

Some perspectives on constitutional conflict in local disaster management through the lens of *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC)

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Abstract

Socially created vulnerabilities are largely ignored in the hazards and disaster literature because they are so difficult to measure and quantify. Social vulnerability is partially a product of social inequities – those social factors and forces that create the susceptibility of various groups to harm, and in turn affect their ability to respond, and bounce back (resilience) after the disaster. But it is more than that. Social vulnerability involves the basic provision of health care, the liveability of places, overall indicators of quality of life, and accessibility to lifelines (goods, services, emergency response personnel), capital, and political representation.¹

1 Introduction

A ‘disaster’ can be described as a serious disruption of the functioning of a community or society causing extensive human, material, economic or environmental losses that exceed the ability of the affected community or society to cope by using its own resources.² As depicted here disasters arise from both

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¹Farber and Chen *Disasters and the law: Katrina and beyond* (2006) 121.

²Holloway ‘Disaster risk reduction in South Africa’ (2003) 12 *African Security Review* 29 at 33. See s 1 of the Disaster Management Act 57 of 2002 and the National Disaster Management Policy Framework of 2005. In the environmental context, a disaster can also be defined as the result of a vast ecological breakdown in the relationship between human beings and their environment. See Van Niekerk *A comprehensive framework for multi-sphere disaster risk reduction in South Africa*

natural and man-made causes. It is accepted that, in line with the quotation by Holloway, that disasters, natural or man-made, increasingly impact on people's lives, property, the environment, infrastructure and economic and social activities.³ Globally, this is a time where humanity in general is dealing with possibly the greatest ever frequency in the occurrence of natural⁴ and man-made⁵ disasters. Damaging disasters have also been known to occur in South Africa.⁶

As suggested by the quotation from Farber and Chen above, depending on their severity and impact, the effects of disasters include different degrees of human suffering and damage to the resources and infrastructure on which people depend for their survival, their livelihood, and the maintenance of their quality of life generally.⁷ Communities are likely not to have the knowledge or resources to detect and prepare for disasters and/or to restore disaster-stricken areas once a disaster has occurred. All over the world the responsibility in terms of disaster risk reduction, addressing the impacts of disasters as well as post-disaster damage estimation and control is therefore the responsibility of state governments.

South African law places a legal duty on the state to foresee, prevent and respond effectively to disasters.⁸ Section 24 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution),⁹ for example provides that everyone has the right to an environment that is not harmful to his or her health or well-being and to have the environment protected for present and future generations.¹⁰ The

(PhD thesis Potchefstroom (North-West University)) (2005) 12. Van Niekerk also describes a disaster as a serious and sudden event on such a scale that the stricken community needs extraordinary efforts to cope.

³Louw and Van Wyk 'Disaster risk management' (2011) *Civil Engineering* 16 at 16.

⁴Examples of recent natural disasters are earthquakes in California, tsunamis in Indonesia, and mudslides in China. See Meyer 'Disaster management South Africa' (2011) 7 *Official Journal of the Disaster Management Institute of South Africa* 1 at 6.

⁵There has been an alarming increase in the occurrence of man-made disasters such as the oil spills in Alberta, Canada in 2010 and slow-onset man-made disasters such as acid mine drainage, which is currently threatening Gauteng in South Africa. See Meyer (n 4) 6.

⁶946 hazardous events were recorded in South Africa between 1800-1995. See Chagutah 'Towards improved public awareness for climate related disaster risk reduction in South Africa' (2009) 2 *JAMBA Journal of Disaster Risk Studies* 113 at 114. In June 2011, flooding caused by heavy rain resulted in more than twenty informal settlements being displaced and in farming areas crops were destroyed and soil eroded. This caused an estimated R328 million in damages. See Anon 'South African Weather and Disaster Information Source' (date unknown) <http://saweatherobserver.blogspot.com/search/label/Disaster%20Aid> (accessed 2013-03-05).

⁷See also Louw and Van Wyk (n 3) 16.

⁸Read together, ss 7(2), 41(1)(b) and 152(1)(d) of the Constitution, the DMA and National Disaster Management Policy Framework of 2005 place a legal obligation on government to ensure the personal and environmental health and safety of people in South Africa. See also SALGA *Report on Disaster Risk Management Status Assessment at Municipalities in South Africa* (2011) 21.

⁹Section 24 of the Constitution.

¹⁰For an analysis of the wide scope of protection afforded by s 24 of the Constitution, see Du Plessis *Fulfilment of South Africa's constitutional environmental right in the local government sphere* (LLD thesis Potchefstroom (North-West University)) (2008) 341-422, Du Plessis 'South Africa's

constitutional environmental right as couched in section 24 arguably places a responsibility on all three spheres of government (national, provincial and local) to intervene for the protection of people's health and safety – including when natural or man-made disasters occur. In addition to the enforceable legal duty it creates, the Constitution serves to provide the contextual background for the more explicit disaster risk reduction and response-related duties of government contained in the Disaster Management Act (hereinafter the DMA),¹¹ the Local Government: Municipal Systems Act¹² and the Major Hazard Installation Regulations¹³ in terms of the Occupational Health and Safety Act,¹⁴ for example.

It has become an oft-repeated refrain that local government or municipalities are in close proximity to local communities. By implication, they are also close to the areas and people affected when disasters threaten to occur and/or actually happen. In addition to the general role of municipalities in protecting and respecting the environmental right of local communities,¹⁵ it appears that municipalities have a key role to play in disaster management.¹⁶ The DMA applies nationally and provides a number of responsibilities for all municipalities.

From the DMA's definition of disaster management¹⁷ it is possible to identify at least three areas of responsibility for local government. The first involves disaster

constitutional environmental right generously interpreted' (2011) 27 *SAJHR* 279 at 292-304, Kidd *Environmental law* (2011) 21-34, Glazewski *Environmental law in South Africa* (2013) 5-10–5-54 and Currie and De Waal *The Bill of Rights handbook* (2013) (6th ed) at 518–529.

¹¹Disaster Management Act 57 of 2002.

¹²Local Government: Municipal Systems Act 32 of 2000.

¹³GN 692 in GG 22506 of 30 July 2001.

¹⁴Occupational Health and Safety Act 85 of 1993.

¹⁵See Du Plessis (n 10) 1-619, Du Plessis 'Local environmental governance and the role of local government in realising section 24 of the South African Constitution' (2010) 2 *Stell LR* at 265-297 and Du Plessis 'Some comments on the sweet and bitter of the legal framework for local environmental governance in South Africa' (2009) 24 *SAPR/PL* 56-96.

