PART III:

WATER GOVERNANCE,

MANAGEMENT AND USE

Chapter 19:
Pollution of water in South Africa by untreated sewage: addressing the governance issues

Michael Kidd

1 Introduction

Anyone who follows developments in the water sector in South Africa will be aware of the pervasive problem of pollution of South Africa's water resources by untreated sewage over recent years. Not only is this acknowledged by the government in the Green Drop Reports (discussed further below), but the media has been replete with stories relating to this problem,[1] the number of news items reflecting the seriousness of the situation. The primary cause of the problem is municipal mismanagement of water treatment and sewage reticulation, which in most cases involves non-compliance with applicable laws. This creates compliance and enforcement complications due to the intra-governmental nature of the relationship between regulator and 'offender' and the South African laws relating to cooperative government; or, perhaps more accurately, interpretations of these laws. While recognising that there are elements other than law that play a role in this scenario, this chapter uses a legal lens to consider the relevant governance framework in relation to water treatment and recommends ways of clarifying and addressing poor governance, as a first and necessary step in addressing the problem.

Having described the problem in more detail, the chapter will then consider the governance structure in relation to water treatment in South Africa. This will be followed by an evaluation of how water governance is failing in the country. The chapter concludes with a set of recommendations, based on existing applicable law, on how to address the concerns. In all cases the focus on governance will be limited to the legal aspects of governance, as explained in more detail later.

1 See, for example, Bronkhorst (2014); van der Rheede (2015); Kings (2015); Qukula (2015); Kings (2017); and *The Citizen* (2017).

2 Sewage pollution in South Africa: highlighting the problem

The 2009 Green Drop Report[2] released by the national Department of Water (DWS)[3] indicated that, of the 449 water treatment plants assessed for the report (53% of the total number in the country), only 65 (14.5%) were in compliance with legal standards applicable to the release of treated effluent. It is likely that very few of the plants not assessed were compliant either.[4] The 2009 Green Drop Report provided a significant amount of detail in relation to the performance of individual treatment plants, but this level of detail was absent from subsequent reports.

In the 2011 Green Drop Report[5] there was far wider coverage: 821 of the 852 waste water systems were assessed, from all 156 municipalities in the country.[6] Details of compliance with applicable legal standards were not provided in this Report, but the overall results (based on a combination of factors affecting the risk involved with the plant, including legal compliance) indicated that only 44% of the plants managed to score over 50% in the rating.

The third, and last available, Green Drop Report, from 2013,[7] assessed a total of 824 waste water treatment works (WWTWs) from 152 municipalities,[8] and there was a slight improvement to 50.4% of the plants scoring over 50%.[9] A total of 248 systems received scores of less than 30%, which the Report labels as 'systems in crisis'.[10]

More recent reports have not been published, although widespread evidence of continuing problems with sewage contamination suggest little if any improvement. It has been suggested by the main opposition political party (the Democratic Alliance) that one of the reasons for non-publication of more recent reports is avoidance of publishing information which would embarrass local governments ahead of the 2016 local government elections throughout the country.[11] This would probably also go some way to explaining why the reports after 2009 contained little detailed information about individual WWTWs.

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2 Department of Water Affairs (2010).
3 The acronym DWS is used in this chapter to refer to the current name of the Department, the Department of Water and Sanitation. It has previously been called the Department of Water Affairs (DWA) and before that the Department of Water Affairs and Forestry (DWAF).
4 For further detail on the 2009 Green Drop Report, see Kidd (2011).
5 Department of Water Affairs (2012).
6 Ibid: 11.
7 Department of Water Affairs (2013). All that was released for public consumption was the Executive Summary of this Report.
8 The total number of municipalities in the country had been reduced from 156 to 152 over that period.
9 Department of Water Affairs (2013: 2).
10 Ibid.
11 See report at <https://www.da.org.za/2016/01/mokonyane-withholding-blue-and-green-drop-reports-to-hide-poor-anc-performance/> (accessed 9-4-2018).

