28 internationally recognised scientists. See Rockström,

widespread, albeit not official, acceptance that human activities have caused the Earth to leave its natural geographical epoch and to move into the era of the Anthropocene.⁶ Recent reports by scientists and the United Nations do nothing to allay these Mayday alerts. The UN Environment Programme's *Making Peace with Nature* report which was released in mid-February 2021, for example, shows that the impacts of climate change are already more severe than thought and species extinction is occurring faster than at any time in history.⁷ A report published later in 2021 by Working Group I of the Intergovernmental Panel on Climate Change led the UN Secretary-General, António Guterres, to say that the Working Group's report was "a code red for humanity. The alarm bells are deafening, and the evidence is irrefutable".⁸

It is, therefore, somewhat ironic that, although proactive measures aimed at preventing COVID-19 from arising may have been lacking, the scale of the urgent responses to the pandemic is what is required in the environmental context and which world leaders have been unwilling to take, even though the failure to do so threatens to have even more enduring and calamitous impacts than the pandemic. Leaders have simply been reluctant to set ambitious environmental goals and to take the hard decisions that are necessary to stop the current trajectories of these crises. This notwithstanding, the COVID-19 responses illustrate that behavioural changes are possible in an extremely short period of time. They have provided an opportunity to reset our thinking and not to return to a business-as-usual approach to environmental management and policy. Indeed COVID-19 has illustrated that it is possible to respond to calls such as "system

Steffen, Noone *et al* "A safe operating space for humanity" 2009 *Nature* 461 472–475.

6 The term was coined by Crutzen and Stoermer in Crutzen and Stoermer "The 'Anthropocene'" 2000 in Robin, Sörlin and Warde *The Future of Nature: Documents of Global Change* 2013 479–490. See also Will, Grinevald, Crutzen and McNeill "The Anthropocene: Conceptual and Historical Perspectives" 2011 *Philosophical Transactions: Mathematical, Physical and Engineering Sciences* 842–67 and Kotzé "Rethinking global environmental law and governance in the anthropocene" 2014 *Journal of Energy & Natural Resources Law* 121–156.

7 See n 2.

8 Masson-Delmotte *et al* *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 2021*; UN News 9 "IPCC report: 'Code red' for human driven global heating, warns UN chief" <https://news.un.org/en/story/2021/08/1097362> (09-11-2021).

change, not climate change” which are made by the global climate justice movement and to properly engage with the disproportionate burden that the poor experience in dealing with these crises which has been made particularly visible since the outbreak of the pandemic.⁹

These changes need to take place in respect to one of the global environmental crises that is being faced, namely the management of waste which humans generate. It is an issue that, like many other environmental problems, has local, regional and international impacts. Recently there has been much publicity about the scourge of plastic waste in the oceans that is increasing at an alarming rate and which is already destroying marine life and posing a threat to human health.¹⁰ The curse of plastic waste, however, begins at the local level where it is not properly managed. Poor management of plastic and other waste streams at the local level can have significant environmental impacts such as water and air pollution. It can also constitute a public health hazard, like COVID-19. For example a study by Tomita *et al* found that people living within five kilometres of a landfill site in South Africa “had a 41% higher risk of asthma, an 18% higher risk of developing tuberculosis, a 25% higher chance of having diabetes, and an 8% greater chance of having depression” than people who lived further away.¹¹ They also found that the risks associated with tuberculosis, diabetes and depression were significantly higher amongst people who are poor.¹² This is significant as, historically, it is most often the poor who live closest to landfill sites¹³ and more people are living closer to landfill sites than ever before.¹⁴

This chapter provides a snapshot insight to waste management activities in South Africa in the period after the outbreak of the pandemic from the perspective of the generation of waste; the nexus between COVID-19 responses and the recycling of waste and the court’s adjudication of waste management practices by municipalities. In

9 See, for example, Finch and Hernández Finch “Poverty and Covid-19: Rates of incidence and deaths in the United States during the first 10 weeks of the pandemic” 2020 *Frontiers in Sociology* 47.

10 United Nations Environment Programme *From pollution to solution. A global assessment of marine litter and plastic pollution* 2021.

11 Tomita, Cuadros, Burns, Tanser and Slotow “Exposure to waste sites and their impact on health: a panel and geospatial analysis of nationally representative data from South Africa, 2008–2015” 2020 *Lancet Planet Health* e223 e230.

12 Tomita *et al* (n 11) e225.

13 Ruiters “Environmental racism and justice in South Africa’s transition” 2001 *Politikon South African Journal of Political Studies* 95.

14 Tomita *et al* (n 11) e231.

some cases, there are direct casual links between these activities and COVID-19 and in others not. Nevertheless, when the waste management activities with their associated health and environmental impacts are juxtaposed against responses to the pandemic, the inevitable question that arises is whether there are lessons to be learned from government's various COVID-19 response measures.

