

REFERENCE  
NOT FOR LOAN ✓

THE APPLICATION, EFFICACY AND RELEVANCE OF  
EXISTING PUBLIC HEALTH LEGISLATION

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SITWELL

JABULANI

MAZIBUKO

THIS DISSERTATION IS SUBMITTED IN PARTIAL  
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THE UNIVERSITY OF DURBAN-WESTVILLE.

SUPERVISOR : PROF M. REDDI

JOINT SUPERVISOR : MR M.C. BUTHELEZI

DATE : 30 APRIL 2003



✓

**DECLARATION**

**The Registrar ( Academic)**  
**UNIVERSITY OF DURBAN-WESTVILLE**

Dear Sir/Madam

I Sitwell Jabulani Mazibuko **REGISTRATION NUMBER: 200001978** hereby declare that the mini dissertation entitled;

**“THE APPLICATION, EFFICACY AND RELEVANCE OF EXISTING PUBLIC HEALTH LEGISLATION”**

is the result of my own investigation and research and that it has not been submitted in part or in full for any other degree or to any other University.

..... .....

(i)

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## TABLE OF CONTENTS

Declaration.....	(i)
Acknowledgements.....	(ii)
<b>CHAPTER 1.....</b>	<b>1</b>
1.1 Introduction.....	1
1.2 What is Public Health Law?.....	2
1.3 Public Health Legislation and its Impact on Public Health at the National, Provincial and Municipal spheres of government.....	5
1.3.1 The National Sphere of Government.....	5
1.3.1.1 Acts dealing with Air Pollution.....	5
1.3.1.2 Acts dealing with Land Pollution.....	7
1.3.1.3 Acts dealing with Water Pollution.....	9
1.3.1.4 Acts dealing with Bodily Health.....	11
1.3.1.5 Acts dealing with Food Control.....	19
1.3.1.6 Acts dealing with Occupational Health at the Work-place.....	21
1.3.1.7 Acts dealing with Health Professions.....	25
1.3.1.8 Acts dealing with Constitutional Matters.....	28
1.3.1.9 Acts dealing with General Public Health Matters.....	30
1.3.1.10 Conclusion.....	31
1.3.2 The Provincial sphere of government.....	32
1.3.2.1 Acts dealing with Bodily Health.....	34
1.3.2.2 Acts dealing with Food Control and Business.....	35
1.3.2.3 Acts dealing with General Public Health Matters.....	36
1.3.2.4 Conclusion.....	36
1.3.3 The Municipal sphere of government.....	37
1.3.3.1 By-laws dealing with Pollution Control and Occupational Health at the Work Place.....	38
1.3.3.2 By-laws dealing with Bodily Health.....	39
1.3.3.3 By-laws that deal with Food Control.....	39
1.3.3.4 By-laws dealing with General Public Health Matters.....	40
1.4 Conclusion.....	42
<b>CHAPTER 2.....</b>	<b>44</b>
2.1 Introduction.....	44

2.2 Public Health Issues and National Legislation.....	44
2.2.1 Air Pollution.....	45
2.2.2 Water Pollution.....	49
2.2.3 Land Pollution.....	51
2.2.4 The Work Environment.....	54
2.2.5 Food Control.....	55
2.2.6 Infectious Diseases Control.....	56
2.3 Public Health Issues and Provincial Legislation.....	58
2.3.1 Trade and Industrial Promotion.....	59
2.3.2 The Environment.....	59
2.3.3 Health Services.....	60
2.3.4 Pollution Control.....	60
2.4 Public Health Matters and Municipal Legislation.....	62
2.4.1 Air Pollution Control.....	63
2.4.2 Municipal Health Services.....	63
2.4.3 Control of Public Health Nuisances.....	64
2.4.4 Street Trading.....	65
2.4.5 Noise Pollution.....	65
2.4.6 Refuse Collection, Refuse Dumps and Solid Waste Disposal.....	65
2.4.7 Food Control.....	66
2.4.8 Municipal Transition Process.....	66
2.5 Conclusion.....	68
<b>CHAPTER 3.....</b>	<b>69</b>
3.1 Introduction.....	69
3.2 The Relevance and Effectiveness of South African Public Health Legislation .....	69
3.3 Enforcement of Compliance Mechanisms.....	77
3.3.1 Appointment of Inspectors.....	77
3.3.2 Criminal Sanctions.....	78
3.3.3 Interdicts.....	79
3.3.4 Administrative Mechanisms.....	80
3.4 Conclusion.....	81

<b>CHAPTER 4.....</b>	<b>82</b>
4.1 Introduction.....	82
4.2 Lacunae, Reformation and Redefinition of Public Health Law in South Africa.....	84
4.2.1 Gaps in Definitions in some Public Health Legislation.....	84
4.2.2 Gaps in some health related legislation are evident in the South African Public Health Legislation.....	86
4.2.3 Additional Gaps in the Public Health Law.....	88
4.3 Redefining Public Health in South Africa.....	90
4.3.1 Recommendations.....	90
4.4 Conclusion.....	92
<b>5. BIBLIOGRAPHY.....</b>	<b>95</b>
5.1 Books.....	95
5.2 List of Statutes.....	96
5.3 Municipal Bylaws.....	97
5.4 Official Documents.....	98
5.5 List of Cases.....	99

## **CHAPTER 1**

### **1.1 INTRODUCTION**

Internationally, the promotion and protection of public health is being recognized and developed through legislation.

Public health law attempts, *inter alia*, to regulate public health establishments which are also responsible for primary health care services. Some of the key functions of public health care are: the prevention and control of diseases, diagnostic examinations, the treatment and care of patients, rehabilitative services, promoting health education, monitoring, the evaluation and surveillance of diseases and the interaction of people with the environment which includes the air, land and water.<sup>1</sup>

The South African Constitution<sup>2</sup> provides that ‘everyone has the right to life’<sup>3</sup> and further states that ‘everyone has the right to an environment that is not harmful to their health and well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.’<sup>4</sup>

Section 26 asserts that everyone has the right of access to adequate housing and that the state should take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.

Section 27 guarantees the right of access to health care services including reproductive health care, the right to sufficient food and water, and social security, including

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<sup>1</sup> Nadasen S Public Health Law in South Africa: An Introduction page 52 2000.

<sup>2</sup> Act 108 of 1996.

<sup>3</sup> Sec 11.

<sup>4</sup> Sec 24.

appropriate social assistance for their dependants and themselves if they are unable to support themselves. Furthermore, no person may be refused emergency medical treatment. This means that the state guarantees everyone who suffers a sudden catastrophe the right to receive immediate medical attention in public and private health care facilities.<sup>5</sup> However, in the case of *Soobramoney v Minister of Health Kwa-Zulu-Natal*, Soobramoney was given access to health services but was refused emergency kidney dialysis treatment in Addington hospital. The hospital maintained that there was a shortage of dialysis machines and that his condition did not meet the criteria set out by the hospital for dialysis treatment. It was established his condition was chronic and that dialysis treatment will not save his life.<sup>6</sup> Soobramoney's constitutional right was violated due to a lack of financial resources.

The state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these goals.<sup>7</sup> Schedules 4 and 5 Part A and Schedules 4 and 5 Part B of the Constitution guarantee the provision of services to local communities by the local government. It is against this background that the framework of public health law has to be viewed.

## **1.2 WHAT IS PUBLIC HEALTH LAW?**

There are distinctively different definitions that assist in putting together the actual concept of Public Health Law. These include the following:

According to Grad "Public Health Law does not come in a single, neat legislative package marked 'Public Health Law'. It consist of many different types of legislation which have little in common except the benign purpose of advancing public health." Grad also asserts that "the reach of public health law is as broad as the reach of public health itself."<sup>8</sup>

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<sup>5</sup> The Constitution Act 108 of 1996 sec 27(3).

<sup>6</sup> *Soobramoney v Minister of Health KwaZulu-Natal* 1997 12 BCLR 1696 (CC); 1998 1 SA 430 (D).

<sup>7</sup> *Supra* 5 sec 27 (2).

<sup>8</sup> Nadasen S Public Health Law in South Africa: An Introduction page 53 2000.

Roemer on the other hand states that: “Public Health Law, like public health, concerns the health of populations as contrasted with the health of individuals, thus public health law concerns the legal aspects of providing preventive, curative and rehabilitative services to populations although public health law has an important impact on health protection and health care for individuals as well.”<sup>9</sup>

Gostin, for his part defines Public Health Law as “the study of the legal powers and duties of organized society to assure the conditions for the people to be healthy, for example to identify, prevent and ameliorate risks to health in the population and the limitation of the power of organized society to constrain the anatomy, privacy, liberty, property or other legally protected interests of individuals for the purposes of the protection of community health.”<sup>10</sup>

Furthermore, protecting public health also requires legislation which regulates, *inter alia*, refuse removal, waste-water and sewerage management, water supply, food control, hazardous and non-hazardous waste control and management, integrated waste and pollution control and management.

It is for this reason that public health law is new as a strategy to promote, control and protect the public health of the people within the context of health legislation. For the strategy to be comprehensive, one will have to understand other complementary concepts like Health Promotion.

The Ottawa Charter<sup>11</sup> developed five areas as points of departure for the implementation of health promotion, namely,

- Building healthy public policy,
- Creating a supportive environment,

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<sup>9</sup> *Supra*.

<sup>10</sup> *Supra*.

<sup>11</sup> World Health Organization’s First International Conference on Health Promotion, Ottawa Canada 17-21 November 1986.

- Strengthening community action,
- Developing personal skills, and
- Re-orientating the health services.

The Charter Action Plan aims to improve the health status of people globally and to produce capacity for ensuring that resources and opportunities are afforded equitably for the realization of the aims of the Ottawa Charter.

The Primary Health Care approach was adopted in Russia (USSR) in the Alma – Ata Declaration.<sup>12</sup> The Department of Health has also adopted this approach in the form of the White Paper for the Transformation of the Health System in South Africa.<sup>13</sup> It recognizes the following services: health education and promotion, family planning, immunization programmes, oral health services, mental health services, pediatric services, nutrition services, substance abuse services, environmental health services, communicable diseases control, ante-natal, post natal and neo-natal care services, and those services which should be provided by professional dieticians, doctors, nurses, therapists, dentists, health planners, nutritionists, pathologists, emergency health trained technicians, social workers, public health officers, environmental health officers, oral hygienists, health educators and radiographers.<sup>14</sup>

This section examined the various diverse definitions of public health law including the complementary concepts of primary health care and health promotion. In South Africa, public health law is still a new strategy that is geared to take to its wings once the true definition, meaning and application is discovered. The next section will set out and identify existing legislation at the national, provincial and municipal government levels and the impact of the legislation on public health.

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<sup>12</sup> WHO and UNICEF Alma Ata Declaration 1978, *Health for All by Year 2000*.

<sup>13</sup> GN 667 of 1997: Government Notice 17910 White Paper for Transformation of Health System in South Africa.

<sup>14</sup> *Supra*.

## **1.3 PUBLIC HEALTH LEGISLATION AND ITS IMPACT ON PUBLIC HEALTH AT THE NATIONAL, PROVINCIAL AND MUNICIPAL SPHERES OF GOVERNMENT**

### **1.3.1 THE NATIONAL SPHERE OF GOVERNMENT**

At this level one notes the following legislation that deals with air pollution, land pollution, water pollution, bodily health, food control, occupational health at workplaces, health professions, constitutional matters, and general health related laws: -

#### **1.3.1.1 Acts dealing with Air Pollution:**

##### **1.3.1.1.1 The Atmospheric Pollution Prevention Act<sup>15</sup>**

This Act provides for the control of noxious or offensive gases generated by industries, atmospheric pollution by smoke, dust control and air pollution by fumes emitted by vehicles. This piece of legislation impacts on public health by controlling the designs and equipment that will be utilized for industrial activities thus producing dangerous, harmful and noxious gases, dust and smoke that will pollute the atmosphere and air that human beings and animals breathe. Should the atmosphere and air be polluted by dangerous gases, dust and smoke, human beings and animals can develop diseases like asthma, pneumonia, bronchitis, sinus allergies and others.