As implied by the information set out above, the vast majority of the WWTWs assessed in these reports (which assess the overwhelming majority of those actually operating in the country) are managed by local government bodies and not by private operators. The legal provisions relating to this governance arrangement are explained in the next part of the chapter.

3 Legal governance structure for water in South Africa

3.1 Water governance generally

According to the Food and Agriculture Organization of the United Nations (FAO), water governance:[12]

> relates to the enabling environment in which water management actions take place: that is, the overarching policies, strategies, plans, finances and incentive structures that concern or influence water resources; the relevant legal and regulatory frameworks and institutions; and planning, decision-making and monitoring processes.

Where the entity that is primarily responsible for water governance is the government, and the government is one that operates in accordance with the rule of law, the 'relevant legal and regulatory frameworks and institutions' are the keystone of the governance framework. It is the legal framework that provides the authority for the government to make the underlying policy decisions relating to water issues, to carry out the necessary planning, strategising and decision-making, make provision for and mobilise the necessary finances, and ultimately ensure that there is compliance with the legal requirements by all players in the water sector. It is because the legal framework is the most important aspect of the governance framework, that it forms the focus of this chapter.

The legal framework operates in (at least) two relevant dimensions in relation to water governance. The first is the law on paper. This (decided and publicised laws) is clearly a prerequisite for any water governance worthy of the description. Its overall quality (on paper) will be determined by how well it provides (on paper) for the other aspects of governance – planning, strategising, decision-making, finances, monitoring and securing compliance with the laws. But it is trite that paper laws are not sufficient. The second dimension is how these laws are utilised: how they are implemented by the relevant legal institutions and how compliance with the laws is secured in practice by a combination of monitoring and enforcement, whatever form the latter takes. Underpinning this second dimension is the way in which the relevant legal institutions understand their legal mandates in relation to water governance. This is an important

12 FAO (2018).

theme in the South African situation discussed in this chapter, as will become apparent below.

3.2 The relevant legal framework in South Africa

South Africa's constitutional structure involves three spheres of government: national, provincial and local. It is important to understand these spheres not as levels in a hierarchical sense, but as individual spheres of government that each have their own 'functional areas' (the term used in the Constitution)[13] of legal authority. In the functional area of water, the overall governance of water is an exclusive national competence in terms of the Constitution, and this responsibility is carried out by the national Department of Water and Sanitation (DWS). Although this is not explicitly indicated by the Constitution, all those functional areas that do not appear on either of Schedule 4 (functional areas of concurrent national and provincial legislative competence) or Schedule 5 (functional areas of exclusive provincial competence) are regarded as being of exclusive national competence.

Local government (municipal) powers and functions are provided for in Section 156 of the Constitution, which provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and any other matter assigned to it by national or provincial legislation. Part B of Schedule 4 includes the item: Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. Consequently, the governance and management of water resources generally is legally provided for by the National Water Act,[14] and exercised by the national DWS. The latter has provincial branches but these are branches of the DWS located in provinces, not part of provincial departments, provinces having no constitutional competence – neither legislatively nor administratively – for water matters. Governance and management of water services (in relation to provision of domestic water supplies and sanitation) is the responsibility of local government in terms of the Water Services Act.[15] Related to this, access to water 'services' (such as household and domestic use) is the responsibility of local government whereas access to water 'resources', for productive use such as irrigation, industry and bulk supply to local government, is the responsibility of the DWS.

The Water Services Act deals with the provision of water supply services and sanitation services, the ambit of which includes the operation of WWTWs. Every 'water

13 Constitution of the Republic of South Africa, 1996.
14 Act 36 of 1998.
15 Act 108 of 1997.

services authority', defined in the Act as a municipality,[16] is under a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.[17] A 'water services provider' is "any person who provides water services to consumers or to another water services institution",[18] and most water services authorities are also water services providers. In other words, most municipalities play the role of water services providers in terms of the Act in their areas of jurisdiction. This is why most WWTWs are operated by municipalities, as observed above.