2 COVID-19's direct impacts on waste management

Some aspects of environmental management undoubtedly benefitted from Covid-related restrictions.¹⁵ During the so-called "hard lockdown" (level 5) in April 2020,¹⁶ for example, a study which solicited input from the public in six provinces found that whereas only 20.61 per cent of respondents reported air pollution as being 'low', 'very low' or 'extremely low' before the Covid restrictions were imposed, during the most restrictive Covid restrictions this percentage rose to 71.92 per cent.¹⁷ These public perceptions have been borne out by scientific studies. In one which surveyed air emission levels in 20 major cities, Johannesburg had the most significant decrease in dust (PM₅ and PM₁₀) emissions during the lockdown period of all the cities.

15 See Bashir and Shahzad "A brief review of socio-economic and environmental impact of Covid-19" 2020 *Air Quality, Atmosphere & Health* 1403; Bates, Primack and Duarte "Global COVID-19 lockdown highlights humans as both threats and custodians of the environment" 2021 *Biological Conservation* 109175 and Lal, Kumar, Kumar, Kumari, Saikia, Dayanandan, Adhikari and Khan "The dark cloud with a silver lining: Assessing the impact of the SARS COVID-19 pandemic on the global environment" 2020 *Science of The Total Environment* 139297.

16 A five level system of restrictive measures was adopted as a response to managing the pandemic with level 5 being the most restrictive and level 1 the least. These were imposed as follows: level 5 from 26 March to 30 April 2020; level 4 from 1 to 31 May 2020; level 3 from 1 June to 17 August 2020; level 2 from 18 August – 20 September 2020; level 1 from 21 September to 28 December 2020; adjusted alert level 3 from 29 December 2020 to 28 February 2021; adjusted alert level 1 from 1 March to 30 May 2021; adjusted alert level 2 from 31 May to 15 June 2021; adjusted alert level 4 from 16 June 2021; adjusted alert level 3 from 16 June to 27 June 2021; adjusted alert level 4 from 28 June to 25 July 2021; adjusted alert level 3 from 26 July to 12 September 2021; and adjusted alert level 2 from 13 September 2021 <https://www.gov.za/Covid-19/about/about-alert-system> (11-11-2021).

17 Barbieri *et al* "Survey data regarding perceived air quality in Australia, Brazil, China, Ghana, India, Iran, Italy, Norway, South Africa, United States before and during Covid-19 restrictions" 2020 *Data in Brief* 106169.

Dust levels decreased by a phenomenal 31.3 per cent compared to the same period in 2019.¹⁸

In addition to better air quality, as different countries implemented lockdown measures, regular footage emerged in the media showing animals entering areas inhabited by humans where they are not normally seen.¹⁹ During South Africa's own hard lockdown footage was posted of lions, hyaenas and African wild dogs roaming through the Skukuza golf course in Mpumalanga.²⁰ Rangers in Cape Town reported sightings of wild animals in the Table Mountain National Park approaching the roads, including shy species such as the caracal and klipspringer²¹ and there was footage of endangered African penguins walking through the streets of Simon's Town in the Western Cape.²²

These benefits of the COVID-19 restrictions revealed insights as to what can happen when there is an "anthropause".²³ However, positive impacts were not anticipated in all environmental sectors, including the waste sector.²⁴ Early in the pandemic, flags were raised about the increase in waste that would eventuate as a result of efforts

18 Barbieri (n 17). The study notes that much of this was attributable to the cessation of economic activities and the restriction on movement. However, the report also notes that 4.9 times more rain fell in Johannesburg during the lockdown than in the same period in 2019 and that this too likely contributed to the decrease of PM_{2.5}.

19 Rutz, Loretto, Bates, Davidson, Duarte, Jetz, Johnson, Kato, Kays, Mueller, Primack, Ropert-Coudert, Tucker, Wikelski and Cagnacci "COVID-19 lockdown allows researchers to quantify the effects of human activity on wildlife" 2020 *Nat Ecol Evol* 1156–1159 1156.

20 "First Lions and Now Penguins in the Streets" *Travel SA People* <https://travel.sapeople.com/2020/04/18/watch-first-lions-and-now-penguins-in-the-streets/> (09-11-2021).

21 See n 20. In some instances the sense of animals 'reclaiming' their space was welcomed by many people and videos of these events went viral. They were not all necessarily accurate. See in this regard, "Fake animal news abounds on social media as coronavirus upends life" *National Geographic* <https://www.nationalgeographic.com/animals/article/coronavirus-pandemic-fake-animal-viral-social-media-posts> (09-11-2021).