¹⁶It is important to note that the term 'disaster management' is no longer used in the international arena as it suggests a response to disaster as opposed to disaster risk reduction or disaster risk management. See United Nations (UN) 'Terminology on disaster risk reduction' in *International Strategy for Disaster Risk Reduction* (ISDR) (2009) 10. In this regard it has now also become common practise in South Africa to refer to the more inclusive term 'disaster risk management' as evidenced by research and policy making. See Coetzee *The development, implementation and transformation of the disaster management cycle* (MA (Development and Management) thesis Potchefstroom (North-West University)) (2009), Van Niekerk *Disaster risk reduction and climate change adaptation towards community resilience* (2013) on file with author and City of Cape Town, Disaster Risk Management Centre, Cape Town 'Municipal Disaster Risk Management Plan' (2012). However, it is important to note that the DMA does not provide a definition for disaster risk reduction or disaster risk management and thus for purposes of this contribution the authors choose to refer mainly to 'disaster management' and will in context refer to disaster risk reduction.

¹⁷The DMA defines disaster management as a continuous and integrated multi-sectoral, multi-disciplinary process of planning and implementation of measures aimed at: a) preventing or reducing the risk of disaster, b) mitigating the severity or consequences of disaster, c) emergency preparedness, d) rapid and effective response to disasters, and e) post-disaster recovery and rehabilitation.

prevention and mitigation. Prevention and mitigation refer to pre-disaster activities involving the assessment of risk and the lessening of the potential effects of disasters, but they also include post-disaster activities aimed at reducing the potential damage of future disasters.¹⁸ Mitigation¹⁹ in relation to a disaster amounts to the taking of measures aimed at reducing the impacts or effects of disasters. While it may not be possible to prevent all disasters, their effects may be limited or reduced by taking appropriate proactive steps.²⁰ Through careful risk-based planning (either through integrated development planning²¹ or otherwise) it may typically be possible for municipalities to reduce the long-term risks to human life and property from hazards.²² The second area of responsibility relates to the response to disaster. Response in this instance includes the activities or measures taken during or immediately after a disaster to bring relief to individuals and communities affected to ensure that the impact of the disaster is minimised.²³ Municipalities would in this instance typically have to respond through rescue measures, evacuation, emergency medical services, fire-fighting and related response services.²⁴ Response efforts could also include actions to reduce the likelihood of secondary damage such as the covering of roofs to prevent further damage to the contents of buildings, restoring public order to prevent looting, and preparations for recovery.²⁵ The third area of responsibility relates to recovery. The post-disaster activities of recovery and rehabilitation are efforts and developments aimed at restoring normality in conditions caused by a disaster.²⁶ Recovery activities include for example the restoration of basic municipal services²⁷ such as power and water supply, the provision of temporary housing, food and clothing, and the clearance of debris.²⁸ It is important to note that recovery should be aimed at long-

¹⁸Uys 'Disaster management: An overview' (2005) 40 *Journal of Public Administration* 404 at 410. See also Holloway (n 2) 29-36.

¹⁹Section 1 of the DMA 57 of 2002.

²⁰Donohue, Masilela and Gear 'Disaster management' (2000) *South African Health Review* 455 at 457.

²¹See s 26 of the Local Government: Municipal Systems Act 32 of 2000. One of the prescribed 'core components' of a municipality's integrated development plan is disaster management plans.

²²Uys (n 18) 410. Disaster prevention or mitigation is of primary importance in reducing the need for disaster relief. See Van Niekerk (n 2) 58.

²³Uys (n 18) 410. See also Holloway (n 2) 29-36. Van Niekerk (n 2) 284 suggests that each municipality should have tried and tested disaster response plans which include the identification of vulnerable groups within the community.

²⁴Uys (n 2) 410.

²⁵*Ibid.* See also Holloway (n 2) 29-36.

²⁶Uys (n 2) 410. Local government is expected to have recovery plans and programmes to support social recovery. See Van Niekerk (n 2) 267.

²⁷Basic municipal services are defined in s 1 of the Local Government: Municipal Systems Act 32 of 2000 (hereafter the Systems Act) as a municipal service that is necessary to ensure an acceptable and reasonable quality of life, and that, if not provided, would endanger public health or safety or the environment.

²⁸Uys (n 2) 411. It has been suggested that these recovery activities should be incorporated into recovery plans and be updated annually. See Van Niekerk (n 2) 318.

term development and reconstruction of an affected community as well as at mitigating the effects of a disaster or creating circumstances that will reduce the risk of a similar disaster occurring in future.²⁹ The DMA also requires the establishment of a municipal disaster management centre.³⁰

Still, while rather broad in its scope, the DMA does not and cannot be expected to provide for every possible legally relevant disaster-related scenario. It is, for example, not clear from the DMA how municipalities should respond in situations where, as a result of an imminent or actual disaster (eg, flooding or chemical poisoning), conflict arises between the constitutional rights of those affected (eg, the rights to life, property, a safe environment and the right of access to housing). Similarly, it is unclear how the limitation of rights is supposed to be understood and applied in situations like these.

The possible tension between constitutional rights in the disaster management context was recently highlighted in the *Pheko* decision.³¹ It was argued in this case that the decision of the Ekurhuleni Metropolitan Municipality (hereafter the Municipality) to respond to an imminent dolomite-related disaster³² by authorising the forced removal of local community members from a disaster-prone area and the demolition of the housing structures in that area was a necessary municipal intervention for the protection of human life.³³ Although the Municipality's decision may be deemed to have been a necessary step in the disaster management context and to have been in line with its constitutional duty to protect the well-being of people,³⁴ by attempting to prevent harm the Municipality seemed to have infringed *inter alia* upon local community members' constitutional right of access to adequate housing (section 26) and the right to

²⁹Uys (n 2) 411. This could possibly be done by identifying the various activities associated with disaster response and recovery and adding these findings to recovery plans. See Van Niekerk (n 2) 318.

³⁰Section 43 of the DMA 57 of 2002.

³¹*Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC) (hereafter referred to as the *Pheko* case.).

³²The Municipality responded to the formation of sinkholes which had the potential to cause loss of life, property and injury. The sinkholes were caused by unstable dolomite and formed various sporadic sinkholes, depressions and cracks within the informal settlement of Bapsfontein. See the *Pheko* case 3 para 6.

³³The *Pheko* case 8 para 14.