This Act places its focus on the control of industrial emissions but does not mention emissions and fumes from food premises such as hotels, restaurants and other food outlets. The Act does not provide for environmental impact assessments which should be conducted to protect the environment, atmosphere and human health. It does not provide for the minimum standards with which industries should comply and conform to. It has not been delegated to the Department of Health for administration but is administered by the Department of Environmental Affairs and Tourism. The Act does not provide for the

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<sup>15</sup> Act 45 of 1965.

protection of human rights in terms of the new Constitution. It has not been reviewed since 1965 and its enforcement lacks manpower and capacity. However, the Act is of good value because it seeks to regulate air pollution, and to minimize air pollutants which will be discharged to atmosphere. The Act is viewed as ineffective in its present state and requires review, amendments, additions to be made to conform to international standards.

#### 1.3.1.1.2 The Minerals Act<sup>16</sup>

This Act deals with matters concerning prospecting and the mining of mines and seeks to regulate all persons responsible for, and activities involved in prospecting and mining operations. While doing so it also seeks to protect and advance the health of the employees engaged in all the activities concerned with prospecting and mining for minerals. This Act is made more effective and relevant by Chapter 5 sections 26 to 37, which overlap with the provisions of the Mine Health and Safety Act 29 of 1996, which provides for the protection, promotion and advancement of the health of the employees in the mines and of the communities living around the mines.

Section 39 of this Act also provides for an Environmental Impact Assessment (EIA) to be carried out before any intended prospecting and mining operations can be commenced. The EIA will safeguard the environment from degradation and protect people from the effects of degradation and possible environmental pollution. The Act provides for the Minister of Minerals and Energy Affairs to consult and co-operate with the other departments which are responsible for the administration of laws that relate to the protection of the environment. Section 63 of this Act empowers the Minister of Mineral and Energy Affairs to make regulations regarding the prevention, control combating of pollution of the air, land, sea and other water, including ground water, where such pollution is connected to prospecting or mining operations.

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<sup>16</sup> Act 50 of 1991.

### 1.3.1.2 Acts dealing with Land Pollution:

#### 1.3.1.2.1 The National Building Regulations and Building Standards Act<sup>17</sup>

Section 10 of the Act empowers local authorities to prohibit or to impose conditions in the construction of a building if a local authority is of the opinion that such building construction will not be in the interest of good health and hygiene, or is to be erected on a site which is subject to flooding or on a site which or any portion of which in the opinion of the local authority does not drain properly or is filled up or covered with refuse or material impregnated with matter liable to decompose. The Act safeguards the lives of human beings by prohibiting the provision and erection of houses that will endanger their health and well-being. It prohibits the erection of buildings that may fall and kill innocent people and occupiers. It is effective in its purpose and is implemented by the various municipalities to protect and promote public health. The Act authorises the Minister of Economic Affairs and Technology to make Standard Building Regulations which are referred to as SABS standards.<sup>18</sup> These Regulations regulate the construction, structure and demolition of buildings and include, *inter alia*, rules relating to structural design, public health safety, demolition work, water supply, electricity supply, ventilation, sewerage and other related matters.

#### 1.3.1.2.2 The National Environment Management Act<sup>19</sup>

The preamble to the Act refers to health as follows, “Whereas many inhabitants of South Africa live in an environment that is harmful to their health and well-being,

- Everyone has the right to an environment that is not harmful to his or her health or well-being,
- Everyone has the right to have the environment protected for the benefit of

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<sup>17</sup> Act 103 of 1977.

<sup>18</sup> R2378 in Government Gazette No. 12780 dated 12 October 1990 amended by R432 in Government Gazette No. 13054 dated 08 March 1991.

<sup>19</sup> Act 107 of 1998.

present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation.”

This Act is relevant to the control of all forms of pollution affecting the environment and human beings. It provides for the environmental impact assessment to be undertaken before any development can be started. It protects human rights in terms of the new Constitution of 1996. It provides for the polluter to be responsible for cleaning up pollution and to pay for the costs incurred. The Act makes provision for community participation in all structures of the three spheres of government. It is found to be effective in the control of pollution.

The Act is administered by the Department of Environmental Affairs and Tourism. It should however be delegated to the municipalities for implementation since they have the competency and the capacity to manage waste collection, removal and disposal. The Department of Health should be empowered and delegated to enforce compliance to people who contravene the provisions of the Act. This delegation of authority will facilitate rapid remedial actions and expedite compliances by offenders.

#### 1.3.1.2.3 The Environmental Conservation Act<sup>20</sup>

The Act provides for the prohibition of littering and the removal of such litter by local authorities. The National Minister in consultation with the Provinces may make regulations regarding waste management, littering, noise, pollution and environmental impact assessments. Proper collection, removal, transportation and disposal of waste ensures protection of communities from diseases. This Act does protect and promote the public health of the people of the Republic of South Africa. The statute provides for application by all three spheres of government. It provides for the establishment and licensing of sanitary landfill sites for waste disposal. It overlaps by also controlling air and water pollution, but it does not provide for community participation in decisions that will affect the communities. Human rights as mentioned in the new Constitution of

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<sup>20</sup> Act 73 of 1989 as amended.

1996 are not protected, and this renders the Act outdated. It therefore, requires review to meet the current legal framework dispensation.

#### 1.3.1.3 Acts dealing with Water Pollution:

##### 1.3.1.3.1 The National Water Act<sup>21</sup>

This Act provides for, *inter alia*, the reduction and prevention of pollution and the degradation of water resources, the management of floods and droughts, the protection of aquatic ecosystems and biodiversity and the promotion of dams safety. This means that water resources should be well and suitably protected, utilized, conserved, developed controlled and managed with the primary intention being to safeguard water resources from destruction, contamination and poisoning which might be dangerous to public health and the environment. Further, the Act makes provision for the achievement of integrated water resource management for the equitable and sustainable use of resources and access to resources.

The Act is effectively implemented by the Department of Water Affairs and Forestry and the Department of Health. It requires ongoing monitoring of water resources by continuous sampling of water for bacteriological and chemical analysis. It ensures that water resources and dams are provided and protected from contamination. The responsible agents have the capacity, manpower and resources to implement and enforce the provisions of the Act for the protection of the environment and the health of the people of the Republic.

##### 1.3.1.3.2 The Water Services Act<sup>22</sup>

Sections 3(1) and (4) of the Act guarantee the right of access to a basic water supply and the right to basic sanitation necessary to secure sufficient water and

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<sup>21</sup> Act 36 of 1998.

<sup>22</sup> Act 108 of 1997.

an environment that is not harmful to human health and well-being. However, these are subject to the limitation of the Act. The primary aim of the Act is to assist municipalities to provide water, and to ensure access to water services in an effective, efficient, affordable, sustainable and equitable manner. The Department of Water Affairs and Forestry is required to provide financial support in order to help municipalities and parastatal organizations (Rand Water, Umgeni Water and others) to realize, achieve and sustain this goal. The Act makes provision for the development of a regulatory framework for water services delivery by defining the roles and responsibilities of water services institutions, such as Umgeni Water and Rand Water. At the provincial and municipal levels, the Act defines the regulatory functions and interventions. The Act is administered by all three spheres of government.

The water services institutions are obliged in terms of the Act to ensure that pure and potable water that is free from impurities and diseases is reticulated and supplied to communities. At this level, public health officials have a duty to monitor the quality of water by continuously taking water samples for bacteriological and chemical analysis. This is done to protect and promote the public health of the people of the Republic of South Africa. This Act is effective and implemented by both the Municipalities and the Provincial spheres of government.

#### 1.3.1.3.3 The Sea-Shore Act<sup>23</sup>

Section 7 of this Act provides for the delegation and exercise of powers for the purposes of public health. In terms of section 30(2)(b) of the Health Act 63 of 1977, the Minister of Health in the National Government may declare a local authority by notice in the Government Gazette, to exercise powers in respect of the sea-shore and the sea situated within its area of jurisdiction or adjoining such area and any of the powers which are conferred by or under the Health Act. Section 10 makes provision for the Minister of Environmental Affairs and Tourism to make regulations regarding any portion of the sea-

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<sup>23</sup> Act 21 of 1935.

shore and the sea situated within or adjoining the area of jurisdiction of such local authority. Such local authority, with the approval of the Minister, may make regulations concerning:-

- (a) bathing in the sea,
- (b) the use of the sea,
- (c) the removal of any material from the sea-shore and the sea,
- (d) the prevention or the regulation of the deposition or discharge upon the sea-shore or the sea, of offal, rubbish or anything liable to be a nuisance or danger to health,
- (e) the control, generally, of the sea-shore and the sea....

These regulations must not be inconsistent with the Act. This Act seeks to protect the sea and the sea-shore from the disposal of all forms of land and water pollution. It protects people from being contaminated by harmful agents that have the potential of spreading diseases. The Act also protects aqua-marine life and plankton from getting contaminated by waste. It is effectively delegated to municipalities for implementation and enforcement. Municipalities have the capacity, manpower and all the resources to enforce the Act.

#### 1.3.1.4 Acts dealing with Bodily Health:

##### 1.3.1.4.1 The Choice of Termination of Pregnancy Act<sup>24</sup>

The Act provides for the determination of the pregnancy period at which pregnancy may be terminated and it stipulates the personnel who can perform such termination. The legislation promotes freedom of choice to women, by giving them the right to choose whether to have an early, safe and legal termination of pregnancy depending on the individual's beliefs. Before the promulgation of this Act, women would often give birth to unwanted children that could end up as street children. The Act also prevents unwanted pregnancies that may arise from rapes. It seeks to prevent backyard abortions that are performed by unskilled and untrained persons. Furthermore, it reduces the

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<sup>24</sup> Act 92 of 1996.

abdominal infections associated with abortions and the number of people who die from such unlawful abortions.

The Act is effective in that many legal and registered private abortion clinics have been opened in cities, and public and private hospitals and clinics are offering abortion services to the people. Lack of capacity and manpower to ensure enforcement of the Act by the Health Department is the crucial blow. Backyard abortion places and unregistered private abortion clinics should be forced to comply and be made to closedown. The Act should criminalize the operation of backyard abortion and unregistered abortion clinics and a heavy fine, penalty and or imprisonment should be offered. This control will form part of the intended objective to protect, promote and advance the public health of the communities.

#### 1.3.1.4.2 The Customs and Excise Act<sup>25</sup>

Section 109 empowers the Commissioner of the South African Revenue Services, at anytime, if it is necessary, to safeguard the public health or the safety of the state or public. He may cause any goods under Customs and Excise control forthwith to be destroyed or otherwise disposed of or delay the departure of any ship or vehicle from any place in the Republic for a period not exceeding 48 hours. On the other hand the department of Customs and Excise is empowered to confiscate any consignment of imported cargo or foodstuff, in collaboration with Department of Health officials, for further investigation which may include a chemical or bacteriological analysis. Such goods may be destroyed should they be discovered to be of a low health quality in terms of South African standards.

This Act is effective in that it safeguards all incoming goods, foodstuff and medicine intended for human use and consumption in the Republic. The South African Police Services officials control all border posts in the airports and seaports to ensure that the

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<sup>25</sup> Act 91 of 1964.

provisions of this Act are complied with in order to safeguard the health of the people of South Africa.

#### 1.3.1.4.3 The Hazardous Substances Act<sup>26</sup>

This Act provides for the control of substances which may cause injury, ill-health or the death of human beings by reason of their toxic, corrosive, irritant, strongly sensitizing or flammable nature, or the generation of pressure thereby in certain circumstances and for the control of certain electronic products and to provide for the division of such substances or products into groups in relation to the importation, manufacture, sale, use, operation, application, modification, disposal or dumping of such substances and products. This Act is effectively administered by the Department of Health. The inspectors have a duty to monitor the storage, handling and selling of hazardous substances. In terms of the Act, all premises where the storing, handling and selling of these substances is taking place, are required to be registered and licensed, and a register is kept for control purposes. The Act criminalizes activities dealing with hazardous substances without authority or a licence. This is done to protect human health and to promote the public health of the people.