22 See n 20.

23 The term was coined by Rutz *et al* (n 19).

24 One positive in South Africa was that strict lockdown measures resulted in a decrease in litter, although this increased again as lockdown measures eased which shows a clear link between human activity levels and littering and arguably that the positive benefit was short-lived as underlying behavioural patterns had not changed. Ryan, Maclean and Weideman "The impact of the COVID-19 lockdown on urban street litter in South Africa" 2020 *Environmental Processes* 1303–1312.

to contain the transmission of the virus.²⁵ This was certainly correct in the case of medical waste. There was a considerable rise in the use of face masks, gloves and aprons in many countries—all of which had to be regarded as potentially contaminated and, therefore, as hazardous waste requiring strict treatment protocols.²⁶ The impact of pandemic responses to this type of waste generation is illustrated in Wuhan where the pandemic originated. By March 2020, Wuhan experienced an increase in medical waste from 40 to 50 tons per day to 247 tons.²⁷ Similar increases are also reported for other cities such as Manila, Kuala Lumpur, Hanoi and Bangkok.²⁸

South Africa was not exempt from the increase in waste generation stemming from the use of personal protective equipment. In 2020, it was reported to have an 80 per cent acceptance rate for the wearing of masks which is estimated to translate to a daily usage of 63 578 916 masks.²⁹ Apart from adding to the amount of waste needing to be landfilled, the waste from these masks constituted a new source of litter and has found its way into the natural environment.³⁰

Lockdown measures also resulted in an increase in domestic waste in many countries such as the United Kingdom. Although this does appear to be location specific and dependent on the type of measures that a country imposed,³¹ it is likely that this occurred at least in some areas in South Africa because of the additional use of consumables such as sanitisers and the extra packaging associated with on-line purchases.

25 Sharma, Vanapalli, Cheela, Ranjan, Jaglan, Dubey, Goel and Bhattacharya “Challenges, opportunities, and innovations for effective solid waste management during and post COVID-19 pandemic” 2020 *Resources, Conservation and Recycling* 105052.

26 Olatayo, Mativenga, and Marnewick “COVID-19 PPE plastic material flows and waste management: Quantification and implications for South Africa” 2021 *Science of The Total Environment* 148190. See also Nzediegwu and Chang “Improper solid waste management increases potential for COVID-19 spread in developing countries” 2020 *Resources, Conservation and Recycling* 104947 104948 regarding concerns that this waste posed an additional risk for developing countries with poor waste management infrastructure.

27 You, Sonne and Ok “COVID-19’s unsustainable waste management” 2020 *Science* 1438.

28 Ibid.

29 Nzediegwu and Chang (n 26).

30 Olatayo *et al* (n 26).

31 Olatayo *et al* (n 26) and Fan, Jiang, Hemzal and Klemeš “An update of COVID-19 influence on waste management” 2021 *Science of The Total Environment* 142014.

Coupled with these altered waste generation patterns, COVID-19 also disrupted waste management in some instances because of labour shortages as workers contracted the virus.³² This was true in the case of Johannesburg where the city provided an update on “the unfortunate state of service delivery by the entities as a direct result of the COVID-19 pandemic” on 8 July 2020 which indicated that 97 workers were infected and that, as a result, four waste depots had been closed in a month and waste collection in some areas had been intermittent.³³ This may have had knock-on effects as the storage of waste for sub-optimal periods attracts vectors with associated disease risks.³⁴

The pandemic, therefore, placed pressure on existing waste management systems which also caused some to question whether developing countries with inadequate waste management systems posed an increased risk to transmission of the virus.³⁵ This concern is relevant in the case of South Africa. Many municipalities were already facing significant challenges in discharging the waste management service delivery function before the outbreak of the pandemic.³⁶ These ranged from the collection function where approximately a quarter (3.67 million tonnes) of domestic waste is not collected and managed through the formal waste collection system,³⁷ to the treatment and disposal of domestic waste where it is formally collected but not disposed of to well managed landfill sites.

Regarding the latter, the 2018 State of Waste Report indicates that the vast majority of the 75 municipal landfills which were assessed were less than 50 per cent compliant with regulatory requirements, with an alarming third of them being between 0 and 25 per cent compliant.³⁸ In addition, many of the larger municipalities are facing challenges in securing enough airspace capacity. For example, the report notes that Newcastle Municipality has already run out of airspace and that

32 Sharma *et al* (n 25) 105052.

33 “Covid-19 impact on services” *Pikitup* <http://www.pikitup.co.za/Covid-19-impact-on-services/> (09-11-2021).

34 Tomita *et al* (n 11) note that vectors such as rats contribute to respiratory diseases such as asthma and hantavirus pulmonary syndrome e224.

35 Nzediegwu and Chang (n 26) 104948.

36 Polasi, Matinise and Oelofse *South African municipal waste management systems: Challenges and solutions* (2020).

37 Rodseth, Notten and Von Blottnitz “A revised approach for estimating informally disposed domestic waste in rural versus urban South Africa and implications for waste management” 2020 *South African Journal of Science* 5635.