³⁴Following the thinking of Du Plessis 'South Africa's constitutional environmental right generously interpreted' (2011) 27 SAJHR 279 at 295, the right of local residents to be assisted in situations posing disaster risks can be traced back to s 24 of the Constitution (the Constitutional environmental right). Section 24(a) states that everyone has the right to an environment that is not detrimental to their well-being. The Constitutional environmental right's reference to well-being arguably implies that people in South Africa should be protected against any environmental harm which may occur *inter alia* in the event of disaster. The possible environmental harm which may result from disasters could threaten the health and livelihood of people, and could in turn negatively impact on their well-being. See also Feris 'Constitutional environmental rights' (2008) 24 SAJHR 29 at 33.

have their dignity respected and protected (section 10).³⁵ Put differently, by virtue of having taken pro-active action from a disaster management perspective, the Municipality effectively limited a number of the community's constitutional rights. This case came at a time when the *Le Sueur* case³⁶ had recently emphasised the important role that municipalities play in ensuring an environment that is not harmful to people's health or well-being. The court *inter alia* held that municipalities are authorised to legislate in respect of environmental matters to protect the environment at the local level despite 'the environment' not being an explicit part of the functional areas of local government as per Schedules 4B and 5B of the Constitution.³⁷

Against the background of the facts of the *Pheko* case, this note considers the position of municipalities in the event of conflict arising between two or more constitutional rights as a result of local disaster management action. The factual background and judgment of the case will be discussed first. This discussion is followed by an introductory analysis of the potential constitutional conflict in disaster management and the pointers in law and literature as to how such a conflict may have to be resolved. The contribution concludes with future perspectives on the role of municipalities in local disaster management.

2 The *Pheko* case: Factual background and judgment

2.1 Factual background

The *Pheko* case dealt with the lawfulness of the removal of the residents of the Bapsfontein Informal Settlement and the demolition of their homes by the Ekurhuleni Metropolitan Municipality.³⁸ In January 2004 the Municipality became aware of sinkholes in the Bapsfontein area caused by dolomite instability. The Municipality commissioned civil engineers to conduct an investigation³⁹ and received the engineering report in June 2005.⁴⁰ The report identified the development of sinkholes in the vicinity of Bapsfontein and recommended that a further study of the area be conducted.⁴¹ Further investigation was subsequently commissioned and another report was submitted to the Municipality in November 2005.⁴² The latter engineering report confirmed the prior findings following the

³⁵Section 26 of the Constitution.

³⁶*Le Sueur v Ethekwini Municipality* (9714/11) [2013] ZAKZPHC 6.

³⁷*Id* 37 para 40.

³⁸The *Pheko* case 2 para 3.

³⁹*Id* para 5.

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²*Id* para 6.

investigation in 2004.⁴³ It found the area around Bapsfontein to be unstable and recommended that the area be avoided for the purposes of mass housing.⁴⁴ Following this second report the municipality decided to relocate approximately 150 families from Bapsfontein during 2005.⁴⁵ However, new occupiers subsequently erected shelters in the same high-risk area of Bapsfontein.⁴⁶

In 2009 geologists were commissioned to conduct a further study on the area and their report, delivered to the Municipality on 8 December 2009, recommended that the residents be evacuated and relocated to an area at least three kilometres north-east of Bapsfontein.⁴⁷ In July 2010 the Municipality's Roads and Transport Portfolio Committee responded by recommending that the Bapsfontein community be relocated.⁴⁸ This recommendation was adopted by the Mayoral Committee and on 10 December 2010 the Municipality issued a notice declaring Bapsfontein a local state of disaster due to the dolomite instability of the area. It did so in terms of section 55(1) of the DMA.⁴⁹

It emerged from a letter dated 13 January 2011 addressed to the Municipality on behalf of the residents of Bapsfontein that the residents were in distress and felt that they were faced with a forced eviction.⁵⁰ The letter revealed that three meetings had been convened by the officials of the Municipality in which the applicants were informed about the impending relocation scheduled to take place on 27 December 2010.⁵¹ The Municipality was advised that the relocation amounted to an eviction and that eviction without a court order is unlawful.⁵² The Municipality was also asked to produce an eviction order or to commit to halt the eviction.⁵³ In response to the letter the Municipality advised that the relocation of the residents was temporary and that it had consulted meaningfully with the residents by drafting letters of consent that were given to each resident to consent to the temporary relocation to the N12 Highway Park.⁵⁴ Further, the Municipality held that busses had been provided for schoolchildren and that basic municipal services were already in place in the area where the applicants were

⁴³ *Ibid.*

⁴⁴ *Id* 3 para 6.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Id* 4 para 8.

⁴⁹ *Ibid.* Section 55(1) of the DMA states that in the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the *Provincial Gazette*, declare a local state of disaster if the specified criteria are met.

⁵⁰ The *Pheko* case 5 para 9.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ The *Pheko* case 6 para 10.

to be relocated.⁵⁵ Thus, the Municipality denied that the applicants had been the victims of a forced eviction and maintained that no eviction order was required.⁵⁶

On 17 February 2011 a directive in terms of section 55(2)(d) of the DMA was issued advising the residents that the area of Bapsfontein had been declared a local state of disaster due to dolomite instability.⁵⁷ The directive stated that all residents of the area were to be evacuated to temporary shelter for the preservation of their lives.⁵⁸ The directive anticipated resistance to the relocation as the Municipality contracted the Red Ants⁵⁹ to demolish the homes of the residents to prevent them from returning to the area.⁶⁰

The residents continued to argue that they had been unlawfully and forcefully evicted from their homes and that the forced eviction and demolition of their homes without an order of court not only violated their constitutional right of access to adequate housing⁶¹ but also the right to have their dignity⁶² respected and protected.⁶³ The Municipality argued in turn that the relocation was authorised and thus legitimate in terms of section 55 of the DMA – it was necessary for the preservation of life.⁶⁴ The Municipality's main argument has been that an evacuation as a result of a disastrous situation or emergency did not amount to an eviction within the contemplation of section 26(3) of the Constitution and that its decision to remove the residents amounted to a legitimate government response to an imminent crisis with the purpose of protecting human life as well as property.⁶⁵

The most contentious issue in this matter was if the removal of the residents amounted to an eviction under section 55 of the DMA.⁶⁶ The subsidiary question was whether or not the DMA authorises an eviction and demolition without a court order.⁶⁷ The determination of this issue required the Constitutional Court to

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Id* 6-7 para 11.

⁵⁸ *Ibid.*

⁵⁹ 'Red-Ants' is a colloquial term for a private security company contracted by the South African government to help with evictions and forced removals. See the *Pheko* case 7 para 12. The Red-Ants are usually contracted by government or property owners to remove people from private land or condemned buildings. They arrive on the scene carrying crowbars and wear red overalls and helmets. See Anon 'In pictures: South Africa's ruthless Red Ants eviction squad' (2011) available at <http://www.bbc.co.uk/news/world-africa-12525859> (accessed 2013-03-05).