Juxtaposed with this governance arrangement is the explicit recognition in the National Water Act's preamble that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, interdependent cycle. In line with this, Section 3 of the Act provides –

> (1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.
>
> (2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.
>
> (3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

How are the responsibilities in Section 3 of the National Water Act reconciled with the constitutional distribution of water governance functions outlined above? The answer is complicated, first, by the Constitution's provisions relating to the competencies of the spheres of government and how these have been interpreted by the courts, and, second, by the Constitution's provisions relating to cooperative government.

Focusing on local government, the following provisions are instructive. Section 151(4) of the Constitution states that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. The objects of local government, in terms of Section 152, are:

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

While the Constitution provides for local government to pursue its objects without interference, there are provisions which allow for oversight and intervention in certain

16 Section 1 of the Water Services Act (1997).
17 Section 11 of the Water Services Act (1997).
18 Section 1 of the Water Services Act (1997).

circumstances. In terms of Section 154(1) of the Constitution, the national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Section 155(6)(a) of the Constitution states that each provincial government must provide for the monitoring and support of local government in the province. Moreover, Section 139, headed 'Provincial supervision of local government', provides –

> (1) When a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –
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> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
>
> (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary –
>
> (i) to maintain essential national standards or meet established minimum standards for the rendering of a service;
>
> (ii) to 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) to maintain economic unity.

In short, local government has specific functions that are within its constitutionally-defined authority, and "the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures".[19]

The Constitution's provisions relating to the powers of the three spheres of government are reinforced by those dealing with cooperative government. Section 41(1) of the Constitution provides that all spheres of government and all organs of state within each sphere must, inter alia –

> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> (h) co-operate with one another in mutual trust and good faith by –
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> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) co-ordinating their actions and legislation with one another;
>
> (v) adhering to agreed procedures; and
>
> (vi) avoiding legal proceedings against one another.

19 *City of Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para. 44.

This is in turn reinforced by the Intergovernmental Relations Framework Act[20] which provides for a suite of mechanisms and procedures to promote relations between different spheres of government. In Section 40(1), it provides that all organs of state must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and to settle intergovernmental disputes without resorting to judicial proceedings.

Before considering these governance provisions' impact on water governance in the country, particularly in relation to water treatment by municipalities, it remains to consider relevant compliance and enforcement provisions. In terms of the National Water Act, Section 19 provides –

> (1) An owner of land, a person in control of land or a person who occupies or uses the land on which-
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> (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 pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.
>
> …
>
> (3) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to –
>
> (a) commence taking specific measures before a given date;
>
> (b) diligently continue with those measures; and
>
> (c) complete them before a given date.

Although the power to issue directives in Section 19 vests in a catchment management agency, the Act provides that, in areas for which a catchment management agency is not established or, if established, is not functional, all powers and duties of a catchment management agency vest in the Minister.

Finally, there are provisions in the Water Services Act for dealing with water services institutions that fail to carry out their responsibilities. Section 62(1) provides that the Minister and any relevant Province must monitor the performance of every water services institution in order to ensure compliance with all applicable national standards prescribed under the Act; compliance with all norms and standards for tariffs prescribed under the Act; and compliance with every applicable development plan, policy statement or business plan adopted in terms of the Act. Section 63 provides that:

> (1) If a water services authority has not effectively performed any function imposed on it by or under this Act, the Minister may, in consultation with the Minister for Provincial Affairs and Constitutional Development, request the relevant Province to intervene in terms of section 139 of the Constitution.
>
> (2) If, within a reasonable time after the request, the Province –
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> (a) has unjustifiably failed to intervene; or

20 Act 13 of 2005.

(b) has intervened but has failed to do so effectively, the Minister may assume responsibility for that function to the extent necessary-

(i) to maintain essential national standards;

(ii) to meet established minimum standards for providing services; or

(iii)to prevent that Province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.

…

(4) After assuming responsibility for a function under subsection (2), the Minister may issue a directive to the water services authority to perform that function effectively.

(5) If the water services authority fails to comply with that directive, the Minister may intervene-

(a) by taking appropriate steps to facilitate the performance of that function, including giving financial, managerial and technical advice and assistance; or

(b) on notice to the water services authority, by taking over that function.