38 Department of Environmental Affairs 2018 57–58.

the City of Cape Town, Mogalakwena, Steve Tshwete and the City of Johannesburg have less than ten years of airspace left.³⁹

This official research regarding the discharge of the waste management function matches public perceptions of government performance as Statistics South Africa notes high levels of dissatisfaction with the waste management service delivery.⁴⁰ Other studies also echo the reality of poor service delivery in many municipalities. For example, the 2020/21 Gauteng City-Region Observatory Quality of Life Survey notes an average decline in weekly waste collection service in Gauteng by five per cent in the last approximately five years and that there are also marked differences between municipalities. The provincial average may, therefore, disguise some particularly poor performers such as Emfuleni where access to weekly collection in the 2015/16 reporting period was reported to be 80 per cent; 57 per cent in 2017/18 and only 26 per cent in 2020/21.⁴¹

The impact of the pandemic on waste generation is not unique in an emergency situation and highlights the need for there to be adequate capacity to manage existing and abnormal waste loads. Given the challenges which government experiences during ordinary times, there is something of a paradox that the health measures which were imposed to address the spreading of COVID-19 could have itself contributed to an increased risk of another public health issue where that waste was not collected and disposed of properly.

3 COVID-19 regulations and waste management policy

Apart from concerns about increased waste generation, perhaps the most immediately visible link between COVID-19 and waste management was in respect of a poor and marginalised informal sector, namely, waster pickers. In the first flurry of COVID-19 regulations that were passed in terms of the Disaster Management Act, 2002, a list of essential services was included which were allowed to operate

39 State of Waste Strategy (n 38) 48.

40 Statistics South Africa *The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data* Report No. 03-01-22 2016 (2016) 59 59.

41 De Kadt, Hamann, Mkhize and Parker *Quality of Life Survey 6 (2020/21): Overview Report 2021* Gauteng City-Region Observatory 88-89 https://cdn.gcro.ac.za/media/documents/2021.09.09_QoL_6_2020-21_overview_report_v7.pdf (09-11-2021).

during the hard lock down/ level 5 period.⁴² Waste and refuse removal services were included in the list.⁴³ But it soon became apparent that the authorities interpreted this narrowly as applying to waste collection for disposal by municipalities and that the category did not extend to the 60 000 to 90 000 waste pickers and their recycling activities.

The approach was a disjuncture from prevailing environmental management approaches. Since democracy, South Africa has sought to progressively update its legislative and policy approach to waste management. A key part of this has been recognising and redressing the relationship between the poor and waste as well as the ineffectiveness of regulation focussing on managing the problem i.e. the disposal of waste rather than the underlying cause, namely, the waste being produced in the first place. These two priorities are linked. Whilst the poor produce the least waste, they frequently bear the effects of waste disposal disproportionately as landfill sites have historically been located closer to poor communities.⁴⁴ Many also make their living from waste through picking on collection days or at landfill sites.

As part of the approach to address this, the environmental law reform process which government embarked on in 1995 adopted the internationally accepted waste minimisation hierarchy in both policy and legislation. In terms of the waste minimisation hierarchy, the approach to waste management is reprioritised. Disposal becomes the least preferred option and the avoidance of waste generation the goal. Where waste is generated, recycling, reuse, recovery and treatment of waste are preferred over disposal.⁴⁵

The waste minimisation hierarchy was first reflected as a principle of environmental management in the National Environmental Management Act 108 of 1998 (NEMA).⁴⁶ It was subsequently front and centre of the policy approach to waste management in the White Paper on Integrated Pollution and Waste Management for South Africa: A Policy on Pollution Prevention, Waste Minimisation, Impact Management and Remediation which was adopted in 2000 as a basis

42 Act 57 of 2002 and Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 (Disaster Management Regulations) GNR 318 GG 43107 18 March 2020.

43 Disaster Management Regulations (n 42) Annexure B(B.15).

44 Ruiters (n 13).

45 Environmental Assessment Institute *Rethinking the Waste Hierarchy* (2005) <https://www.osti.gov/etdeweb/servlets/purl/20623175> (11-11-2021) 1.

46 s 2(4)(a)(ii).

for developing new legislation.⁴⁷ Apart from the title of the policy itself signalling the shift in emphasis away from disposal, the contents of the policy re-emphasise the waste minimisation hierarchy throughout. The policy laid the bedrock for subsequent law reform and the resulting architecture of the National Environmental Management: Waste Act 59 of 2008 is structured around giving effect to it.⁴⁸ Indeed, the objectives of the act set out in section 2 include the following:

- “2(a) to protect health, well-being and the environment by providing reasonable measures for—
- (i) minimising the consumption of natural resources;
 - (ii) avoiding and minimising the generation of waste;
 - (iii) reducing, re-using, recycling and recovering waste;
 - (iv) treating and safely disposing of waste as a last resort”

Despite the shift in policy, practical realisation has been slow at the municipal level and waste pickers have contributed more to the recycling effort than most municipalities.⁴⁹