⁶⁰ The *Pheko* case 6-7 para 11.

⁶¹ Section 26 of the Constitution.

⁶² *Id* s 10.

⁶³ The *Pheko* case 8 para 13.

⁶⁴ *Id* 8 para 14.

⁶⁵ The *Pheko* case 11 para 20.

⁶⁶ *Id* 13 para 24. An eviction under s 55 of the DMA is described in s 55(2)(d) of the DMA.

⁶⁷ *Id* 17 para 33.

interpret section 55(2)(d)⁶⁸ of the DMA along with section 26(3)⁶⁹ of the Constitution.⁷⁰ The court (represented by Mogoeng CJ, Moseneke DCJ, Froneman J, Jafa J, Khampepe J, Skweyiya J, Van der Westhuizen, Yacoob J and Nkabinde J) was of the view that section 26 must be read as a whole and does not permit legislation authorising eviction without an order of court.⁷¹ The court stated that section 55(2)(d) of the DMA provides that evacuation should be limited to cases where temporary action is necessary for the preservation of life and that the section must be interpreted narrowly.⁷² The court held that the text of section 55(2)(d) should be interpreted in the context of the DMA as a whole, taking into consideration whether or not the preamble to the Act⁷³ and other relevant provisions, such as section 55(1),⁷⁴ authorise eviction without a court order.⁷⁵ The court was of the opinion that, properly construed and read in conjunction with other provisions (eg, sections 55(1) and 55(2)(d)), the DMA does not authorise eviction or demolition without an order of the court.⁷⁶ The court emphasised that the DMA ordinarily applies in emergency situations to temporary removal from a disaster-stricken area to temporary shelter.⁷⁷ This implies that people evacuated may return to their homes if and when possible.⁷⁸ The court held that an evacuation in this context does not entail the demolition of people's homes or indefinite removal.⁷⁹

⁶⁸Section 55(2)(d) states that: if a local state of disaster has been declared, the municipal council concerned may make by-laws or issue directions, or authorise the issue of directions, concerning *inter alia* the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such an action is necessary for the preservation of life.

⁶⁹Section 26 states that:

- (1) everyone has the right to have access to adequate housing,
- (2) the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right,
- (3) no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, no legislation may permit arbitrary evictions.

⁷⁰The *Pheko* case 17 para 34.

⁷¹*Id* 18 para 35.

⁷²*Id* 19 para 37. The court held that a wide construction may adversely affect s 26 of the Constitution. See 19 para 37. It is important to note that the court did not elaborate on what was meant by 'narrowly'. The court merely stated that s 55(2)(d) should be interpreted narrowly and that the language used in that section is 'critical'. *Pheko* case 19 para 37.

⁷³The preamble of the DMA states that the aim of the Act is to provide for an integrated and co-ordinated disaster management framework that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters, and post-disaster recovery.

⁷⁴Section 55(1) of the DMA states that in the event of a local disaster the council of a municipality having primary responsibility for the co-ordination and management of the disaster may, by notice in the *Provincial Gazette*, declare a local state of disaster if existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or if other special circumstances warrant the declaration of a local state of disaster.

⁷⁵The *Pheko* case 19 para 37.

⁷⁶*Id* 20 para 38.

⁷⁷*Id* 20-21 para 39.

⁷⁸*Ibid.*

⁷⁹*Id* 21 para 40.

The court acknowledged the content of the engineering report which recommended that the residents of Bapsfontein be evacuated from the area but emphasised that the facts did not suggest that there was any need for urgent eviction.⁸⁰ In doing such, the proportionality of the risk of a disaster was measured up against the existing enjoyment of rights. No loss of life had been reported as a result of sinkholes since the early 1970s, for example.⁸¹ Against this background, the court found that the rushed destruction of the residents' homes by the Red Ants not only infringed upon the residents' constitutional rights under section 26(3) (the right not to be evicted from their homes or have their homes demolished without an order of the court) but also under section 10 (the right to have their inherent dignity respected and protected).⁸² The court further found that in engaging the DMA to evict the residents from their homes without an order of the court, the Municipality acted outside the authority conferred upon it by the DMA and contrary to sections 10 and 26(3) of the Constitution.⁸³ As a result, the court found that in this instance the removal of the residents was unlawful.⁸⁴ The court ordered the Municipality to identify land in the immediate vicinity for the relocation of the residents and to provide them with adequate accommodation.⁸⁵

The *Pheko* case serves *inter alia* to illustrate the tension between the right to the preservation of human life (which arguably includes the right of community members to an environment that is not harmful to their health or well-being and which further translates into an entitlement to be assisted in a situation posing the risk of a disaster),⁸⁶ the right of access to adequate housing,⁸⁷ the right to the preservation of their human dignity⁸⁸ and the right not to be evicted or to have their homes demolished without an order of the court.⁸⁹ It would appear that in this instance the Municipality attempted to intervene for the preservation of human life, which forms part of the protection of the residents' right to an environment that is not harmful to their health or well-being.⁹⁰ The latter includes by extension the right to be assisted in a situation posing the risk of a disaster.

⁸⁰*Id* 21 para 41.

⁸¹The *Pheko* case 23 para 44. Sinkholes are regarded as rapid onset hazards with little to no prior warning which means that they can fall in and cause extensive damage or loss of lives at any given time. See Coppola *Introduction to international disaster management* (2010) 59. It is therefore the submission of the authors that in the *Pheko* case, eg, one would be able to argue that the longer the municipality chose to postpone managing the potential disaster (sinkholes falling in and causing damage to property and loss of lives) the higher the risk of such a disaster occurring.

⁸²The *Pheko* case 23 para 44.

⁸³*Id* 23 para 45.

⁸⁴*Id* 26 para 53.

⁸⁵*Ibid*.

⁸⁶Section 24 of the Constitution. See also (n 39) above.

⁸⁷*Id* s 26(1).

⁸⁸*Id* s 10.

⁸⁹*Id* 26(3).

⁹⁰*Id* s 24.