#### 1.3.1.4.4 The Health Act<sup>27</sup>

This Act provides for the provision of health services and defines the duties, powers, and responsibilities of the National, Provincial and Local Authority spheres of government. The Act requires co-operation, liaison and co-ordination between the three spheres of government in the rendering of health services.

Effectively, it supervises the provinces by ensuring and providing for the building of hospitals, clinics, community health centres, nurses homes, emergency and ambulance services, the supply of generic medicines and making funds available for that purpose. It

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<sup>26</sup> Act 15 of 1973.

<sup>27</sup> Act 63 of 1977.

stipulates the duties and functions of municipalities and the provision and running of municipality primary health care clinics.

Again effectively, the Act also provides for the abatement of nuisances in the area of jurisdiction of the municipalities. These nuisances may be the emission of noxious gases and fumes into the atmosphere by industries, or the prevention and control of littering. This is in compliance with the duties and competence of the municipalities in terms of Schedules 4 and 5 of the new Constitution. Intergovernmental co-operation, co-operative governance and co-ordination of health services by all three spheres of government is stipulated in the Act, which makes the Act applicable and relevant to the new Constitution.

Contrary to its effectiveness, the Act does not advocate community involvement and participation in processes that lead to decision making in matters affecting the running of health institutions. The Act is found to fail the Constitution by not complying with the human rights entrenched in the new Constitution. It does not provide for the control of the administration and licensing of private surgeries. Although this piece of legislation is outdated, it is still valid until the new National Health Act that is still undergoing comments and changes in the form of a Bill, is passed. The Act protects, promotes and advances the public health of the people of the Republic.

#### 1.3.1.4.5 The International Health Regulations Act<sup>28</sup>

As adopted from the International Health Regulations of the World Health Assembly, this Act provides for the control of communicable and non-communicable diseases by international states. It controls the international transportation of persons, cargo, goods, baggage and mail at seaports and airports. It provides for the control of plague, yellow fever, smallpox, cholera and other contagious and infectious diseases including vectors such as rodents and mosquitoes. Should this Act not be properly implemented by the state, infectious, communicable and syndromic diseases can spread to our country

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<sup>28</sup> Act 28 of 1974.

and cause fatalities and become a financial burden to the allocated fiscal resources. Before any ship or airplane can land in our country with any sick person on board, the captain has to notify the officials about the sick person on board so that quarantine arrangements can be made to contain the sickness or the disease from spreading. Similar measures apply to foodstuff, cosmetics and disinfectants and other cargo which require testing and sampling for bacteriological and chemical analysis before they can be released in the country.

This Act is relevant to the control of international infectious diseases. It should, however, be reviewed to include other emerging infectious diseases which threaten the global movement of people. The Department of Health should provide capacity and manpower to deal with the influx of ships, aircraft and road and rail transport carriers entering the borders of the Republic. The high value of the Act demands the intensive monitoring of all incoming ships, aircraft and road and rail transport carriers and to carry out inspection of rodents, mosquitoes and sick people.

#### 1.3.1.4.6 The Sterilization Act<sup>29</sup>

This Act provides for the right to perform sterilization, but with the consent of the patient. It further stipulates measures for incompetent patients who are unable to give consent, for example, mentally ill patients. It recognizes and promotes the rights of patients to give informed consent to sterilization, especially mentally ill patients. The Act is relevant and effective to protect those people who are not competent to object to sexual abuse by other people. For instance, an insane person may not be able to refuse sexual abuse because of his or her illness. Sterilization prevents unwanted pregnancies for the mentally ill person and those individuals who do not have the capacity to give birth and raise a child. It recognizes the human rights as enshrined in the Constitution. The value of the Act is high because it seeks to reduce the number of unwanted pregnancies, and it gives patients the right to exercise their choice of informed decision making. It upholds human dignity. However, for the Act to achieve its intended objective, it requires

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<sup>29</sup> Act 44 of 1998.

intensive education of the communities. This Act protects and promotes the public health of the people of South Africa.

#### 1.3.1.4.7 The South African Police Service Act<sup>30</sup>

Section 14 of the Act provides that the National and Provincial Commissioners of the South African Police Service (SAPS) may appoint members of the service in the preservation of life, health and property. The members of the police are empowered to preserve life in cases of emergency and accidents. They are equipped to rescue people whose lives are threatened or in danger. In road accidents and disasters, they have the capacity to handle accidents and disaster situations to preserve human life, protect and promote public health. With disaster management education the police manpower is offered in order to handle all dangerous situations. It is a testimony to prove that this Act holds high value to the communities of the Republic of South Africa to protect, promote and advance the public health of the citizens of the country.

This Act is effective to the extent that the police are called on in emergency situations, such as cases of suspected food poisoning, unlawful importation of foodstuff and medicines, to confiscate such suspected foodstuff and medicines for submission to government pathologists for bacteriological and chemical analysis. The SAPS also employs trained divers and rescuers who use high technology equipment and transport to help preserve life, thereby protecting and promoting public health.

#### 1.3.1.4.8 The Tobacco Products Control Act<sup>31</sup>

The Act provides for the restriction and prohibition of smoking in public places and regulates the sale and advertising of tobacco products. It prescribes what is to be reflected on packages and the displaying of warning messages that smoking is dangerous to health. Persons under the age of 16 years are prohibited from buying cigarettes and tobacco at

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<sup>30</sup> Act 68 of 1995.

<sup>31</sup> Act 83 of 1993.

shopping outlets. All tobacco products and cigarettes are required to display warning messages that read, for example, “Warning: Smoking is dangerous to your health, it causes diseases like lung cancer”. At all public places “No Smoking” signs are required to be conspicuously displayed in order to be visible to all persons.

This piece of legislation requires the provision of separate facilities for smokers, demarcated and separated from the public. This is done to protect non-smokers from inhaling tobacco smoke, which is dangerous to human health. The Tobacco Products Control Amendment Act<sup>32</sup> prohibits advertising, sponsorships and promotions of tobacco products at sports venues. The Act prohibits and criminalizes smoking in public places and workplaces. The law prohibits the free distribution of tobacco products by companies and the issuing of incentives for example, awards and prizes in order to entice the public to buy and consume cigarettes.<sup>33</sup>

This Act is effective in its application. The ban on sponsorship for sports events has been effective and successful; all tobacco products now display warning signs that say “cigarette smoking is dangerous to your health”; “no smoking” signs are posted at conspicuous places in all public places; and separate facilities at public places are provided for smokers. Whilst the Act is found to be effective, it is dealt a blow by the enforcement authorities for stating categorically that they do not have the capacity and manpower to accede to the demands of the communities for the arrest and prosecution of people who smoke in public places.

#### 1.3.1.4.9 The Prevention and Treatment of Drug Dependency Act<sup>34</sup>

The purpose of this Act is “to provide for the establishment of a Drug Advisory Board, the establishment of programmes for the prevention and treatment of drug dependency, the establishment of treatment centres and hostels, the registration of institutions as

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<sup>32</sup> Act 81 of 1999.

<sup>33</sup> Saloojee Y. Tobacco Control. South African Health Review 2000. Health Systems Trust. Durban. 2000.

<sup>34</sup> Act 20 of 1992.

treatment centres and hostels, the committal of certain persons to and their detention, treatment and training in such treatment centres or registered treatment centres.” This legislation seeks to cater for the rehabilitation of persons addicted to drugs and to return them to a normal life and contribute to healthy lifestyles. The establishment of rehabilitation centres and the rendering of health education and health promotion is seen as preventing people from taking drugs. Hence it contributes to the promotion of public health.

#### 1.3.1.4.10 The National Health Bill<sup>35</sup>

The purposes of the Bill is to, *inter-alia*, create a National Health System that will encompass public, private and non-governmental organizations that will provide health services; to ensure that services are rendered equitably, efficiently, effectively, and in an acceptable manner; and to encourage communities to participate actively in all aspects of health in order to realize the implementation of the District Health System as required by the National Health System. Once this Bill is passed, it will replace the old Health Act 63 of 1977. The Bill advocates the community involvement in the planning, provision and evaluation of health services. It will determine and formulate norms, standards and national health policy and legislation for the health services. Further, it will address all the imbalances and mistakes of the previous apartheid regime by ensuring that the District Health System is implemented by the Provinces and Municipalities.

The new Act will be effective because it upholds the notion human rights as entrenched in the new Constitution. At the time of writing this dissertation, the Bill is still undergoing a number of review processes, debates and consultations with all stakeholders and civil society.

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<sup>35</sup> Draft: dated 22 October 2001.

#### 1.3.1.4.11 The Mental Health Care Bill<sup>36</sup>

The Bill provides for mental health services as forming an integral part of primary, secondary and tertiary health services. This Bill recognizes the human rights of mentally ill patients and their right to make informed decisions in matters affecting their health. It is relevant to the new Constitution. It is still undergoing the processes of consultation, reviewing and debate in order to be passed and enacted into law.

#### 1.3.1.5 Acts dealing with Food Control:

##### 1.3.1.5.1 The Agricultural Research Act<sup>37</sup>

Section 2 provides for the establishment of the Agricultural Research Council. In terms of section 3 the main objective of the Agricultural Research Council is “to promote agriculture and industry through research, development and technology transfer, to improve the nutritional value and quality of agricultural products, to prevent environmental pollution, to improve techniques for the processing of agricultural products and the keeping quality of perishable products and thereby contributing to the improvement of the quality of life of the people of the Republic.” It is also empowered to perform such other functions as may be assigned to the Agriculture Research Council or under the Act as may be necessary to protect the environment.

This Act is effective in the conduct and control of research in the technology of food production. It provides for improving the nutritional value of agricultural products. When the agricultural products are of high nutrition value, they provide good quality and healthy food for human consumption and the people will be healthy. Every country requires a healthy nation, therefore this Act has high value in the food research fraternity.

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<sup>36</sup> Bill 2000 Notice 344 of 2000.

<sup>37</sup> Act 86 of 1990.

### 1.3.1.5.2 The Foodstuff, Cosmetics and Disinfectants Act<sup>38</sup>

This Act provides for the control of the sale, manufacture, processing and importation of foodstuff, cosmetics and disinfectants. This Act safeguards human-beings from eating and using infected and unsound foodstuff, cosmetics and disinfectants. It ensures and guarantees the good quality of the foodstuff that should be manufactured and sold for public consumption.

The Act impacts on public health by imposing safety measures that are implemented by public health officers who carry out periodic visits and inspections on all premises where foodstuff, cosmetics and disinfectants are handled, manufactured and sold for human consumption. It is effective in that all food preparing and selling outlets are continuously monitored to ascertain that fresh and healthy food is sold to the public for human consumption. In terms of this Act, it is imperative that the health and hygiene of all personnel that handle food undergo periodical medical checks in order to ensure that they do not harbour infectious diseases that can be transmitted to the people who buy foodstuff. This is done to prevent the outbreak of food-borne poisoning.

The Act is of high value because it protects people from eating contaminated foodstuff. In so doing, it promotes and advances the public health of the communities in the Republic. However, the Act should be reviewed and made to conform to the international community by making provision for the establishment of the Food and Drug Agency (FDA) that will be made responsible for food control in the Republic of South Africa. This Act is implemented by the Health Department in conjunction with the Department of Customs and Excise in terms of the Customs and Excise Act 91 of 1964, in order to confiscate imported foodstuff at the border posts, airports and seaports for bacteriological and chemical analysis to check whether such foodstuff conform to the standards required in the Republic of South Africa.

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<sup>38</sup> Act 54 of 1972.

### 1.3.1.5.3 The Liquor Products Act<sup>39</sup>

Section 2 empowers the Minister of Agriculture to establish the Wine and Spirit Board. This Act regulates wine, fruit-beverages, grape-based liquors and spirit based liquors. It provides for the control of the production of alcoholic products, the composition and the properties of such alcoholic products, and control over the importation and exportation of alcoholic products. It also controls the sale of alcoholic products in the Republic of South Africa. The Act does not apply to beer, sorghum beer and medicines. The Minister may grant authority to a person to sell, produce for sale, for drinking purposes, a sacramental beverage, alcoholic beverage obtained through alcoholic fermentation of the fruit juices, cane sugar and honey. Since all alcoholic beverage products, wines and spirits are purported for human consumption, they are required to be of highest health standards, free from harmful effects and impurities.