It was in this context that Lawyers for Human Rights, acting on behalf of several groups of waste pickers, launched an urgent application soon after the level 5 lockdown started requesting a declaratory order that waste pickers falls within the category of essential services.⁵⁰ The court papers which were filed reveal the true hardships that waste pickers are exposed to in their daily lives including their dependency on the environment and their inability to be resilient to change. The papers point out, for example, that many waste pickers do not have access to water and rely on people making water available when they do collections. They also frequently have to cook on open fires, and apart from their income being truncated, the inability to move around to find wood for the fires was a further obstacle. Food donations which they had received also stopped.⁵¹

47 GN 227GG 20978 17 March 2000.

48 Personal knowledge, legal drafter of the Act.

49 The State of Waste (n 38) 2 report indicates that only 10 per cent of waste is recycled.

50 “Tshwane waste pickers ‘face starvation’ as court dismisses their plea for lockdown exemption” *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-09-tshwane-waste-pickers-face-starvation-as-court-dismisses-their-plea-for-lockdown-exemption/> (09-11-2021). The court order is not publicly available.

51 *Ibid.*

The minister of co-operative governance and traditional affairs, Nkosazana Dlamini-Zuma, opposed the application. The papers filed by her were at odds with government policy. In part they appeared to simply not appreciate the position that poor and marginalised groups find themselves in and the limitations that they have in making choices. They state both that the lockdown measures “constitute sacrifices that millions of South Africans are prepared to make in order to save our nation”⁵² and that the “applicants’ contention that they should be regarded as an essential service ... is opportunistic”.⁵³ In addition, they do not reflect an appreciation for the waste minimisation hierarchy and the role that it plays in the waste management cycle as the minister stated that: “The work that the applicants are engaged in does not entail waste and refuse removal, at least not in the conventional sense” and that it is an economic activity as “[i]t entails the collection and sale of abandoned material”.⁵⁴

The minister’s approach overlooked the role that waste pickers play in the waste management service delivery function. It is estimated that 80 to 90 per cent of paper and packaging is recovered and collected by the pickers and that they have saved municipalities between R309.2 and R748.8 million in landfill air space per annum as a result of their diverting waste away from landfills.⁵⁵

The court dismissed the application. The hardships that ensued were well documented in the media.⁵⁶ Apart from the impacts on the waste pickers the situation also disrupted waste management. As a CSIR report notes, stopping waste picker activities during the most restrictive periods of lockdown “resulted in stockpiles of recyclable waste at processing facilities while in lockdown with the knock-on

52 Ibid.

53 “Lockdown: Court decision a heavy blow to waste-pickers’ hopes” *GroundUp* <https://www.groundup.org.za/article/Covid-19-court-decision-heavy-blow-waste-pickers-hopes/> (09-11-2021).

54 Ibid.

55 Godfrey, Strydom and Phukubye “Integrating the Informal Sector into the South African Waste and Recycling Economy in the Context of Extended Producer Responsibility” February 2016 CSIR <https://www.csir.co.za/documents/policy-briefinformal-sectorcsir-finalpdf> (09-11-2021).

56 See for example, “Waste pickers reclaim their power” *Mail and Guardian* <https://mg.co.za/article/2020-04-08-waste-pickers-reclaim-their-power/> (09-11-2021) and “Lockdown pushed waste pickers to near-starvation, says report” *Business Day* <https://www.businesslive.co.za/bd/national/2021-04-20-lockdown-pushed-waste-pickers-to-near-starvation-says-report/> (09-11-2021).

effect of backlogs when services may resume, and a resulting lower price paid for recyclables”.⁵⁷

From a regulatory perspective, other developments which ensued in the next year offered both hope and further woes for waste pickers. In this regard, to alleviate the hardships under the level 5 lockdown, the minister of environmental affairs passed directions in terms of the Disaster Management Act on 14 May 2020 in terms of which pickers were allowed to resume their activities if they obtained permits from the municipality under level 4 COVID-19 restrictions.⁵⁸ Whilst undoubtedly demonstrating a sensitivity to the plight of pickers, it provided a challenge which waste pickers had not been exposed to before as they had not had to follow such administrative processes.⁵⁹ This decision too was challenged in court, but was struck off the roll for lack of urgency.⁶⁰

A further policy shift occurred in August 2020 when a waste picker integration guideline was adopted by government.⁶¹ Much of its approach was incorporated into the National Waste Management Strategy 2020 that became effective in January 2021 and which recognises the role of waste pickers and the need to strengthen that role in many places.⁶² For example, it notes that “[i]n the absence of formal systems for separation at source of recyclables, an informal sector comprised of waste pickers has emerged that contributes significantly to the collection of recyclables”.⁶³

On the negative side, certain municipalities demonstrated a misalignment with national government trends. The City of Johannesburg proposed imposing a recycling levy on residents and to award contracts to private companies to collect separated waste, side-

57 Polasi *et al* (n 36) 11.

58 Disaster Management Act (57/2002): Directions regarding measures to address, prevent and combat the spread of COVID-19 in relation to recycling of waste GN 539 GG 43325 14 May 2020.