However, the attempts of the Municipality by necessary implication infringed the residents' right of access to adequate housing and incidentally also their right to have their inherent dignity respected and protected.⁹¹

Given the circumstances and the information at its disposal, the Municipality had to make a decision that by implication required a balance to be struck between at least three constitutional rights. The end result of the Municipality's decision was that it 'favoured' one constitutional right over the other.⁹² In deciding to have the residents removed, the Municipality afforded more weight to the right to be assisted in a situation posing the risk of disaster than the right of access to adequate housing and the right to have one's inherent dignity respected and protected. Put differently, the Municipality limited the right of access to adequate housing and the right to dignity in the process of protecting the residents of Bapsfontein against an imminent environmental hazard. In doing so, the Municipality may be said to have failed to engage in a proportionality analysis where the risk and likely impacts of disaster should have been measured up against the limitation of the enjoyment of existing rights.⁹³

As part of questioning whether or not the Municipality in this instance should have explored less intrusive options in the pursuit of the preservation of human life, the following section shows how the protection of environmental interests often requires challenging trade-offs to be made in government's decision-making processes.

2.2 Constitutional conflict in local disaster management

Authorities are often expected (albeit implicitly so) to strike a balance or to decide between the protection of and respect for two or more constitutional rights. This is true in many different contexts – the field of disaster management is no exception. The consequences of government's decisions are often criticised on the grounds, for example, that they are unreasonable. The consequences of the Municipality's trade-off between three pertinent constitutional rights in the *Pheko* case rendered 777 residents without secure tenure and provided them with access to temporary housing only.⁹⁴ In this matter the Municipality's implicit preferential protection of one right (the right to life and by extension, the environmental right) above a number of others, was an indirect and unintended consequence of managing a disastrous situation, an executive act demanded by the DMA.

⁹¹*Id* ss 26(3) and 10.

⁹²The Municipality's approach in their decision-making throughout their management of the disaster rendered 777 residents with no secure tenure. The *Pheko* case 2 para 4.

⁹³A fully-fledged discussion of proportionality in the limitation of rights context falls beyond the scope of this contribution. See, however, the discussion in Currie and De Waal (n 10) 163-170.

⁹⁴The *Pheko* case 2 para 4.

In the *Pheko* case, the right of the residents to be assisted in a situation posing the risk of a disaster was not placed in dispute.⁹⁵ However, the infringement of their rights under sections 10 and 26 of the Constitution as a result of the Municipality's attending to the disastrous situation was the topic of lengthy deliberations.⁹⁶ The residents claimed that the Municipality's decision to evict infringed *inter alia* upon their right to dignity.⁹⁷

Dignity is a rich and complex concept which is closely connected to the ideals of human worth, autonomy, agency, equality, solidarity and difference and for this reason it is considered to be what gives people their intrinsic worth.⁹⁸ Dignity vests in every human person, regardless of his or her bodily or mental capacity.⁹⁹ The Constitution places a particularly high premium on human dignity to the extent that it has been adopted as one of the constitutional values (s 1) as well as a justiciable constitutional right (s 10). In the *Pheko* case the court found that the rushed destruction of the residents' homes by the Red Ants under the instruction of the Municipality was inimical to their right in section 10.¹⁰⁰ The link between access to housing and dignity has often been argued and perhaps most prominently so by Yacoob J in the *Grootboom* case,¹⁰¹ where he held that there can be no doubt that human dignity, being one of the foundational values of our society is denied to those who have no shelter.¹⁰² In the *Tswelopele* case,¹⁰³ for example, the court was of the opinion that to be hounded willy-nilly from the privacy and shelter of one's home, even in the most extreme circumstances, is a painful and humiliating indignity.¹⁰⁴

The affected residents in the *Pheko* case further claimed that the Municipality infringed upon their right of access to adequate housing in terms of section 26 of the Constitution. Section 26 is classified as a socio-economic right¹⁰⁵ and was designed *inter alia* to protect people's interests in their homes when faced with eviction or demolition.¹⁰⁶ Section 26(3) states that no one may be evicted from his or her home, or have his or her home demolished, without an order of the court made after considering all the relevant circumstances, and that no legislation may

⁹⁵*Id* 2 para 3.

⁹⁶*Id* paras 18, 28, 34 and onwards.

⁹⁷See Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 171 at 217.

⁹⁸Currie and De Waal (n 10) 250.

⁹⁹Botha (n 97) 191.

¹⁰⁰The *Pheko* case 23 para 44.

¹⁰¹*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter the *Grootboom* case).

¹⁰²*Id* 12 para 23.

¹⁰³*Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA) (hereafter the *Tswelopele* case).

¹⁰⁴The *Tswelopele* case 15.

¹⁰⁵Currie and De Waal (n 10) 565.

¹⁰⁶Liebenberg *Socio-economic rights* (2010) 270.

permit arbitrary evictions.¹⁰⁷ Section 26 places a negative obligation on the state to desist from impairing or causing harm to the right of access to adequate housing.¹⁰⁸ Since 1996 the right has often been invoked in eviction cases.¹⁰⁹

The Ekurhuleni Metro maintained that in the case of the residents of the Bapsfontein Informal Settlement no eviction order from a court was required, given the circumstances and facts of the matter.¹¹⁰ The Municipality maintained that the evacuation of the residents from the area was a legitimate response to a potential disaster and that it was necessary for the preservation of life. The court, however, found that the DMA read with section 26 of the Constitution does not authorise eviction or demolition without a court order.¹¹¹

Although section 24(1) of the Constitution was not invoked by any of the parties in the *Pheko* case there is merit in considering its contextual relevance. Section 24 read with section 7(2) of the Constitution mandates the state (including local government) to respect, protect, promote and fulfil the right of people to an environment that is not harmful to their health or well-being. Section 24 is an enforceable (people-centred or anthropocentric) environmental right – the meaning of which has often been explored in recent years.¹¹² ‘Health’ as referred to in section 24 has to date been interpreted to refer to the health of individuals or the public at large.¹¹³ Being healthy therefore includes being in a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹¹⁴ Health as referred to in section

¹⁰⁷Section 26(3) of the Constitution.

¹⁰⁸*Grootboom* (n 101) 15 para 34.

¹⁰⁹See, eg, *City of Cape Town v Rudolph* 2004 5 SA 39 (C); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

¹¹⁰The *Pheko* case 6 para 10.

¹¹¹*Id* 20 para 38.

¹¹²See, eg, Scholtz ‘The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa’ (2005) 1 *Journal of South African Law* 69-86; Feris and Tladi ‘Environmental rights’ in Brand and Heyns *Socio-economic human rights in South Africa* (2005) 259; Feris (n 34) 30-38; Du Plessis (n 10) 292; Glazewski (n 10) 1-7 and 1-8. See also *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) (hereafter the *Fuel Retailers* case) where the idea of the environmental right as a foundation for basic human existence was confirmed. In the *Fuel Retailers* case the court held that the importance of the protection of the environment cannot be gainsaid as it is vital to the enjoyment of the other rights contained in the Bill of Rights and that the environment must therefore be protected. *Fuel Retailers* case 27 para 102.