### 1.3.1.6 Acts dealing with Occupational Health at the workplace:

#### 1.3.1.6.1 The Compensation for Occupational Injuries and Diseases Act<sup>40</sup>

Section 4(2)(b) empowers the Director General of the Department of Labour to establish, subsidize, or assist with the founding, establishment or subsidizing of a body or organization or scheme whose objects include one or more of the following:-

- (i) The prevention of accidents or of any diseases which are caused by the nature of a particular activity.
- (ii) The promotion of the health or safety of employees.

The Act is effective because it provides facilities designed to assist injured employees and those employees suffering from occupational diseases to return to their work or to reduce or to remove any disability from their injuries or diseases. The Act seeks to compensate employees who contract occupational diseases while in the employ of the employer. Further, it compensates the employees for any temporary, total or partial

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<sup>39</sup> Act 60 of 1989.

<sup>40</sup> Act 130 of 1993.

disability or death acquired at the workplace. It also compensates those employees who meet accidents or contract an occupational disease which is due to the negligence of the employer. This Act is effectively monitored by Occupational Inspectors of the Department of Labour who carry out inspections to check compliance. The Act is relevant to public health because it empowers the officials of the Department of Labour to seek all notifications of injuries and accidents that occur at the workplace. It also seeks all medical records of occupational diseases and the names of employees who contracted them.

#### 1.3.1.6.2 The Employment Equity Act<sup>41</sup>

Section 6(1) of this Act prohibits unfair discrimination on any ground, including, the HIV/AIDS positive status of an employee. Section 7(1) prohibits the medical testing of an employee, unless, legislation permits or requires the testing, or such testing is justifiable in the light of medical facts, employment conditions, social policy, and the fair distribution of employee benefits or is an inherent requirement of the job. Section 7(2) prohibits the testing of employees to determine their HIV/AIDS status unless the Labour Court determines that such testing is justifiable. Section 7(1) differs from 7(2) by referring to the prohibition of medical testing in general. Section 7(2) specifically refers to the prohibition of medical testing to determine HIV status.

Section 50(4) empowers the Labour Court, where it declares that the medical testing is justifiable, to make any order it deems appropriate in the circumstances, including imposing conditions relating to the following:

- (i) the provision of counseling,
- (ii) the maintenance of confidentiality,
- (iii) the period during which the authorization for any testing applies, and
- (iv) the category or categories of jobs or employees in respect of which the authorization for testing applies.

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<sup>41</sup> Act 55 of 1998.

The Act becomes effective in protecting the rights of the employees and the applicants who seek employment. It ensures that medical testing is not conducted to discriminate against employees and work-seekers on the grounds listed in section 6(1). It protects employees from discrimination on the grounds of their HIV and AIDS status. This Act is relevant to the protection of the public health and the promotion and advancement of the health of the employees at the workplace. The Act is administered by the Department of Labour.

#### 1.3.1.6.3 The Mine Health and Safety Act<sup>42</sup>

The Act provides for the protection and promotion of the health and safety of persons involved in mining. It aims to promote a culture of health and safety in mines and promotes the training in health and safety in the mines. Most importantly it provides for the enforcement of health and safety measures in mines.

The Act is effective by requiring the employers to periodically conduct occupational hygiene measurements, check mine hazards at regular intervals, and to conduct medical checks on employees exposed to health hazards in order to detect early signs of impairments and the development of chronic medical conditions. It provides for the early retirement of employees who are detected to be developing chronic medical conditions.

Mine Inspectors are appointed to ensure effectiveness of the Act and compliance by both employers and employees with the requirements of the Act for the protection and promotion of public health in the mines. This Act also overlaps with the provisions of the Occupational Health and Safety Act 85 of 1993, which seeks to protect and promote the health of the employees at the workplace.

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<sup>42</sup> Act 29 of 1996.

#### 1.3.1.6.4 The Occupational Health and Safety Act<sup>43</sup>

The objective of this Act is “to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery, the protection of persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work, and to establish an advisory council for occupational health and safety.” The Act compels the employer to undertake various functions to ensure the protection and safety of its employees in the workplace.

For instance, the employer is required to undertake risk assessments of chemical, physical and biological stresses in the workplace on a regular basis. The Act is effective because it ensures the protection of employees from health hazards and harmful conditions on the working floor that can result in partial or permanent disability and the development of chronic medical conditions.

The effectiveness is further advanced and controlled by the Occupational Health Inspectors, who visit industries for conducting inspections and risk assessments. This Act seeks to protect the health of employees whilst performing their duties and promotes public health in the work place. It attempts to ensure that workers are not made vulnerable to occupational diseases, or temporary, partial, total or permanent disabilities in the workplace.

#### 1.3.1.6.5 The Skills Development Act<sup>44</sup>

Section 2 (1)(a)(i) of the Act provides for the development of the skills of the South African workforce to improve the quality of life of all workers, their prospect of work and mobility. The Department of Labour has been empowered to establish training centres that will facilitate the training of unemployed persons in skills that will empower

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<sup>43</sup> Act 85 of 1993.

<sup>44</sup> Act 97 of 1998.

them to get jobs, create jobs and improve the quality of life and health standards. This empowerment is geared to alleviate poverty and promote public health.

#### 1.3.1.7 Acts dealing with the Health Professions:

##### 1.3.1.7.1 The Health Profession Act<sup>45</sup>

This Act seeks to control the health professions in the Republic. Effectively, it ensures that a standard of high health care is provided by the health professionals to protect, promote and advance the health of the people of the Republic. Section 15 of this Act provides for the Minister of Health to establish professional boards for the relevant specific professions. Section 15(A)(b) states further that the main objective of the professional board is to assist in the promotion of health for all the citizens of the Republic of South Africa. It promotes the standard of training of health professionals in the country. It controls all matters connected with the diagnosis, treatment and prevention of illnesses, diseases, and physical and mental defects in humans.

Section 24 stipulates that all health professionals registering for the first time should perform compulsory community service for one year, before they can be considered for registration with the Health Professions Council in terms of this Act. This practice is carried out to expose the professionals to the realities of Primary Health Care and has proved to be successful and effective.

The Act requires and ensures that every Health Professional is registered with the relevant Professional Board in order to authorize them to practice their profession. A register is kept for the respective professions where names are registered or deregistered and restored. The Act also provides for the disciplinary measures to be taken for penalizing, suspending and deregistering health professionals found guilty of misconduct or disgraceful conduct. Health professionals found guilty are also liable to prosecution. The Act prevents bogus people from rendering treatment to the public. It is viewed as a

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<sup>45</sup> Act 56 of 1974.

means to protect and promote public health. The Act criminalizes the practice by bogus people and unregistered health professionals.

#### 1.3.1.7.2 The Nursing Act<sup>46</sup>

Section 2 of this Act empowers the Minister of Health to establish the South African Nursing Council. Section 3(a) of the Act states that the South African Nursing Council shall assist in the promotion of the health standards of citizens of the Republic of South Africa. The Act ensures that only registered nurses are authorized to practice and work as nurses in State hospitals and clinics and private hospitals and clinics. It also seeks to sustain the best and highest level of nursing health care in the Republic of South Africa.

The Act regulates all nursing colleges and controls the education and training of nurses in the country. Section 38 empowers registered professional nurses to consult, examine, diagnose and prescribe medicine in the absence of medical practitioners. Effectively, professional nurses do consult, examine, diagnose and prescribe medicine, in the absence of doctors, in the primary health care institutions (clinics).

The Act provides for the keeping of register to register all practicing nurses in the Republic. Nurses can be registered, deregistered and restored, disqualified, charged for misconduct or disgraceful conduct and may be liable to prosecution. The Act also criminalizes the practice of bogus nurses and unregistered nurses. The nursing profession is involved in protecting and promoting public health through the delivery of basic health services based on Primary Health Care.

#### 1.3.1.7.3 The Pharmacy Amendment Act<sup>47</sup>

This Act requires pharmacists to undergo compulsory community service in State institutions in order to qualify for registration with the Pharmacy Council. Intern

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<sup>46</sup> Act 50 of 1978.

<sup>47</sup> Act 1 of 2000.

pharmacists are required to serve twelve months doing compulsory community service designated by the department of Health. This Act seeks to regulate the pharmacist profession, the pharmacy business, and the licensing of pharmacy businesses. All medical professionals who require registration with the Health Professions Council of South Africa are required to serve this period in order to qualify for registration. This practice is intended to equip pharmacists with community health related needs and conditions with the intention to promote the health of the people of the Republic. The Pharmacy profession is brought in line with other professions regulated by the Health Professions Act.

#### 1.3.1.7.4 The Pharmacy Act<sup>48</sup>

In terms of section 2 of the Act, the Minister of Health is empowered to establish the South African Pharmacy Council. Section 3(b) provides that the Pharmacy Council has an obligation to safeguard and uphold the rights of the public to universally acceptable standards of pharmacy practice in the private and public sectors. The Act ensures the control of the pharmacist's practice. It also intends to promote the health of the citizens of the Republic. Only registered pharmacists can practice. Further, the Act ensures that every pharmacy must be under the continuous supervision of a registered pharmacist. The Act effectively controls the licensing of the pharmacy trade and the dispensing of medicine to people. This is done to protect patients and the general public from receiving unhealthy medication. It criminalizes practice by bogus pharmacists, unregistered pharmacists and the selling of medicines not approved in the Republic. This is another method of protecting and promoting public health.

#### 1.3.1.7.5 The South African Medical Research Council Act<sup>49</sup>

Section 2 of the Act provides for the establishment of the South African Medical Research Council. In terms of the Act, the Medical Research Council shall promote the

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<sup>48</sup> Act 53 of 1974.

<sup>49</sup> Act 58 of 1991.

improvement of the health and quality of life of South Africans through research, development and technology. Medical research is only allowed to be undertaken by or under the supervision of highly qualified medical professionals. All medical research information is highly controlled. Research is undertaken to improve technology in medicine and to develop appropriate drugs that will protect humans from contacting diseases. The research and technology developments and disease control seeks to protect and promote public health. The newly acquired information, through research, will assist in developing appropriate technology and measures in controlling diseases. The State President, by proclamation in the Government Gazette, is empowered to assign the administration of this Act to any Minister.

#### 1.3.1.8 Acts dealing with Constitutional matters:

##### 1.3.1.8.1 The Promotion of Access to Information Act<sup>50</sup>

This Act has the purpose to give effect to Section 32 of the Constitution, which guarantees everyone the right of access to any information held by the State, private and other persons. Section 30 of this Act guarantees access to health records. Access to health and medical records may only be denied on grounds of patient denial of access.

It is an offence to deny access in terms of this Act with an intention to destroy, damage or alter a record, conceal a record, or falsify a record. Any person found committing this crime is liable to prosecution. This Act is effective, because it provides for the Human Rights Commission (HRC) to run educational programmes and workshops in all the provinces, and to equip and educate the communities on their health rights. The HRC is empowered to gather information from all the provinces in connection with the number of requests for access to information that were received, granted and refused. Further, the HRC is obliged to report to parliament in terms of section 181 (5) of the Constitution, the number of requests for access to information that were received, granted, complaints lodged to Public Protector and the applications submitted to courts. This monitoring by

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<sup>50</sup> Act 2 of 2000.

the HRC assists in the awareness campaign of the communities of the Republic and helps them to exercise their human rights for the protection and promotion of public health.

#### 1.3.1.8.2 The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>51</sup>

This Act prohibits unfair discrimination, including the provision of inferior services to any racial group, when compared to those of another racial group. The Act also prohibits discrimination including gender-based violence, female genital mutilation, and limiting the rights of women to social services on the grounds of pregnancy or disability. The Human Rights Commission (HRC) is empowered to promote human rights and equality in respect of gender, race, disability and other rights.