59 “Lockdown: Waste pickers fight work permit regulation” *IOL* <https://www.iol.co.za/pretoria-news/news/lockdown-waste-pickers-fight-work-permit-regulation-48508907> (09-11-2021).

60 “Waste pickers’ matter struck off Gauteng High Court, Pretoria roll” *IOL* <https://www.iol.co.za/pretoria-news/waste-pickers-matter-struck-off-gauteng-high-court-pretoria-roll-48662052> (09-11-2021).

61 Department of Environment, Forestry and Fisheries and Department of Science and Innovation “Waste picker integration guideline for South Africa: Building the recycling economy and improving livelihoods through integration of the informal sector” 2020.

62 GN 56 GG 44116 28 January 2021.

63 National Waste Management Strategy (n 62) 28.

lining waste pickers in the process.⁶⁴ After numerous objections, the proposal was withdrawn.⁶⁵

The consequence of the COVID-19 responses in this instance was that government did not speak with one voice and suspended its own policy and legislative approach to waste management during certain periods of the lockdown. Given the urgency of the various environmental crises, it would be far more preferable in times of emergency for disaster management responses to be reconciled with environmental ones rather than environmental issues being afforded a Cinderella status in terms of which they can be marginalised whenever it is expedient to do so.

4 Service delivery and the courts during COVID-19

The need for waste pickers in realising the waste minimisation hierarchy was highlighted by litigation against municipal basic service delivery failure which also came to the fore during the COVID-19 lockdown. The first which gained attention during this period related to the South African Human Rights Commission's (SAHRC) investigation into the Msunduzi Municipality's New England landfill site in Pietermaritzburg in 2020.⁶⁶ The SAHRC initiated the investigation after receiving what the court describes as a "desperate cry for help from the citizens of Pietermaritzburg to make the municipality accountable for its continued failure to maintain the landfill site in a manner that would not be injurious to their health and well-being".⁶⁷ As a result of its findings during this investigation, the SAHRC gave the municipality notice in October 2020 that it would be initiating legal proceedings.⁶⁸

In the proceedings, the SAHRC sought a declaratory order and a structural interdict in terms of which the court would exercise a form of supervisory jurisdiction.⁶⁹ The municipality opposed the

64 "Johannesburg is threatening to sideline informal waste pickers. Why it's a bad idea" *University of the Witwatersrand* <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-05/johannesburg-is-threatening-to-sideline-informal-waste-pickers-why-its-a-bad-idea.html> (09-11-2021).

65 "CoJ, Pikitup withdraw R50 recycling levy proposal" *Engineering News* <https://www.engineeringnews.co.za/article/coj-pikitup-withdraw-r50-recycling-levy-proposal-2021-05-13> (09-11-2021).

66 *South African Human Rights Commission v Msunduzi Local Municipality and Others* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021).

67 the *Msunduzi* case (n 66) par 14.

68 the *Msunduzi* case (n 66) par 18.

69 the *Msunduzi* case (n 66) par 10.

granting of declaratory relief, but ultimately did not challenge the application for a structural interdict.⁷⁰ The judgment in *South African Human Rights Commission v Msunduzi Local Municipality and Others* provides a summary of the compliance measures which the provincial and national environmental departments have taken over the last few years, including issuing various compliance notices in respect of significant contraventions—which were themselves not complied with—in an effort to address the situation. These reflect an inability of the other spheres of government to hold the municipality to account effectively, despite clear attempts to do so.

The judgment also notes the fires that break out on a too frequent basis at the landfill site. Clearly these are serious fires, as fires during October and December 2019 were discussed by the provincial cabinet and one fire during July 2020 lasted five days—with smoke from the fire enveloping major portions of the city and resulting in the N3 highway being closed due to a lack of visibility.⁷¹

The court made a number of important findings that are relevant to the jurisprudential development of environmental law but which are beyond the scope of this article to discuss— other than to mention one which may provide welcome news to members of civil society who wish to hold polluters to account. This was the court’s finding in relation to the municipality’s argument that the SAHRC had not placed scientific or medical evidence before the court which proved unacceptable levels of pollution were caused by the landfill.⁷² The court rejected this argument, accepting the applicant’s argument that there is judicial authority to the contrary and the academic work of Devenish which points out that the concept of environment has now acquired a more sociological element and that in the instance of section 24(b) of the environmental right—which imposes an obligation on government to take measures to secure the environmental right—that does not require harm to wellbeing to be proved.⁷³

In what ultimately ended up being a strong rebuke of the municipality, the judgment notes that “[t]he citizens of Pietermaritzburg, including the highly disadvantaged community of the Sobantu township, are justifiably aggrieved”.⁷⁴ The court was

70 the *Msunduzi* case (n 66) par 13.

71 the *Msunduzi* case (n 66) par 49 and 51.

72 the *Msunduzi* case (n 66) par 97.

73 the *Msunduzi* case (n 66) par 97. Devenish *The South African Constitution* (2005) par 111 at 123.