…

(9) In the interests of co-operative government, a Province must immediately inform the Minister of its intention to intervene by taking over any function of a water services authority under section 139 of the Constitution.

(10) In considering the manner and implementation of any intervention under this section, the Minister must consider –

(a) the reasons for the extent and the period of non-compliance by the water services authority concerned;

(b) the attempts made to achieve compliance;

(c) the effect of the non-compliance; and

(d) any other relevant matter.

In light of these legal provisions, their use (or non-use) in the context of pervasive non-performance in terms of the water legislation will now be assessed.

4 Evaluation of current water governance in relation to water treatment and sewage pollution

As observed in the discussion of the Green Drop Reports above, there are many municipalities that are not complying with their responsibilities under (at least) the Water Services Act. As I have observed elsewhere,[21] the reasons for this are not confined to a lack of conscientiousness in relation to compliance with the law. There are problems with resources (both physical and human) and often historical shortcomings inherited by current municipalities. In 2010, it was estimated that it would cost over R500 billion (about US$41 billion) to repair and increase the capacity of infrastructure – 30% to

21 See further: Kidd (2011); and Kidd (2016: 157).

40% of which was not working.[22] It is unlikely that most municipalities in the country will have the resources (given current funding sources) to meet the infrastructural costs necessary to address water treatment problems. In 2015, the Auditor-General of South Africa "rated the financial health of 65% of the municipalities as either concerning or requiring intervention".[23] Moreover, in total, "27% of municipalities were in a particularly poor financial position by the end of 2015-16, with material uncertainty with regard to their ability to continue operating in the foreseeable future".[24] In January 2017, municipalities owed Eskom (the country's electricity supplier) a total of R10.2 billion[25] and in November 2017, there were 29 municipalities facing water supply cut off by the DWS due to non-payment of costs amounting to R10.7 billion.[26] This shows that a substantial number of municipalities are in no financial position to spend sufficient money on water infrastructure to address the water treatment problems, irrespective of whether they are directed to do so by the DWS or whether there is intervention in terms of Section 63 of the Water Services Act.

The response of the DWS to non-performing municipalities following the 2013 *Green Drop Report* evaluation is that those scoring less than 30%[27]

> …have 30 days in which to implement a corrective action plan. If they do not comply they subsequently receive a directive from DWS. If there is still no compliance it becomes very difficult for the Department to take action against them because of the principle of co-operative government in the South African Constitution.

The approach of issuing a directive (in terms of Section 19 of the National Water Act as outlined above), is only likely to be effective when there are no serious budgetary constraints to compliance; for example, where the municipal manager refuses to approve the payment for chlorine for water treatment because 'chlorine is very expensive' and expenditure was prioritised elsewhere,[28] as opposed to having to carry out a capital upgrade of the entire WWTW. Issuing a directive to address a problem that requires several million rand to fix when there is no budget for WWTW repairs is pointless.

The cooperative government impediment to taking further action against defaulters mentioned in the quote above may attract two responses. The first is that the requirements of cooperative government do not prohibit absolutely legal proceedings between

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22 CDE (2010).
23 Auditor-General of South Africa (2017: 7).
24 Ibid: 8. See also Monteiro (2018).
25 Njobeni (2017).
26 *Business Tech* (2017).
27 Ntombela et al. (2016: 708). The Executive Summary of the 2013 Green Drop Report indicates that "…systems scoring under 30% are placed under regulatory surveillance, in accordance (sic) the Water Services Act (108 of 1997) Sections 62 and 63" (Department of Water Affairs (2013: 4)). As Section 63 envisages intervention, it appears that this is not being carried out in practice, as no municipalities have been subject to intervention for failures in the water treatment responsibilities.
28 Stacey (2016).