Section 29 of the Act give examples of human rights violations relevant to public health. These include subjecting persons to medical experiments without their consent, denying access or refusing access to health care facilities or failing to make health care facilities accessible to all persons, refusing to provide emergency medical treatment to persons of a particular group and refusing to provide access to health services to elderly people.

This Act is effective because the Human Rights Commission (HRC) and the Commission for Gender Equality (CGE) have implemented an ongoing programme of action to promote equality. Training and workshops are continuously provided and conducted in all provinces.

The Act asserts South Africa's obligation to honour the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These Conventions guarantee the rights of persons to health care establishments and the elimination of all forms of discrimination in health care.

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<sup>51</sup> Act 4 of 2000.

### **1.3.1.9 Acts dealing with general public health matters:**

#### **1.3.1.9.1 The Local Government Municipal Demarcation Act<sup>52</sup>**

Section 2, of the Act makes provision for the establishment of the Municipality Demarcation Board. Section 7(1)(b) requires that a person must have experience in or a qualification or appropriate knowledge of Public Health to qualify for being a member of the Board. This will enable the Board to function appropriately in all matters affecting the general public during the demarcation of new municipality boundaries which impact on the delivery of all services to communities.

The Demarcation Board ensures that municipalities have the capacity to deliver services to communities in a sustainable fashion. Effectively, public health services are included in the process of demarcating new boundaries. The Board has managed to rationalize the number of municipalities from 843 to 284 in the Republic. Effectively, primary health care clinics are now servicing the communities that were not before included in these areas. Successfully, refuse collection, removal and disposal services are now incorporated in previously disadvantaged areas. Potable water supplies are now reticulated to all previously disadvantaged communities. The Board allows for the cross-subsidization of services where municipalities with financial advantages are amalgamated with previously disadvantaged and poor areas.

#### **1.3.1.9.2 The Transport Deregulation Act<sup>53</sup>**

Article VI (1) of this Act provides that the memorandum of understanding shall not derogate from the application of national laws and regulations imposing any restriction on the ground of Public Health, Road Traffic, Veterinary or Phytopathological reasons or the levying of dues chargeable by virtue of such laws and regulations of the contracting parties. This article means that the memorandum of understanding signed by the Republic

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<sup>52</sup> Act 27 of 1998.

<sup>53</sup> Act 80 of 1988.

of South Africa, Botswana, Lesotho and Swaziland requires these countries to maintain effective transportation arrangements. All transport operations and permits to operate such transport shall be done and be compliant with the restrictions and controls of the national laws and regulations of the contracting countries to the agreement made in terms of this Act.

Transport carriers should not be a menace to the communities of the country. Hazardous, poisonous and flammable substances should be transported in properly constructed roadworthy transport which conform and comply with the standards of public health and road legislation. All public health control measures of the Republic of South Africa shall apply to transport carriers from other countries, to protect and promote public health.

#### 1.3.1.10 Conclusion:

Various statutes were examined by determining their role in promoting, advancing and protecting public health. It is apparent that public health legislation is diverse, duplicated and fragmented. The national laws take precedence over the provincial legislation and municipal by-laws in times of disputes and conflicts. Jayasuriya points out that the effectiveness of legislation, *inter-alia*, depends on the legislative framework which should be consistent with the policy.<sup>54</sup> The relevance and the application of the various legislation were determined to check their objectives, namely whether they address the desired goal to regulate health care services delivery, promote, advance and protect public health. The next section will also examine the relevance, application and efficacy of the legislation but at the provincial level. The section explores the existing provincial laws in terms of their relationship to the national legislation and to the municipality by-laws.

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<sup>54</sup> Jayasuriya D C Legal Issues and Approaches Regulation of Pharmaceuticals in Developing Countries WHO page 83 1985.

### **1.3.2 THE PROVINCIAL SPHERE OF GOVERNMENT**

All national public health legislation that deal with air pollution, land pollution, water pollution, bodily health, food control, occupational health at workplaces, health professions, constitutional issues and general health related laws as have been mentioned in section 1.3.1 are also applied by the provincial spheres government.

Section 44 of the Constitution<sup>55</sup> empowers the national sphere of government to pass laws that deals with matters listed in schedules 4 and 5 of the Constitution. Should there be a conflict between the national legislation and the provincial legislation with regards to the functions and duties of the provincial government as listed in schedule 4, national laws supercede provincial laws. However, the national legislation must meet the following conditions<sup>56</sup>; the legislation must deal with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually; the legislation must deal with a matter that is dealt with effectively which requires uniformity across the nation, and the legislation must provide that uniformity by establishing norms and standards, frameworks and or national policies; the legislation must be necessary for the maintenance of national security, the maintenance of economic unity, the protection of the common market in respect of the mobility of goods, services, capital and labour, the promotion of economic activities across provincial boundaries, the promotion of equal opportunities or equal access to government services and or the protection of the environment; the national legislation prevails over provincial legislation if the national government aims at preventing unreasonable actions by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole, or impedes the implementation of the national economic policy.

Where there is a dispute concerning whether national legislation is necessary for any of the purposes set out in subsection (2) (c) above, and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the

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<sup>55</sup> Act 108 of 1996.

<sup>56</sup> The Constitution Act 108 of 1996 Sec 146.

legislation by the National Council of Provinces. Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

A law made in terms of an Act of Parliament or a Provincial Act can prevail only if the National Council has approved that law. Furthermore, Provincial Premiers together with other members of the Executive Council are empowered to implement all National legislation within the functional areas listed in Schedules 4 and 5.<sup>57</sup> The Constitution also emphasises that the National Council of Provinces may initiate or prepare legislation falling within a functional area listed in Schedule 4<sup>58</sup>. The Provincial legislatures are empowered to pass legislation for their provinces with regard to matters listed in Schedule 4 and Schedule 5<sup>59</sup>. Some of functional duties listed in Schedule 4 Part A relate to public health issues, and include, *inter-alia*, disaster management, health services, pollution control, environment management, regional planning and development, soil conservation, welfare services, trade control, population development, nature conservation, agriculture and animal control and diseases. Other functional duties listed in Schedule 5 Part A relate to public health issues, and include, *inter-alia*, abattoirs, ambulance services, liquor licences, veterinary services, provincial planning, traffic control and provincial roads.

It is worthwhile to mention that the national sphere of government together with the provincial spheres of government may, by agreement delegate or authorise municipalities to execute some functions listed in Schedules 4 and 5 Part A. This delegation of authority may be authorised if the function would be administered efficiently and effectively and if the municipality has the capacity to do so or to administer that function.

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<sup>57</sup>Sec 125 (2) (b).

<sup>58</sup>Sec 68(b).

<sup>59</sup>Sec 104 (1) (b).

At this level one notes the following provincial government legislation that have an impact on public health matters;

#### **1.3.2.1 Acts dealing with bodily health:**

##### **1.3.2.1.1 The Kwa-Zulu Natal Health Act<sup>60</sup>**

The main objectives of the Act are the following; to establish and provide for the implementation of the District Health System and an integrated provincial health care network and health service delivery in accordance with provincial health policy; to develop and implement the provincial health policies, norms, frameworks and standards in accordance with the National Health Policy, norms, frameworks and standards; to give effect to and regulate the right to the progressive realization of access to health services as conferred by section 27 of the Constitution Act 108 of 1996 and the right to an environment that is not harmful to the health or well-being of the people in the Province in terms of section 24 of the Constitution.

This piece of legislation allows full and active community and public participation in all matters affecting the health and well-being of their communities. The Act also addresses and fulfils the Constitution and the Municipal Structures Act<sup>61</sup> and Municipal Demarcation Board in the provision of essential health services in terms of the different categories of municipalities.<sup>62</sup>

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<sup>60</sup> Act 4 of 2000.

<sup>61</sup> Act 117 of 1998.

<sup>62</sup> Nadasen and Gray. Health Legislation. South African Review 2000. Health Systems Trust. Durban. 2000.

### 1.3.2.1.2 The Kwa-Zulu Natal Cemeteries and Crematoria Act<sup>63</sup>

This Act provides for the establishment, control, management, maintenance and the regulation of cemeteries and crematoria. It prohibits burial or cremation elsewhere than at established and approved cemeteries and crematoria. It provides for exhumation of human remains and re-interment in cases where a person was buried as pauper and his or her family requires a dignified burial service, or want to bury the remains of their loved one next to their place of abode. The exhumation is conducted under the watchful supervision of public health officials in order to safeguard against unhealthy conditions. It further provides for municipalities to make by-laws for the control, management, regulation and maintenance of cemeteries and crematoria. The Member of Executive Committee (MEC) may make regulations concerning the establishment and registration of cemeteries and crematoria, the construction of crematoria and equipment, and appliances to be employed thereto and the disposal or interment of ashes of human remains. Public health officials have to ascertain that living human beings are not contaminated by the remains and fluids from the corpse. The handling, storage and burial of the dead person should be performed hygienically to protect the public health of the citizens of the Republic. This Act is found to be effective.

### 1.3.2.2 Acts dealing with food control and businesses:

#### 1.3.2.2.1 The Business Act as amended by the Business Amendment Act<sup>64</sup>

The Act provides for the Premier, in consultation with Local Authority, to appoint a licensing authority for that particular local authority. It further states that every person conducting a business shall hold a business licence issued by a licensing authority, but subject to compliance with the town planning, safety, and health requirements which apply to those premises. This Act controls businesses by stating the necessary requirements to be complied with, such as toilet facilities, wash hand basins, ablution

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<sup>63</sup> Act 12 of 1996.

<sup>64</sup> Act 186 of 1993. Administration of the whole Act has, under Proclamation 18 of 1995 published in Govt Gazette 16302 dated 09 March 1995, been assigned to the Province of KwaZulu-Natal with effect from 09 March 1995.

facilities, waste water systems and gullies, changeroom facilities and licensing requirements before the business can be operated and during the operating process of the business.

#### 1.3.2.3 Acts dealing with general public health matters:

##### 1.3.2.3.1 The Kwa-Zulu Natal Planning and Development Act<sup>65</sup>

The purpose of this Act is to facilitate provincial development in an orderly manner to ensure the rational development of the province and of the utilisation of its resources. This Act effectively seeks to achieve this through the establishment of a Planning and Development Commission that is responsible for the co-ordination of planning and development in the province. In terms of section 22 every development plan should have as its general purpose, a co-ordinated, harmonious and sustainable development of the area to which it relates. Moreover, any development plan must be such that it will most effectively promote public health, safety, order, amenity, convenience and general welfare. It must also promote efficiency, economy and participation in the planning and development process.

#### 1.3.2.4 Conclusion:

The role of national legislation was examined and its impact on the provinces as delegated by the supreme law of the Republic, the Constitution Act 108 of 1996 was assessed. Acts dealing with air pollution, land pollution, water pollution, occupational health at workplaces, the health professions and constitutional matters have not been promulgated at the provincial level. However the national legislation, as mentioned in 1.3.1 above, is being applied at the provincial level in order to regulate these functions. The following section will examine the relationship between the municipalities, the provinces and the national government and the role of municipal by-laws and their application. Guidelines to settle legislative disputes will be discussed.

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<sup>65</sup> Act 5 of 1998.

### **1.3.3 THE MUNICIPAL SPHERE OF GOVERNMENT**

A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution Act.<sup>66</sup> The objects of municipalities which have reference to public health, are to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, to promote a safe and healthy environment, and to encourage the involvement of communities and community organisations in matters of local government.<sup>67</sup>

A municipality has executive authority in respect of the functions listed in Part B of Schedule 4 and Part B of Schedule 5 and have the Constitutional right to administer these functions and any other matter assigned to it by national or provincial legislation.<sup>68</sup> Further, the Constitution empowers the municipalities to promulgate and administer by-laws for the effective administration of the functions they have the right to administer.<sup>69</sup>

On the other hand, the National government and Provincial governments may assign the administration of functions as listed in Part A of Schedule 4 and Part A of Schedule 5 of the Constitution, to a municipality by agreement. However, this can only be done provided that the functions would be most effectively administered locally and the municipality has the capacity to administer it.<sup>70</sup>

Whilst the municipalities have the Constitutional mandate to govern their local affairs matters, the national government and provincial governments also have Constitutional powers legislatively and executively to oversee the effective performance by municipalities of their functions in respect of the functions listed in Schedules 4 and 5.<sup>71</sup>

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<sup>66</sup> Act 108 of 1996 sec 151(3).