74 the *Msunduzi* case (n 66) par 91.

persuaded that there was “an abject failure” to comply with the environmental right and associated legislation and that:

“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”.⁷⁵

The court concluded its findings with an observation that the municipality’s conduct “shows scant regard for the health and well-being of its citizens and the environment”⁷⁶ and by noting that:

“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. ... 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”.⁷⁷

The court accordingly granted a declaratory order that the municipality was in breach of the latest compliance notice issued to it, its waste management licence and the environmental right as well as various other Acts. It also granted a structural interdict that required the municipality to develop an action plan and submit monthly reports to the court—all of which can be commented on by the public—and an order that the municipality discharge its duty of care and remediation in terms of section 28 of NEMA and report to the court on the steps that it has taken to do so.

⁷⁵ the *Msunduzi* case (n 66) par 88.

⁷⁶ the *Msunduzi* case (n 66) par 107.

⁷⁷ the *Msunduzi* case (n 66) par 108.

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The second judgment, which was handed down in September 2021, relates to Makana Municipality in the Eastern Cape Province. A judgment had already been handed down in January 2020 in the matter of *Unemployed Peoples Movement v Premier, Province of the Eastern Cape* ordering that the council of the municipality be dissolved and that a temporary administrator be appointed because it had breached its obligations in terms of section 152 and 153 of the constitution.⁷⁸ As part of its decision in that judgment, the court was required to consider the contention that the municipality had infringed the environmental right in section 24 of the constitution. There are several references to the poor state of waste management, including the court noting a 2015 court order requiring the municipality to comply with its waste permit conditions as well as granting extensive structural relief⁷⁹ and that “[p]oor waste collection leaves Grahamstown East in a permanent state of unhygienic filth. Illegal dumping sites are not managed, controlled or cleaned, and large swathes of land are breeding grounds for disease”.⁸⁰

The consideration of waste service delivery in the *Unemployed Peoples Movement* case also contributed to the court finding that the municipality was in breach of sections 152 and 153 of the Constitution *inter alia* because it had failed “to ensure the provision of services to its community in a sustainable manner” and had failed “to promote a safe and healthy environment for its community”.⁸¹ An application by several of the respondents to appeal that decision was dismissed in May.⁸²

Efforts to hold the municipality to account were not over, however. In October 2020, proceedings were again launched against the municipality and other respondents by the Ezihagweni Street Committee and Mary Waters High School.⁸³ This application focussed solely on the infringement of the residents’ environmental right through the lens of the consequences of the failed waste management service delivery, including the mushrooming of illegal dump sites as a result of erratic collection services.

78 (553/2019) [2020] ZAECGHC 1 (14 January 2020).

79 the *Unemployed Peoples Movement* case (n 78) par 40.

80 the *Unemployed Peoples Movement* case (n 78) par 46.

81 the *Unemployed Peoples Movement* case (n 78) par115.

82 *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* (553/2019) [2020] ZAECGHC 47 (21 May 2020).

83 “Makhanda residents take Makana Municipality to court over uncollected refuse” *Legal Resource Centre* <https://lrc.org.za/october-2nd-2020-media-release-makhanda-residents-take-makana-municipality-to-court-over-uncollected-refuse/> (09-11-2021).

5 Reflections on waste management in South Africa

The reality of the conditions which residents in poor areas were forced to contend with is explained by Ms Moholo, one of the street committee members who lives in an area which is referred to as “Ezihagweni” meaning “place of pigs” or “pig sty”, as follows:

“There is another, even larger illegal dumpsite 200 metres along the road from my house in the opposite direction and close to DD Siwisa Primary School. ... The dumpsite has been there for more than five years. The site has never been cleared in the past five years. The rubbish smells terrible and often makes learning conditions at the school intolerable. The school is forced to keep classroom windows closed, even when the weather is hot. Also, young learners often play at the illegal dumping site after school as it is in an open and unsupervised space.

...

Sometimes, to clear the informal dumpsites, residents burn the rubbish, which produces smoke and fumes. Animals such as dogs, donkeys and goats rip open rubbish bags at the unofficial dumping sites. The smell is always unpleasant, and at times it is unbearable. It is particularly bad during warm weather. I don't open my door anymore when it is hot because the smell comes into my house and is overpowering”⁸⁴.