¹¹³Du Plessis (n 10) 293. See also Kotzé ‘The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection’ (2007) 16 *Reciel* 298 at 300.

¹¹⁴Du Plessis (n 10) 293. See also Currie and de Waal (n 10) 526. See also Feris ‘Environmental rights and locus standi’ in Paterson and Kotzé *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) 135-138.

24 can be negatively affected by external factors such as pollution, exposure to hazardous substances or the provision of insufficient access to safe drinking water or sanitation.¹¹⁵ It is suggested that disasters, which have been known to be able to cause extensive damage to an affected area, could have a negative impact on the health of those affected. It is therefore relevant to note that by virtue of section 24, municipalities must ensure that the natural environment as a space where people live and work is maintained at a level of quality that is not harmful and will not potentially become harmful to the mental and/or physical health of people.¹¹⁶

Section 24 further refers to well-being.¹¹⁷ It has been stated that 'well-being' is unmistakably a fairly wide and general term and that it should as a result sustain a wide interpretation.¹¹⁸ Section 24 provides for the protection of a person's welfare, which covers those environmental interests that do not necessarily have evident health implications.¹¹⁹ The reference to well-being implies that people should be protected against environmental harm, which may impact on people's ability to be content and at ease.¹²⁰ Furthermore, someone's knowledge of a threat or reasonable anticipation or fear of a threat to his or her environment and natural resources anywhere may also impact on his or her environmental well-being.¹²¹ It may be argued that the reference to well-being in section 24 seems to protect a person's sense of environmental security and safekeeping – including in relation to the potential risks and danger of disaster.¹²²

The contextual background of the meaning of 'health' and 'well-being', suggests that the decision of the Municipality to take precautionary measures in the *Pheko* case may have been implicitly informed by its constitutional obligation to ensure an environment that is not harmful to residents' health or well-being.¹²³ The Municipality's decision was further in keeping with its obligation in terms of South Africa's framework environmental law, the National Environmental Management Act 107 of 1998 (the NEMA), which calls for the adoption of a precautionary approach where decisions must be taken amid environmental uncertainty.¹²⁴

¹¹⁵Du Plessis (n 10) 293. See also Glazewski (n 10) 5-15.

¹¹⁶Du Plessis (n 10) 293.

¹¹⁷Section 24(a) of the Constitution.

¹¹⁸Currie and De Waal (n 10) 522.

¹¹⁹Du Plessis (n 10) 295. The ambit of 'well-being' is potentially limitless as seen in *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E) at 415 para B-E where it was held that no one should be obliged to work in an environment of stench and that to be in such an environment is adverse to one's well-being. See also Kotzé (n 113) 303.

¹²⁰Du Plessis (n 10) 295. See also Feris (n 114) 135-138.

¹²¹Du Plessis (n 10) 295.

¹²²*Ibid.*

¹²³An obligation placed on the state by s 24 of the Constitution that is further reiterated in the local government context in s 152(1)(d) as well as in a number of provisions of the Systems Act (eg, s 4(2)(d), s 4(2)(i), s 4(2)(j), s 11(3)(l), s 23(1)(c), s 26(g) and s 73(2)(d)).

¹²⁴See s 2(4)(a)(vii) of the NEMA.

The facts and circumstances in the *Pheko* case reveal how at times government is faced with the difficulty of having to make a trade-off in decision-making between two or more constitutional rights. In order to be compliant with its environmental duties in terms of the Constitution and environmental and disaster management legislation, the Ekurhuleni Metro had to impede the people of Bapsfontein Informal Settlement's rights of access to housing and by implication, their right to human dignity. While it is easy to afterwards confront the Municipality on the basis of having infringed these two rights, one should ask what would have been the legal consequences in the event that the Municipality failed to take precautionary steps and people subsequently suffered loss of life and/or other harm. It should be borne in mind that dolomite is a rock bed that is water-soluble and which causes cave-like formations over extended periods of time.¹²⁵ These formations can eventually result in the collapse of topsoil, for example, and as a consequence can form sinkholes with disastrous effects in most cases, especially where buildings and other constructions have been erected on dolomitic sites.¹²⁶ Bearing this in mind, one should question whether or not the Municipality, that has acted on the basis of scientific information, should have taken its decision in a different way. Part of this question is whether or not the Ekurhuleni Metro should have approached the required constitutional balancing in a different way.

2.3 Constitutional conflict in local disaster management through the lenses of relational balancing and comparative harm analysis

It is well-known that the South African Constitution aims at facilitating the construction of a new political, social and economic order based on democratic values, social justice and fundamental human rights.¹²⁷ This new order expressly envisages improving the quality of life and freeing the potential of each person.¹²⁸ A key instrument in this regard is the Bill of Rights.¹²⁹ The latter is the foundation of democracy in South Africa, enshrining a broad range of rights of the people in the country and affirming the democratic values of human dignity, equality and freedom.¹³⁰ It provides for a set of universally recognised human rights,¹³¹ of

¹²⁵See the Department of Water Affairs (DWA) *Dolomite guideline: A short guide to available documents on procedures for developing dolomitic land* (2009) 5-6 available at [http://www.dwa.gov.za/Groundwater/Documents/Dolomite/DWA%20Dolomite%20Guideline%202009%20\(Final\)%11.pdf](http://www.dwa.gov.za/Groundwater/Documents/Dolomite/DWA%20Dolomite%20Guideline%202009%20(Final)%11.pdf) (accessed 2013-07-12).

¹²⁶*Ibid.*

¹²⁷Liebenberg (n 106) 27.

¹²⁸*Ibid.*

¹²⁹Chapter 2 of the Constitution.

¹³⁰Section 7(1) of the Constitution.

¹³¹Liebenberg (n 106) 35.

which the right to dignity,¹³² the right to a safe and healthy environment¹³³ and the right of access to adequate housing¹³⁴ are particularly relevant for the purposes of this contribution.

The Bill of Rights instructs the state to use its constitutionally entrenched governing power in a way that does not violate the Bill of Rights.¹³⁵ However, it seems inevitable that situations will arise where certain rights conflict with one another or where there is no other option but to limit certain rights in terms of section 36 of the Constitution. The *Pheko* case is illustrative of a situation where some rights have to be limited in order for government to be able to execute a constitutional duty and to protect other rights. This raises the question how, in government's disaster management decision-making processes, the balance should be struck between conflicting constitutional duties and rights.