<sup>67</sup> *Supra* sec 152(1).

<sup>68</sup> *Supra* sec 156(1).

<sup>69</sup> *Supra* sec 156(2).

<sup>70</sup> *Supra* sec 156(4).

<sup>71</sup> *Supra* sec 155(7).

This they do by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Should a local government fail to fulfil its executive responsibilities in terms of the Constitution, section 139(1) of Provincial Supervision of Local Government, states that the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.

It is important to state that Schedule 4 Part B and Schedule 5 Part B of the Constitution, list all the functions and duties which pertain to public health as follows:- Air pollution, building regulations, child care facilities, electricity and gas reticulation, fire-fighting services, local tourism, municipal airports, municipal planning, municipal health services, trading regulations, water supply systems and domestic waste water and sewerage disposal systems, control of public nuisances, cleansing services, cemeteries, funeral parlours and crematoria, beaches and amusement facilities, markets, street trading, noise pollution, local amenities, control of undertakings that sell food to the public, local sports facilities, municipal parks and recreation and public places.

By-laws are promulgated to deal with all listed functions in terms of National legislation and provincial legislation. Mentioned hereunder are some examples of Local Government Legislation and municipality By-laws:

#### 1.3.3.1 By-laws dealing with pollution control and occupational health at workplaces:

##### 1.3.3.1.1 Scheduled Trades and Occupational By-laws<sup>72</sup>

These by-laws seek to regulate and control trades, businesses, occupations or callings that must be undertaken and carried out in satisfactory conditions and to prevent nuisances that may endanger the public health of the citizens of the Republic and workers at the

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<sup>72</sup> P.N. 134/1979 Section D.6 Durban Unicity, North and South Local Council.

workplace. Nuisances could be air pollution emanating from dust operations, gas or smoke emissions, fuel burning appliances and occupational health hazards that may cause chemical, physical and biological stresses to employees in the workplaces. These by-laws are implemented in conjunction with the Occupational Health and Safety Act 85 of 1983, the National Environmental Management Act 107 of 1998, the Health Act 63 of 1977, the National Water Act 36 of 1998, the Environment Conservation Act 73 of 1989 and the Atmospheric Pollution Prevention Act 45 of 1965.

The main object of these by-law is to prevent all forms of pollution, nuisances, health hazards and unhygienic conditions that may endanger the public health of the people of this country. Effectively, it protects, promotes and advances the public health.

#### 1.3.3.2 By-laws dealing with bodily health:

##### 1.3.3.2.1 Health Act<sup>73</sup>

Municipalities are utilizing the provisions of this Act in order to provide municipal health services such as primary health care clinics, sexually transmitted diseases control, tuberculosis control, communicable diseases control services, occupational health services, ante and post-natal care clinics and family planning services. These services have an objective to cure the sick, to control the spread of infectious and communicable diseases, and to protect, promote and advance the health of the citizens of the Republic.

#### 1.3.3.3 By-laws that deal with food control:

##### 1.3.3.3.1 Food By-laws<sup>74</sup>

These by-laws seek to strictly regulate, control, and monitor food premises, which involve the manufacturing, preparation, storing, handling, selling and distribution of

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<sup>73</sup> Act 63 of 1977.

<sup>74</sup> P.N.627/1950 (as amended) Section D.2 Durban Unicity. North and South Central Local Council.

food. Periodic and continuous monitoring is exercised by taking food samples, sampling of working surfaces, and medical examination of food handlers. The goal is to prohibit the sale of contaminated or unsound food to the general public. The by-laws promote the manufacturing, preparation, selling and distribution of healthy food to the public. These by-laws are implemented in conjunction with the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972 that also promote the hygienic handling of foodstuff intended for sale to the public.

#### 1.3.3.3.2 Street Trading By-laws<sup>75</sup>

These by-laws regulate and control street trading by imposing conditions, norms and standards under which persons intending to carry out street trading shall comply with and conform to. The by-laws promote cleanliness in places of business and in the selling of hygienic food to the public and thereby protect public health.

#### 1.3.3.4 By-laws dealing with general public health matters:

##### 1.3.3.4.1 Accommodation Establishment By-laws<sup>76</sup>

These by-laws seek to regulate and control lodging establishments that accommodate more than four persons whether or not they provide meals for reward. However, these do not include hotels, old age homes, schools and university hostels and flats. The by-laws require that buildings should be kept clean, hygienic, safe, and sound so as to avoid public health nuisances and to maintain good sanitation at all times.

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<sup>75</sup>M.N. 97/95 Section J.6 Durban Unicity, North and South Local Council.

<sup>76</sup>M.N. 228/93 Section J.8 Durban Unicity North and South Local Council

#### 1.3.3.4.2 Animal By-laws<sup>77</sup>

These by-laws seek to regulate, control and limit the number of dogs to be kept at specified homes. The by-laws also prohibit wild animals, ferocious, dangerous, vicious animals on public places and streets except under certain stipulated circumstances. They also regulate bovine, equine, sheep, pigs, goats, or other breeds of animals in the city and its surroundings and do not allow nuisances like barking, yelping, crowing or making of disturbing noises in public.

#### 1.3.3.4.3 General By-laws<sup>78</sup>

These by-laws seek to control and regulate conduct, behaviour, loitering and dangerous acts in streets and public places. They prevent littering in public places and the obstruction of public places and streets or any interference with the free movement of persons and vehicles. The by-laws also promote cleanliness and healthy behaviour of everyone in the city thus protecting public health.

#### 1.3.3.4.4 Local Government Municipal Systems Act<sup>79</sup>

The Act provides for the internal and external service delivery mechanisms which municipalities should utilize to ensure the efficient, effective and sustainable provision of basic municipal services to communities which are required to ensure a guaranteed, acceptable and reasonable quality of life, which services if they are not provided, could culminate in conditions that would endanger the public health and well-being of individuals, families, communities and cause environmental degradation. The internal service delivery mechanisms are organizational change, public participation in decision making, human resources policies and management, performance management, integrated development planning, credit control and debt collection.

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<sup>77</sup> P.N. 530/84 Section E.8 Durban Unicity..

<sup>78</sup> <http://intranet.durban.gov.za/council/bylaws/general%5Fby-law.htm>

<sup>79</sup> Act 32 of 2000.

## **1.4 CONCLUSION**

This chapter has set out and identified various legislation relevant to public health at the national, provincial and municipal levels of government. The objects of the statutes were examined to determine whether or not they promote and protect public health. Law is essential to advance, protect and promote public health because public health programmes cannot function without legislative authorization.<sup>80</sup> It is noticed that national legislation prevails over provincial government legislation and municipal by-laws. The by-laws are supplemented by national laws and provincial laws in order to deliver public health services. In the same vein, the provinces use national laws to deliver public health services. This interaction is aimed at satisfactorily delivering health services to the people of the Republic.

The municipalities are obliged in terms of the Local Government; Municipal Structures Act to review, rationalize and prepare by-laws and regulations in accordance with the new set of changes due to the amalgamation of certain municipalities which have formed new big municipalities, within their new areas of operation and jurisdiction. Previous by-laws had diverse terminology, definitions, meanings and interpretation of words which need to be co-ordinated in order to produce by-laws with common terminology, meanings, definitions and interpretation of words and definitions. This will bring about uniform health by-laws within the new municipality boundaries, in accordance with the requirements of the Municipal Structures Act.

The following chapter will discuss the public health issues covered, protected and promoted by the national, provincial and municipal spheres of government and explain the relationship between the three spheres of government in terms of their legislative obligations. In addition, chapter 2 will examine, identify and address public health issues as they affect human life and the environment in homes, businesses, industries and

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<sup>80</sup> Grad F P, Public Health Law: Its Reform, Function, Future and Ethical Parameters IDHL pg 21 Vol 49 1998

related workplaces. These issues will be identified in relation to the specific legislation that apply at the National, Provincial and Municipal spheres of government.

## **CHAPTER 2**

### **2.1 INTRODUCTION**

The Constitution covers a wide range of public health services which the state should provide to the inhabitants of the Republic and stipulates those services which the people are entitled to receive from the state. For instance, section 24 of the Constitution provides for environmental rights to everyone, which is not harmful to their health and well-being, to have the environment protected for the benefit of present and future generations, through legislative and other measures that prevent pollution and ecological degradation, to promote conservation and to secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

### **2.2 PUBLIC HEALTH ISSUES AND NATIONAL LEGISLATION**

It must be noted that in order to achieve an environmental right, the prevention of all forms of pollution should be provided for, that is (i) land pollution, (ii) water pollution and (iii) air pollution; the promotion of conservation and economic and social development and the protection of the environment should be fulfilled. A number of environmental laws have been promulgated to achieve this goal.

The monitoring of the manufacturing, processing, storing and selling of food to the public is also the responsibility of the state in terms of the Foodstuff Cosmetics and Disinfectants Act.<sup>81</sup> Land-use Planning has as its primary objective the control of the use of land for the purpose of promoting health, welfare and amenities provided to communities living in urban areas, to prevent nuisances.<sup>82</sup> Housing rights<sup>83</sup> guarantee everyone access to adequate housing and shelter in terms of the Constitution. Health care, food, water and social security rights<sup>84</sup> guarantee everyone the right of access to health

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<sup>81</sup> Act 54 of 1972.

<sup>82</sup> Kidd M Environmental Law: A South African Guide page 155 1997.

<sup>83</sup> Constitution Act 108 of 1996 sec 26.

<sup>84</sup> *Supra* sec 27.

care services, sufficient food, water and social security. Children's protection rights<sup>85</sup> guarantee every child the right to nutrition, shelter, health care services and social services and protection from abuse, neglect and maltreatment. Prisoner's rights<sup>86</sup> guarantee every detained and sentenced prisoner the right to medical treatment and nutrition. Access to information rights<sup>87</sup> guarantee everyone the right of access to information held by the State or any other person which is required for the protection of any human right as stipulated in the Constitution.

## 2.2.1 Air Pollution

### 2.2.1.1 The Atmospheric Pollution Prevention Act<sup>88</sup>

This Act is administered by the Department of Environmental Affairs and Tourism<sup>89</sup> at the national level. It regulates air pollution control. In terms of this Act, air pollution is further subdivided into four categories namely noxious offensive gases pollution; smoke pollution; dust pollution, and fumes emitted by vehicles.

PART I of the Act deals with the administration of the Act, which provides for the establishment of the National Air Pollution Advisory Committee (NAPAC) and Appeal Boards, and the appointment and powers of officers. The main functions of NAPAC are to advise the Minister on matters of air pollution, to study and report on measures taken in other countries, and to stimulate interest on air pollution problems.<sup>90</sup> The Act provides for the establishment of a National Pollution Appeal Board and Regional Appeal Boards<sup>91</sup> and for the appointment of the Chief Air Pollution Control Officer<sup>92</sup> and Inspectors.<sup>93</sup>

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<sup>85</sup> *Supra* sec 28.

<sup>86</sup> *Supra* sec 35.

<sup>87</sup> *Supra* sec 32.

<sup>88</sup> Act 45 of 1965.

<sup>89</sup> The Act was administered by Department of Health until it was transferred in 1995 to Department of Environmental Affairs and Tourism.

<sup>90</sup> Sec 2 and 3.

<sup>91</sup> Sec 5.

<sup>92</sup> Sec 6 (1) (a).

<sup>93</sup> Sec 6 (1) (b).