organs of state, but requires them to use this, in effect, only as a last resort. But it appears as if the DWS's response outlined in the quote above is the *only* response; not a last resort response having exhausted other avenues. According to Ntombela et al, the engagement of the DWS with municipalities scoring poorly in the *Green Drop* analysis is confined to Departmental officials involved with compliance and enforcement actions and who are not equipped to offer support to the municipalities.[29] This may be exacerbated by lack of capacity and skills to offer the requisite support.[30] This suggests that the DWS is ignoring the essence of cooperative government – that organs of state must work together (cooperate) in order to meet mutual objectives (in this case, effective water treatment and clean water) – and jumping straight to the last resort (command and control) and then complaining that this approach does not work because of the impediment of cooperative government. If one recalls the 'public trusteeship' mandate in Section 3 of the National Water Act, the DWS is required to –

> ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

Nobody can claim that this mandate is being respected when half of the WWTWs in the country are not performing adequately, and when the state of sewage pollution in the country is as reflected in the media articles cited in the introduction.

The (more desirable) alternative is to take both the Section 3 exhortation and cooperative government seriously and for DWS to cooperate with and support municipalities in order to improve the performance of water treatment. It is clear that many municipalities will not be able to improve the situation acting alone because of a lack of resources. Requiring the non-performing municipality to implement a corrective action plan without DWS support seems to be a classic case of passing the buck. Proponents of cooperation may face the possible argument that DWS support of municipalities contravenes those provisions of the Constitution (outlined above) that prohibit national government interference in (or usurpation of) matters of municipal competence. But that is ignoring the difference between 'support' and 'interference'. Section 3 of the National Water Act, in my view, requires such support.

DWS's apparent failure to appreciate the difference between support and interference was evident in the case of *Federation for Sustainable Environment and Another v. Minister of Water Affairs and Others*[31] where it was argued on behalf of the DWS that, although national and provincial government were 'committed' to providing financial assistance to a municipality suffering from a water supply contaminated with acid mine drainage (which finance had been provided), "they are debarred from

29 Ntombela et al. (2016: 708).
30 Ibid.
31 Unreported case 35672/12 (NG), see <http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html> (accessed 9 April 2018).

interfering and imposing their will on the local government".[32] The court appeared to agree with this argument and decided, in effect, to absolve them of any responsibility in the case, although there is no express wording to this effect in the judgment. The approach of the DWS in this case appears to be one of "let's give the municipality some money which may address the problem" rather than the one which would be required by Section 3 of the National Water Act of cooperating (not only in relation to finance) to address the problem – "how can we solve this together"?

If the DWS were to put more effort into support of municipalities in their water services functions, this could assist in appropriate municipal planning (for example, upgrades of existing facilities that have not kept track with increasing populations), which in turn could provide insight for the DWS in regulating municipal expenditure on water treatment (by means of norms and standards envisaged by Section 9 of the Water Services Act, for example). Another potential benefit of national-municipal co-operation could arise from economies of scale in relation to procurement of supplies for WWTWs. Procurement is currently seen as a problem facing municipalities,[33] both in relation to identification of appropriate technologies and in relation to the reliability of suppliers, and the facilitation of DWS in this regard could be of great assistance.

Potentially the most ideal instrument in providing for a cooperative response to sewage pollution problems is the catchment management agency (CMA), provided for in the National Water Act. The Act envisages division of the country into nine (previously 19) water management areas and each has a CMA with governance jurisdiction over that water management area. The functions of CMAs are set out in Section 79(4) of the Act, and these include that a CMA must strive towards achieving cooperation and consensus in managing the water resources under its control.[34] The development of catchment management agencies has been slow and, at this stage, only two have been established. Upon the establishment of a CMA, its initial functions are –[35]

- to investigate and advise interested persons on the protection, use, development, conservation, management and control of the water resources in its water management area;
- to develop a catchment management strategy;
- to coordinate the related activities of water users and of the water management institutions within its water management area;
- to promote the coordination of its implementation with the implementation of any applicable development plan established in terms of the Water Services Act…; and

32 *Federation for Sustainable Environment and Another v. Minister of Water Affairs and Others* (Unreported case 35672/12 (NG), see <http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html> (accessed 9-4-2018)) para. 19.
33 Ntombela et al. (2016: 707-708).
34 Section 79(4)(b).
35 Section 80.