The suggested balancing act may be expected to be fair and just. It is possible to derive guidelines in this regard from other, non-disaster related contexts. Smit¹³⁶ for example argues with reference to the context of educational rights that the balancing of rights entails two distinct formats. The first format may be relevant to a situation where head-to-head comparison of rights occurs.¹³⁷ In such a situation the value or weight of one right in relation to another right will be compared and an 'either-or' determination is made by deciding which right outweighs the other.¹³⁸ It is suggested that in the *Pheko* case this approach would entail the Municipality's basing its decisions on a comparison of the right of residents to be assisted in a situation posing the risk of disaster, as a right derived from the rights to life and an environment that is not harmful to their health or well-being,¹³⁹ with the right of access to adequate housing¹⁴⁰ and the right to dignity.¹⁴¹

The second format may be referred to as the 'striking of a balance'.¹⁴² This occurs in situations where rights can co-exist with each other and it is not necessary to decide in favour of one right or the other.¹⁴³ This format would require equilibrium to be re-established by bringing equally important rights to an even keel.¹⁴⁴ For instance, it is suggested that in the *Pheko* case this approach

¹³²*Ibid* s 10.

¹³³*Ibid* s 24.

¹³⁴Section 26 of the Constitution.

¹³⁵Currie and de Waal (n 10) 23.

¹³⁶Smit 'Balancing rights in education' (2008) 40 *Acta Academia* 210 at 216.

¹³⁷*Ibid*.

¹³⁸*Ibid*.

¹³⁹Section 24 of the Constitution.

¹⁴⁰*Ibid* s 26.

¹⁴¹*Ibid* s 10.

¹⁴²Smit (n 136) at 216.

¹⁴³*Ibid*.

¹⁴⁴*Ibid*.

would require that the Bapsfontein residents be assisted in the disaster situation without having their homes demolished or the residents being forcefully removed from the disaster stricken area. It is suggested that by using this approach the residents' right of access to adequate housing¹⁴⁵ along with their right to have their dignity respected¹⁴⁶ would be brought into balance (equilibrium) with their right to be assisted in a disaster situation. This approach suggests that neither of the residents' rights would have to be limited in their entirety to the extent that the scope of the protection afforded by the different rights is only adjusted.¹⁴⁷

There is merit in considering whether or not the courts have adopted either of the two approaches. In the *Pheko* case the court did not go into detail about the extent of the infringement on the residents' rights to have their dignity respected and protected.¹⁴⁸ Instead the court placed specific emphasis on the infringement of the residents' rights found in section 26 of the Constitution.¹⁴⁹ As in the *Pheko* case, the infringement of the right of access to housing was of particular relevance in the Constitutional Court's consideration of the *Port Elizabeth Municipality* case.¹⁵⁰ This case serves to illustrate the approach adopted by the courts in evaluating conflicting rights in the context of eviction.¹⁵¹ The court rejected inappropriate judicial approaches which favour one right over the other.¹⁵² Instead, the court said that an attempt must be made to balance and reconcile the opposed claims in as just a manner as possible, taking into account all of the interests involved and the specific factors relevant in each case.¹⁵³

Liebenberg argues that the approach by the court in the *Port Elizabeth Municipality* case could be described as 'relational balancing'.¹⁵⁴ Relational balancing between different constitutional rights strives to achieve solutions which provide the maximum possible protection of all the interests and values protected by the rights in the Constitution.¹⁵⁵ The relational balancing approach was initially adopted and executed by the courts in evaluating conflicting rights in the eviction context.¹⁵⁶ This approach seems particularly useful in guiding Municipalities in the matter of local disaster management and any accompanying constitutional conflicts. The practical application of the relational balancing approach suggests that municipalities' should attempt to balance and reconcile opposing constitutional

¹⁴⁵Section 26 of the Constitution.

¹⁴⁶*Id s* 10.

¹⁴⁷Smit (n 136) 216.

¹⁴⁸The *Pheko* case paras 18, 28 and 44.

¹⁴⁹*Id* paras 17-21, 28, 32 and onwards.

¹⁵⁰Liebenberg (n 106) 273.

¹⁵¹*Id* 312.

¹⁵²*Ibid.*

¹⁵³Liebenberg (n 106) 312.

¹⁵⁴*Ibid.*

¹⁵⁵*Ibid.*

¹⁵⁶*Ibid.*

rights in as fair and just a manner as possible, taking into account all interests of local communities as well as the specific factors or risks arising from a disastrous situation. In applying this approach in local disaster management, a municipality would consider the possible risks of a specific disastrous situation, eg, the possibility and extent of harmful consequences (including the prospect of the population's suffering injury or loss of life and property etc) as well as all of the interests of all of the people involved (including, eg, interests related to community members' livelihoods, culture, labour, health, safety and dignity).¹⁵⁷

Applying the above to the *Pheko* matter it is suggested that the Ekurhuleni Metropolitan Municipality should have attempted to balance and reconcile the residents' right of access to adequate housing¹⁵⁸ with their right to be assisted in a situation posing the risk of disaster by taking into account all the interests of the residents – including all surrounding factors and the real risks posed by the potential disaster situation. The relational balancing approach would *inter alia* entail the Municipality's consideration of all of the applicable rights against the information revealed by the engineering reports following the dolomitic discoveries.¹⁵⁹ The information should have been used to conduct a comparative harm or cost-benefit analysis,¹⁶⁰ which broadly speaking is a method of quantitatively evaluating whether or not to implement a proposed action,¹⁶¹ thus making a comparison between the most likely positive or negative consequences of an envisaged action and those of inaction in terms of the overall cost to the community.¹⁶² The comparative harm or cost-benefit analysis would typically have enabled the Municipality to consider the range of consequences that would follow the infringement of an existing and vested right (the right of access to housing) *vis-à-vis* the protection of a right (the rights to life and an environmentally safe environment) on the basis of the realisation of a probable risk.

The probability of risk in this context must, however, be understood against the background of the duties of local government arising from the precautionary principle in environmental law. This principle has firmly established itself as a legal principle in recent times and is essentially directed at the avoidance of

¹⁵⁷Louw and van Wyk (n 3) 16.

¹⁵⁸Section 26 of the Constitution.

¹⁵⁹The *Pheko* case 3 para 5.

¹⁶⁰For a further discussion on cost-benefit analysis see Driesen 'Is cost-benefit analysis neutral?' (2006) 17 *Fordham Environmental Law Review* 365-404 and Revesz 'Environmental regulation, cost benefit analysis and the discounting of human lives' (1999) 99 *Columbia Law Review* 941 – 1017.