PART II deals with the control of noxious and offensive gases. The Minister of the Department of Environmental Affairs and Tourism has the power to declare controlled areas<sup>94</sup> and to stipulate controlled areas wherein scheduled processes may be not carried out without a registration certificate authorising the carrying out of those processes in the premises.<sup>95</sup> The Act permits the Chief Officer to consider the best practicable means for preventing or reducing to a minimum, the escape into the atmosphere of noxious or offensive gases.<sup>96</sup> It is worth mentioning that the consideration of the best practicable means option to discharge offensive and noxious gases into the atmosphere is merely done to protect human beings, whilst disregarding potential environmental hazards and degradation that may develop from the discharged offensive and noxious gases. The Act overlooks the protection of the environment. It protects human health, at the point of generation of the offensive and noxious gases, and health hazards. The dangerous offensive and noxious gases discharged into the atmosphere are likely to formulate environmental health hazards that may affect human beings negatively and cause ill-health.

PART III deals with smoke pollution whereby the national and provincial spheres of government require the concurrence of the municipality, with regard to the application of Part III of the Act. Municipalities are empowered to take responsibility to control smoke pollution<sup>97</sup>, and to declare smoke control areas after consultation with the province and to make regulations and by-laws. The Act defines smoke as “including soot, grit and gritty particles emitted in smoke.” This definition is seen as aimed at industrial pollution. It is seen as not encompassing smoke emissions emanating from restaurants.<sup>98</sup> If it is found feasible to control smoke as a “nuisance” in terms of other legislation, the Health Act can be used to control smoke as a nuisance. The Occupational Health and Safety Act<sup>99</sup> places the responsibility on employers to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his or her

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<sup>94</sup> Sec 8.

<sup>95</sup> Sec 9.

<sup>96</sup> Sec 10.

<sup>97</sup> Sec 18.

<sup>98</sup> Olge F Air Pollution page 17.

<sup>99</sup> Act 85 of 1993 sec 8.

employees by ensuring that smoke pollution is at an acceptable level within the work place.

PART IV deals with the dust pollution emanating from mining activities, sandblasting, wood industries and dry powder spray-painting. To control dust pollution, the Act requires the best practicable means measures to abate the dust nuisance at generation.<sup>100</sup> In the mining industry an inter-departmental approach is used by the Ministries of Trade and Industry, Environmental Affairs and Tourism and Minerals and Energy to control dust. The Department of Environmental Affairs and Tourism is the leading or responsible government department in the control of dust and water pollution in the mining industry.

PART V deals with the fumes emitted by vehicles. The administration of this part lies in the hands of the National Minister of the Department of Environmental Affairs and Tourism who invokes local authority involvement after consultation with the provinces and the NAPAC. The Department of Minerals and Energy conducts research on the various uses of fuel in the country with an aim to control pollution. The Road Traffic Act<sup>101</sup> makes it an offence to drive a vehicle that emits smoke or fumes on a public road. The Act is administered by the provincial governments and the municipalities. The National Minister may make regulations regarding the emission of exhaust gas, smoke, fuel, oil, sparks, ash or grit, from any vehicle on a public road, but to date no regulations have been promulgated.<sup>102</sup>

There is a fragmentation of application of this Act by the various government departments who enforce different aspects of the Act. This fragmentation is seen at the local authority, provincial and national levels of government and this leads to duplication of enforcement mechanisms, which leave offenders and communities confused and cause delays in enforcing compliance. The lack of capacity, human resources, financial resources and the provision of equipment to monitor, evaluate, assess and punish offenders is an obstacle in the implementation of this piece of legislation.

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<sup>100</sup> Sec 28.

<sup>101</sup> Act 29 of 1989.

<sup>102</sup> Glazewski J Environmental Law in South Africa page 730 2000.

### 2.2.1.2 The National Environmental Management Act<sup>103</sup>

This legislation attempts to solve some of the duplication issues by bringing all the role players together whereby a committee for Environmental Co-ordination<sup>104</sup> is established. The committee consists of all the relevant government departments and provinces and endeavours to tackle all issues relating to environmental pollution prevention. Further, the committee is kept informed of activities that may cause pollution before they may be considered for approval, or during the on-going of processes of such activities, and after such activities have been processed, with a view to prevent and avoid the generation of any form of pollution, or to minimize the generation of any form of pollution, and to remedy any generated form of pollution.

The Act affirms co-operative governance for the purpose of executing the environmental management and implementation plans.<sup>105</sup> The Act allows for conflict management and decision-making by all three spheres of government.<sup>106</sup>

In addition, the Act provides for the enforcement of criminal sanctions by first placing a duty of care and for the remediation of environmental damage<sup>107</sup> should significant pollution or degradation occur. It also provides for the control of emergencies,<sup>108</sup> for whistleblowers and for access to information held by the State or any person.<sup>109</sup> The Act may encounter the same problem of enforcement as it is supposedly to be implemented by various government departments at the national, provincial and local spheres of government.

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<sup>103</sup> Act 108 of 1998.

<sup>104</sup> *Supra* sec 7 part 2.

<sup>105</sup> Sections 11, 12, 13, 14, 15 and 16, Ch 3.

<sup>106</sup> Sections 7, 18, 19, 20, 21 and 22, Ch 4.

<sup>107</sup> Sec 28.

<sup>108</sup> Sec 30.

<sup>109</sup> Sec 31.

## 2.2.2 Water Pollution

There are three main water quality problems in South Africa, namely, progressive salination of water sources, the introduction of excessive nutrients into water resources by use of fertilizers, and the release of toxic chemicals from industries and mining processes as effluents, discharges and leachate from waste disposal sites and urban run-off.<sup>110</sup> Chemicals, for example, Dichlorodiphynyltrichloroethane (DDT) and Polychlorinated Bi-phynyls (PCBs) used in paints and paper manufacturing, are carcinogenic, mutagenic, teratogenic and toxic. In the well known Thor Chemical saga, the factory was forced to close down after a Commission of Enquiry established that mercury poisoning was discharged into the natural water stream feeding the Mngweni, a tributary of the Umgeni river, which was found to contain high levels of mercury.<sup>111</sup>

### 2.2.2.1 The National Water Act<sup>112</sup>

This Act is administered by the Department of Water Affairs and Forestry. It provides for pollution prevention and the protection of water resources.<sup>113</sup> It objectively aims to ensure that all water resources in the Republic are properly and adequately protected, utilised, conserved, controlled, developed and managed. Further, it protects water dams from abuse and contamination, which may lead to the poisoning of water by ruthless people.

The Act gives fundamental priority to the use of water for basic needs and services, for example, the provision of potable water to underprivileged communities, for human consumption. The Act defines pollution as “the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it (a) less fit for any beneficial purpose for which it is or may reasonably be expected to be used or (b) harmful or potentially harmful to (i) the welfare, health or safety of human beings, (ii) any aquatic or non-aquatic organisms, (iii) the resource quality or (iv) property.” It

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<sup>110</sup> Glazewski J Environmental Law in South Africa page 759 2000.

<sup>111</sup> *Supra* page 762.

<sup>112</sup> Act 36 of 1998.

<sup>113</sup> *Supra* sec 19

should be noted that one of the objectives of the Act is to reduce and prevent pollution and the degradation of water resources.<sup>114</sup>

#### 2.2.2.2 The Water Services Act<sup>115</sup>

The Act provides for the right of access to basic water supply and the right to basic sanitation, necessary to secure sufficient water and an environment that is not harmful to human health or well-being. It empowers the Minister of Water Affairs and Forestry to prescribe compulsory national standards, *inter alia*, to the quality of water from or discharged into any water services or water resource system, and for the requirements of persons who install and operate water services works.<sup>116</sup> The Act provides for the setting of norms and standards for water services in the Republic by defining the roles and responsibilities of water services institutions and parastatals, such as, Rand Water and Umgeni Water.

It is suggested that this piece of legislation should be amended in order to be complementary to the provisions of Local Government: Municipal Structures Act and Municipal Systems Act as it provides for regulatory and intervention functions of Municipalities.

The protection of the water regime was successful in the case of *Rainbow Chicken Farm (Pty) Ltd vs Mediterranean D Woollen Mills (Pty) Ltd*<sup>117</sup> where a chicken producer was successfully granted an interdict against the respondent, an upstream clothing manufacturer, stopping him from discharging polluted industrial effluent from his dyeing operations, into the Sterkspruit river in Hammarsdale, KwaZulu-Natal.

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<sup>114</sup> *Supra* sec 2.

<sup>115</sup> Act 108 of 1997.

<sup>116</sup> *Supra* sec 59 (1) (b) and (e).

<sup>117</sup> 1963 (1) SA 201 (N) at 205A.

## 2.2.3 Land Pollution

### 2.2.3.1 The National Environmental Management Act<sup>118</sup> (NEMA)

The Act defines pollution as “any change in the environment caused by substances, radioactive waves or noise, odours, dust or heat, emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by a person or organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of the natural or managed ecosystems, or on materials useful to people, or will have such effect in the future.”<sup>119</sup>

The NEMA provides for national environmental management principles in chapter 1, and states that; environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably;<sup>120</sup> sustainable development requires the consideration of all relevant factors, including; that pollution and degradation of the environment are avoided, or where they cannot be altogether avoided, are minimised and remedied; that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;<sup>121</sup> responsibility for the environmental health and safety consequences of a policy, programme, project, product, service or activity exists throughout its life cycle;<sup>122</sup> the costs of remedying pollution, environmental degradation and consequent adverse health effects and preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.<sup>123</sup> The Act advocates the involvement of community representatives from previously discriminated and disadvantaged communities in decision-making concerning

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<sup>118</sup> Act 107 of 1998.

<sup>119</sup> Sec 1.

<sup>120</sup> Sec 2 (2).

<sup>121</sup> Sec 2 (4) (a) (ii) and (iv).

<sup>122</sup> Sec 2 (4) (e).

<sup>123</sup> Sec 2 (4) (p).

environmental management, in the National Environmental Advisory Forum. This forum informs and advises the Minister of the Department of Environmental Affairs and Tourism regarding the application of the national environmental management principles. The Act strives for adequate and appropriate opportunities for public participation and non-governmental organizations (NGO's) in decisions that may affect the environment and it ensures environmental impact assessments to identify, predict, and evaluate the actual and potential impacts on the environment, which may impact on human health as well.

Land pollution mainly comes from the indiscriminate disposal of all forms of waste matter in open spaces and unused land. Land pollution results in polluting the water regime. According to the Council for Scientific and Industrial Research (CSIR) there are about thirty-seven pieces of legislation that deal with or relate to littering or waste or pollution.<sup>124</sup> The definition of pollution in section 2 of the National Environmental Management Act also relates to waste by referring to “any change in the environment caused by dust, noise, heat, emitted from any activity including the storage of waste, ...where that change has an adverse effect on human health or well-being,...” This piece of legislation cannot be enforced by Health Department in spite of having good, relevant and appropriate provisions to safeguard public health and environmental degradation, because it is administered by the Department of Environmental Affairs and Tourism, and it is not delegated to other departments for enforcement.

#### 2.2.3.2 The Environment Conservation Act<sup>125</sup>

The Act defines waste as “any matter whether gaseous, liquid or solid or any combination thereof, which from time to time is designated by the Minister of Environmental Affairs and Tourism by notice in the Gazette as an undesirable or superfluous bye-product, emission, residue or remainder of any processes or activity.”<sup>126</sup>

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<sup>124</sup> Glazewski J Environmental Law in South Africa page 629 2000.

<sup>125</sup> Act 73 of 1989.

<sup>126</sup> *Supra* sec 1

For the purpose of controlling environmental pollution caused by littering, the Act states that no person shall discard, dump or leave any litter on any land or water surface, street, road or site in or on any place to which the public has access, except in containers, or at a place indicated, or provided for, for that purpose.<sup>127</sup>

The Act also makes provision for the removal of litter by a responsible person or authority for the purpose of safe disposal.<sup>128</sup> To control waste management, the Act states that no person shall establish, provide or operate any disposal site without a permit issued by the Minister of Water Affairs and Forestry.<sup>129</sup> In terms of Act, the Minister of Environmental Affairs and Tourism or any competent local authority shall require the compilation of impact assessment reports on proposed activities that may have a detrimental effect on the environment before authorisation can be considered and the permit granted.<sup>130</sup>

#### 2.2.3.3 The Health Act<sup>131</sup>

The Act seeks to protect and promote human health by taking steps for the promotion of a safe and healthy environment. It defines the duties and powers of local authorities, including, *inter alia*, the abatement of nuisances that may be harmful, dangerous or detrimental to public health and the environment.