In the face of this daily reality where Ms Moholo raises important health and well-being issues, it must have been a welcome ruling that the court made in September 2021. The court granted an order against the municipality which included a structural interdict. It declared the waste management by-laws to be unconstitutional to the extent that they fail to protect and fulfil the residents' right to an environment that is not harmful to their health and ordered the municipality to amend them within eight months. It also ordered the municipality to clean up a list of illegal dumpsites within 14 days; identify and clean up additional dumpsites within 120 days; provide refuse bags to residents every week within 14 days of the order and provide receptacles around the town within 60 days. It further ordered a range of other steps aimed at improving the quality of waste service delivery within specified time

84 “The filth and the fury: Desperate Makhanda residents obtain court order forcing municipality to clean up the town” *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-09-15-the-filth-and-the-fury-desperate-makhanda-residents-obtain-court-order-forcing-municipality-to-clean-up-the-town/> (09-11-2021).

periods and with an order that the municipality report to the court on its progress.⁸⁵

Shortly after the Makana Municipality order, another Eastern Cape municipality was the subject of a court ruling in October 2021. In this instance, and again after repeated enforcement attempts by the provincial regulatory sphere of government, the Walter Sisulu municipality entered into a plea and sentence agreement in respect of its failure to manage its Aliwal North landfill site. In what is likely the first criminal conviction of a municipality in respect of a waste matter, the municipality was fined R1 million, suspended for five years, and ordered to implement a compliance notice issued to it by the provincial department which required it to close and rehabilitate the landfill site.⁸⁶ Like the examples discussed above, this site too was causing health issues. A community member who lobbied for action to be taken noted that the smoke from the site threatens the health of the Dukathole Township and that “the overfilled dumping sites become breeding grounds for rodents, snakes and insects, which can spread diseases and cause harm to residents”.⁸⁷

These judgments send a strong signal to municipalities regarding their waste management responsibilities and what will, or will not be, tolerated by the courts. While this approach to emphatically holding up the environmental right is to be welcomed, it may also be questioned what the court’s response will be if the municipalities do not comply with the judgments, as they have done in the wake of the administrative enforcement mechanisms which other spheres of government have used in respect of the management of the landfill. They also call into question the potential of cooperative governance as a mechanism for contributing to the holistic actions that are required to address environmental crises, many of which require local intervention and management.

85 The order is available at https://www.groundup.org.za/media/uploads/documents/makhanda_order.pdf (09-11-2021).

86 “Eastern Cape municipality given suspended fine of R1m and forced to relocate mismanaged landfill site” *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-10-13-eastern-cape-municipality-given-suspended-fine-of-r1m-and-forced-to-relocate-mismanaged-landfill-site/> (11-11-2021).

87 Ibid.

5 Conclusion

The pandemic shows that it is possible for government to impose drastic changes in a short period of time even if they result in far-reaching societal consequences. It is precisely this type of rapid change that is needed to address the environmental crises. In the case of waste management, like COVID-19, poor waste management practices have public health and environmental implications and also disproportionately affect the poor. These implications have attracted far less popular attention and less severe regulatory response. As an example, the significantly increased risk of asthma, diabetes and depression—particularly amongst the poor—which is associated with living near a landfill site can, as Tomita *et al* note, “have deadly consequences when left untreated, yet are often neglected when compared with other public health problems in South Africa, such as the HIV and tuberculosis epidemic”.⁸⁸

The snapshot provided above suggests that while the courts may be ready for a new discourse in which they are firmer and more interventionist in their judgments and more sympathetic to the plight of the poor, a sound environmental discourse has not uniformly taken root amongst politicians. In fact, the lockdown period may in general rather have reflected a magnification of the pre-existing failures to uphold the environmental right and policy and of systemic societal injustice rather than being seized on as an opportunity for rapid change.

In the wake of COVID-19, this making of environmental injustice more visible ought to be used as a catalyst to pant rather than breathe life into the constitutional aspirations and environmental right with a renewed sense of urgency. There clearly needs to be a narrowing of the gap between COVID-19 type responses and environmental ones if the waste management crisis is to be arrested and environmental injustice addressed.

One light on the horizon is that the minister of environmental affairs presided over the African Ministerial Conference on the Environment (AMCEN) for a two year period, much of which coincided with the lockdown.⁸⁹ ACMEN produced an African Green Stimulus Programme during this time which is an “initiative developed to

⁸⁸ Tomita *et al* (n 11) e225.

⁸⁹ Opening remarks by Ms Barbara Creecy, minister of forestry, fisheries and the environment of the Republic of South Africa on the occasion of part one of the 18th Ordinary Session of the African Ministerial Conference on the Environment (AMCEN) virtual meeting <https://www.gov.za/>

support the Continent's recovery response in a sustainable manner to the devastating socio-economic and environmental impacts of the COVID-19 Pandemic".⁹⁰ Waste is mentioned throughout the document and features as a priority area.⁹¹ The programme is drafted in reasonably high-level wording, but perhaps it will add impetus to building the required waste management political will and capacity. It is hoped so because, if the discourse doesn't change, neither will the outcome and the unsustainable status quo will remain.

speeches/minister-barbara-creecy-18th-ordinary-session-african-ministerial-conference-environment (11-11-2021).

90 *African green stimulus programme* (draft) January 2021 <https://wedocs.unep.org/bitstream/handle/20.500.11822/34409/AGSP.pdf?sequence=3> (11-11-2021).

91 See, for example, (n 90) sections 5.1 and 5.11.