¹⁶¹Clowney 'Environmental ethics and cost benefit analysis' (2007) 18 *Fordham Environmental LR* 106.

¹⁶²Sunstein 'Beyond the precautionary principle' (2003) *University of Pennsylvania LR* 1003-1058 at 1057. Cost-benefit analysis is also described as the investigation of whether or not the expected benefits from a proposed activity outweigh its expected costs. As per Zander *The application of the precautionary principle in practice: Comparative dimensions* (2010) 22.

possible harm to human health and the environment.¹⁶³ The precautionary principle has gained support in the international community as 'a higher order legal principle'¹⁶⁴ but is also firmly embedded in South Africa's NEMA. Section 2(4)(a)(vii) of the NEMA states that:

a risk-averse and cautious approach [should] be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

The value of the precautionary principle for the purposes of making decisions related to the dolomitic instability would lie in the fact that the principle demands 'a comprehensive survey of the space of possibilities, and evaluation of outcomes' – this involves 'not just a singular act of interest but rather the full set of feasible alternatives'.¹⁶⁵ In general, the precautionary principle is intended to enable and encourage precautionary action that serves the underlying values based on what is known as well as what is not known, and combines the ethical notion of the duty to prevent harm with the realities of the limits of scientific understanding.¹⁶⁶ Thus the precautionary principle means that action should be taken to correct an environmental problem as soon as there is evidence that harm may occur, not after the harm has already occurred.¹⁶⁷ To this extent it is possible to argue that what is required for relational balancing in cases of constitutional conflict seems to mirror to some extent that which is necessary for the application of the precautionary principle in public decision-making. Where relational balancing strives to take into account all of the interests involved, on the one hand, and specific factors or risks on the other, in order to provide the maximum possible protection of all the interests involved, the precautionary principle requires the acknowledgement of all potential outcomes, even those that are scientifically uncertain.¹⁶⁸ The application of the precautionary principle may therefore be said to encompass relational balancing and could, in the face of environmental uncertainty, be used to build a margin of safety into all of government's decisions, especially in decisions in the context of disaster management.¹⁶⁹

The precautionary principle is aimed at workable and acceptable approaches to potential dangers.¹⁷⁰ Framing 'relational balancing' as being part of the implementation of the precautionary principle in local disaster management is

¹⁶³Steele 'The precautionary principle: A new approach to public decision-making?' (2006) 19 *Law, Probability and Risk* 19.

¹⁶⁴Steele (n 163) 19.

¹⁶⁵Steele (n 163) 20.

¹⁶⁶World Health Organisation Europe *The precautionary principle: Protecting public health, the environment and the future of our children* (2004) 66.

¹⁶⁷Sunstein (n 162) 1013.

¹⁶⁸Steele (n 163) 21.

¹⁶⁹Sunstein (n 162) 1013.

¹⁷⁰Feintuck 'Precautionary maybe, but what's the principle? The precautionary principle, the regulation of risk and the public domain' (2005) *Journal of Law and Society* 371-398 at 394. See also Zander (n 162) 19.

useful and necessary in the local government context. It serves to reiterate the duty of municipalities to take pre-emptive action to prevent potentially irreversible harm – including when faced with an imminent disaster.¹⁷¹ Notably, risk can rarely be reduced to zero,¹⁷² and precautionary measures should as far as possible be based on a determination of the acceptable level of risk to a specific community in a looming disaster situation.¹⁷³

3 Conclusion

In executing its local disaster management mandate, it is possible for municipalities to be faced with difficult situations – a classic example is the constitutional conflict and the need for the limitation of rights that surfaced in the *Pheko* case.

In the *Pheko* case the Constitutional Court dealt with the facts and applicable law that were argued before it. Viewed in this way, the Court cannot be criticised for its judgment – *de facto*, the case has been decided correctly. The tragedy of the *Pheko* case, however, lies in the lost opportunity for the judiciary to have emphasised and contextualised the constitutionally entrenched developmental role of local government – generally, and with specific reference to the plight of vulnerable community members. The *Pheko* case is directly relevant to the (developmental) duty of local government in terms of section 153 of the Constitution and section 73(2)(d) of the Systems Act to provide municipal services in an environmentally sustainable manner.¹⁷⁴

The *Pheko* judgment made a small contribution towards explaining what the basket of constitutional rights in the Bill of Rights mean *inter alia* for local disaster management. It also made a contribution, albeit a minor one, towards local government officials' and Councils' understanding of how to take executive decisions when faced with seemingly conflicting constitutional mandates or duties and the limitation of rights through decision-making, generally. Those people involved in presenting and judging the *Pheko* case (the Court as well as the legal representatives) nonetheless failed to take advantage of the opportunity to draw the links between constitutional, local government, disaster management and environmental law. The precautionary principle as entrenched in the NEMA and proportional limitation of rights theory are directly relevant to the facts and

¹⁷¹Feintuck (n 170) 393.

¹⁷²Sunstein (n 162) 1017.

¹⁷³Steele (n 163) 22. See also Tickner *Precaution, environmental science and preventative public policy* (2003) 50.

¹⁷⁴Notably 'environmentally sustainable' is defined in s 1 of the Systems Act as the provision of a municipal service in a manner aimed at ensuring that the risk of harm to the environment and to human health and safety is minimised to the extent that is reasonably possible under the circumstances, the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances and legislation intended to protect the environment and human health and safety is complied with.

circumstances in the *Pheko* case but it did not surface in the arguments before or in the judgment of the Court.

South Africa is likely to face an increased incidence of different kinds of disasters – most of which are expected to be related to the environment and people's ability to access natural resources such as safe and adequate water and unpolluted land as well as basic amenities such as housing, sanitation services and electricity.¹⁷⁵ The *Pheko* case served to illustrate the constitutional dilemma when decisions must be taken in the face of uncertainty. The case further served to show how conflict may arise within the basket of constitutional rights of local communities and the concomitant duties on local authorities.

In this note we have only touched the surface of any consideration of the ways in which constitutional conflict in the local disaster management context may have to be approached. Considering the impacts of climate change as acknowledged *inter alia* in South Africa's National Climate Change Response White Paper it may now be more important than ever for the entire South African government to position itself towards the reduction of disaster risk and the response to disaster. While the *Pheko* case hinted at the role of local government in this effort, in-depth inter-disciplinary future research may be necessary to fully understand the implications and legal relevance of the critical links between environmental risk and uncertainty, the prevention of and response to disasters, and the rights of local communities *vis-à-vis* the duties of municipalities as entrenched in South African law.

¹⁷⁵See para 5.9 of the National Climate Change Response White Paper (2011).