- to promote community participation in the protection, use, development, conservation, management and control of the water resources in its water management area.

These functions appear to be tailor-made for cooperative solutions to sewage pollution problems in areas under the governance of CMAs, and the establishment of the remaining CMAs ought ideally to be expedited as much as possible. This may, however, not materialise because of a proposal in late 2017 to establish only one CMA for the entire country,[36] which appears to undermine the entire purpose of CMAs. The reasons provided for such a move are wholly unconvincing and, as pointed out by former Director-General of DWS, Mike Muller, proper implementation of the existing Act is what is necessary, not tinkering with the legal framework.[37]

The functions of the CMA also highlight the role played in community participation, which is largely absent, other than complaints made by citizens, in the sewage pollution crisis. Part of the reason for this is the lack of transparency, in relation to the Green Drop Reports that followed the first one.[38] Other than a series of unreported cases brought by the NGO Save the Vaal Environment against the Ngwathe Municipality,[39] there are no examples of 'citizen suit' applications to require municipalities to clean up their act in relation to water treatment. Despite liberal environmental laws (which include water laws) permitting relatively easy access to courts, there has been a somewhat perplexing shortage of cases of this type. Perhaps one of the reasons is that citizens are aware that the problem is often not merely a case of recalcitrant municipal officials and that the appropriate remedy is therefore a difficult one to mould. Be this as it may, increasing participation by citizens, including by means of litigation if necessary, would appear to be a prerequisite for improvement of the situation. This in turn is dependent on adequate access to information which, as has been pointed out, is deficient at present.

In wrapping up this section, it is worth observing that the apparent desire by the DWS to address failures of implementation of the water laws by amending the legislation rather than improving the existing laws' implementation makes it somewhat difficult to make recommendations for addressing the sewage pollution governance issues. The following recommendations, nevertheless, assume that the law remains as it is.

36 *Government Gazette* 41321 GN 1415 of 15 December 2017.
37 Muller (2018).
38 Ntombela et al. (2016: 708).
39 Stacey (2016).

5 Recommendations

In the light of the preceding discussion, the following recommendations are apposite.

First, there must be a change in emphasis by the DWS from command-and-control to cooperative attempts at finding a solution to the problems of inadequate water treatment. Municipalities must not be regarded as adversaries but an important part of the solution and the DWS needs to provide appropriate support in line with the true objective of laws relating to cooperative government.

Secondly, in this regard, it is important that the DWS appreciates the difference between support or assistance of municipalities in carrying out their water services functions on the one hand and interference in these functions on the other. The latter is constitutionally impermissible; but 'support' is not only consistent with the Constitution but required by Section 3 of the National Water Act, which must be regarded as a guiding light in dealing with the problem of sewage pollution.

Thirdly, in addition to support of municipalities, the DWS must regulate water treatment appropriately based on the nature of the existing failures and identified needs of municipalities, whether in relation to forward-planning; compulsory ring-fencing of funds required for WWTWs; norms and standards relating to maintenance and upgrade requirements; or similar aspects.

Finally, there needs to be significant improvement in transparency. Maximum detail of which municipalities are performing or not, and in which ways they are deficient, must be made available to all stakeholders, including affected citizens. This will facilitate citizen involvement which, as argued above, will contribute to reaching solutions.

All of these recommendations, however, depend on a strong DWS that is functioning optimally and consistently with its constitutional and statutory mandate. Unfortunately, the current situation of the DWS appears to be far from what is required, with the Standing Committee on Public Accounts reportedly describing the 'complete collapse' of the DWS, involving claims of instability and financial mismanagement.[40] The onus thus is on national government to strengthen the Department, ensuring capable leadership and employment of the requisite skills in order to be able to follow these recommendations. It is clear that most municipalities are incapable of stemming the ineffable flow of untreated sewage by acting on their own and the participation and support of a strong and competent DWS is vital if this crisis is to be averted.

40 Tandwa (2018). The 'Mokonyane' referred to in the title of the article is the erstwhile Minister of Water and Sanitation, who has been moved to another Cabinet position after a reshuffling early in 2018.

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