Land pollution, with its emerging and re-emerging public health problems like diseases, is controlled by this Act. The Act defines a nuisance in a broad outline that includes land pollution, which is an accumulation of refuse, offal, manure and any matter which is offensive, injurious or dangerous to human health. The Act does not provide for the control of waste dump sites and the issuing of permits to run the site yet civil society expects the Department of Health to play a decisive role in demanding effective and swift remedial measures.

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<sup>127</sup> Sec 19.

<sup>128</sup> *Supra* sec 19A.

<sup>129</sup> *Supra* sec 20 (1).

<sup>130</sup> *Supra* sec 22 (2).

<sup>131</sup> Act 63 of 1977.

## 2.2.4 The Work Environment

### 2.2.4.1 The Occupational Health and Safety Act<sup>132</sup>

Employees at the workplace should perform their tasks in a safe and healthy environment. Plant and machinery with ergonomics should harmoniously ensure a prolonged healthy life for employees. The Act requires every employer to conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health and safety.<sup>133</sup>

The Act further states that every employee at work is, *inter alia*, under a duty to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions.<sup>134</sup> It provides for the provision of personal protective clothing and equipment in the workplace to protect workers from the inhalation of harmful fumes and gases that may cause chronic diseases. It also provides for the assessment and evaluation of chemical stresses, biological stresses and physical stresses in the workplace environment that may impair the health of workers. It requires compulsory routine medical examinations of employees in places where they are constantly exposed to a hazardous working environment.

This is a good piece of legislation which is administered by the Department of Labour. However, this Act is seen as not implementable due to the lack of human resources necessary for the enforcement of the law; financial resources which should provide for the employment of inspectors; the provision of equipment for monitoring of workplaces; and capacity building by the responsible department to enforce the Act. This has been proved by countrywide industry accidents, for example, in one incidence employees were locked-in in an industry during the night shift by their employer. During this lock-in fire broke out and burnt several employees to death. Should the provisions of the Act have

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<sup>132</sup> Act 85 of 1983.

<sup>133</sup> *Supra* sec 9 (1).

<sup>134</sup> *Supra* sec 14 (a).

been enforced and monitored at regular intervals, such an event would not have taken place.

## 2.2.5 Food Control

### 2.2.5.1 The Foodstuff, Cosmetics and Disinfectants Act<sup>135</sup>

The control of the sale, manufacture, importation, storage of foodstuffs, cosmetics and disinfectants is provided for in the Act. It is an offence to sell, manufacture, import, or to store for sale any foodstuff or cosmetic which is contaminated, impure or decayed, or in terms of any regulation, is deemed to be harmful or injurious to health, or contains or has been treated with a contaminated, impure or decayed substance or a substance which is in terms of any regulation, deemed to be harmful or injurious to health.<sup>136</sup> People are not allowed to operate backyard food manufacturing processes without the necessary permit to do so. The Health Department Officers check whether the food is contaminated, and whether food-handlers are sick so as not to infect food with pathogens that will make other people sick and spread communicable diseases. This piece of legislation is delegated to municipalities to enforce compliance with the provisions of the Act and to prosecute offenders.

The National Minister of Health may make regulations prescribing the nature and composition of any foodstuff, cosmetic or disinfectant or standards for the composition, strength, purity or quality or any other attribute of any foodstuff, cosmetic or disinfectant or any ingredient or part of a foodstuff, cosmetic or disinfectant, for implementation by all three spheres of government to safeguard public health.<sup>137</sup> Foodstuff imported from other countries is required to undergo chemical and bacteriological sampling for analysis at the national laboratory in Pretoria. Should the sample be found not to be in compliance with South African standards, it is ordered to be returned to the country of origin, or otherwise be destroyed. If it is established that it has been distributed to retailers, it is

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<sup>135</sup> Act 54 of 1972.

<sup>136</sup> *Supra* sec 2 (1) (i) and (ii).

<sup>137</sup> *Supra* sec 15

recalled and confiscated by inspectors from the Provincial and Municipal Health Departments for condemnation and destruction.<sup>138</sup>

The provisions of this Act do not provide for the Codex Alimentarius, which was established in 1962 jointly by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) to protect the health of consumers by the co-ordination of international food standards.<sup>139</sup> However, the Department of Health, food directorate is mandated, and delegated to liaise and to actively participate in all Codex activities, which involves the Republic of South Africa.<sup>140</sup>

## 2.2.6 Infectious Diseases Control

### 2.2.6.1.1 The International Health Regulations<sup>141</sup>

The international spread of infectious diseases is controlled by this Act and was adopted by the World Health Organization (WHO). The Act requires the monitoring and submission of notifications of all infectious diseases through the National Departments of member States for transmission to the WHO.

It requires and regulates health measures at airports and seaports with facilities for the departure and arrival of persons and cargo, baggage, mail and goods. It provides for the control of yellow fever, plague, cholera and other infectious diseases at airports and seaports.

Should a person on board a vessel or airplane suffer from an infectious disease, the vessel or aircraft must be quarantined until the completion of the incubation period of that disease in order to verify and ascertain that nobody has contracted the disease. Medical

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<sup>138</sup> Sections 10, 11, 14 and 20 of Act No 54 of 1972.

<sup>139</sup> The Statutes and Rules of Procedure of the Codex Alimentarius Commission were first established by FAO Conference and the World Health Assembly in 1961/1962.

<sup>140</sup> Food Safety through Regulation and Education, page 50 Department of Health , Annual Report 2001/2002.

<sup>141</sup> Act 28 of 1974.

personnel are called on board the vessel or aircraft to assess the health status and dispense medication.

This piece of legislation does not provide for charging levies on client vessels and aircraft arriving in the Republic. All services are rendered free of charge. It is suggested that levies should be charged for the inspection services rendered and the documentation processed. The Act should be amended to make provisions for the reporting of other syndromic diseases, since the World Health Organization no longer only focuses on yellow fever, plague and cholera. There are many emerging and re-emerging diseases that need to be included and regulated in the Act.

#### 2.2.6.2 The Health Act<sup>142</sup>

Communicable and infectious diseases control is legislated in terms of this Act.<sup>143</sup> The Minister may make regulations concerning the imposition and enforcement of quarantine, or may subject to medical examination, observation, or surveillance any person suffering or suspected to be suffering from any infectious or communicable disease.<sup>144</sup> He or she may make regulations relating to the prevention of the spread of, and the eradication of malaria and the extermination of mosquitoes.<sup>145</sup> Further, the Minister may regulate on the compulsory immunization of persons against communicable disease.<sup>146</sup> Finally, he or she may order the evacuation, closing, alteration, demolition or destruction of any premises the occupation or use of which is considered likely to spread, or to impede the eradication of any communicable disease.<sup>147</sup>

In terms of this Act, co-operative governance is promoted, whereby the national government authorises and delegates duties and functions to the municipalities and provinces who implement the provisions of the Act for protecting and promoting public

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<sup>142</sup> Act 63 of 1977.

<sup>143</sup> Act 63 of 1977 sec 33.

<sup>144</sup> *Supra* sec 33 (c).

<sup>145</sup> *Supra* sec 33 (g).

<sup>146</sup> *Supra* sec 33 (j).

<sup>147</sup> *Supra* sec 33 (q).

health.<sup>148</sup> This piece of legislation is old and outdated. It is not framed in terms of the international norms and standards that base health services delivery in terms of the primary health care approach, national health systems and district health systems as required by the World Health Organization. The proposed new national health legislation is still in the form of a Bill and is currently undergoing amendments and additions before it is passed and enacted into law. The new Health Bill is structured in accordance with the National Health System,<sup>149</sup> and Primary Health Care based on the District Health System.<sup>150</sup>

### **2.3 PUBLIC HEALTH ISSUES AND PROVINCIAL LEGISLATION**

Chapter 3 of the Constitution provides for co-operative governance by all three spheres of government and organs of state<sup>151</sup> and the State is obliged to secure the well-being of all the people of the Republic.<sup>152</sup> The main objective of the province is to supervise the municipalities. Where the municipalities fail to fulfil their executive obligations in terms of the law, the provinces are obliged to intervene by taking any appropriate measures to fulfil that obligation<sup>153</sup> including the issuing of directives to municipalities, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations,<sup>154</sup> and assuming responsibility for the relevant obligation in that municipality to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of services, to prevent that municipality from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole and to maintain economic unity.<sup>155</sup>

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<sup>148</sup> Sec 12 of Act No 63 of 1977.

<sup>149</sup> African National Congress. A National Health Plan for South Africa. (Prepared by the ANC health Department with support and technical assistance of WHO and UNICEF). Barh Mapping and Printing, Maseru. 1994.

<sup>150</sup> Owen C P (Ed.) A Policy for the Development of a District Health System for South Africa. Health Policy Co-ordinating Unit, National District Health System Committee. Department of Health 1995.

<sup>151</sup> Act 108 of 1996 sec 41.

<sup>152</sup> *Supra* sec 41 (b).

<sup>153</sup> *Supra* sec 139 (1).

<sup>154</sup> *Supra* par (a).

<sup>155</sup> *Supra* sec 65 (1) (b) (i), (ii) and (iii).

The Provincial legislation and the National legislation compliment each other by means of the legislated provisions in Schedule 4 Part A of the Constitution, which provides for functional areas of concurrent legislative competence by the two spheres of government. This allows for the assigning of national laws to the provinces for their application. National laws are applicable in provinces and municipalities in terms of proclamations of parliament. A few examples of public health issues of provincial competence in terms of the Schedules 4 and 5 of the Constitution, *inter alia*, include the following:

### **2.3.1 Trade and Industrial Promotion:**

#### **2.3.1.1 The Business Act<sup>156</sup>**

This Act was assigned to the KwaZulu-Natal Province with effect from 9 March 1995 in terms of Proclamation 18 of 1995 published in Government Gazette 16302 dated 9 March 1995. This Act provides for the province, in consultation with the municipalities, to appoint licensing authorities for particular municipalities. The proclamation stipulates that every person conducting business shall hold a business licence issued by a licensing authority. However, such licence issuing is subject to compliance with town planning, safety and health requirements which apply to those premises.

### **2.3.2 The Environment**

#### **2.3.2.1 The Environment Conservation Act<sup>157</sup>**

This Act was assigned to KwaZulu-Natal under proclamation R43 of 1996 published in Government Gazette 17354 dated 8 August 1996, with effect from 8 August 1996. The Act prohibits littering and provides for the removal of litter by local authorities. The National Minister of Environmental Affairs and Tourism may, in consultation with the provinces make regulations regarding waste management, littering, noise, pollution and

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<sup>156</sup> Act 71 of 1991 as amended by Act 186 of 1993.

<sup>157</sup> Act No 73 of 1989 as amended.

environmental impact reports. The statute provides for application of the Act by all three spheres of government.

### 2.3.3 Health Services:

#### 2.3.3.1 The Health Act<sup>158</sup>

This Act has also been assigned to the Province of KwaZulu-Natal under proclamation R152 of 1994 published in Government Gazette 16049 dated 31 October 1994, with effect from 31 October 1994. The statute provides for measures for the protection and promotion of health, and the rendering of health services. It defines the duties, powers, functions, and responsibilities of provinces and municipalities. The provinces are obliged to provide health services, hospitals and clinics, medicines, maternity homes, nursing homes, ambulance and emergency services. The Act provides for its application by all spheres of government and advocates co-operative governance, inter-departmental collaboration, and inter-provincial collaboration.

### 2.3.4 Pollution Control

There are numerous laws dealing with pollution control in the Republic of South Africa. These laws try to control the behaviour of people who litter indiscriminately, dispose of waste in public or open and vacant places, discharge toxic and contaminated effluent into natural water streams, produce noise levels which are unbearable, emit offensive gases and smoke into the atmosphere, and produce dust from their industrial activities.<sup>159</sup> In terms of Schedules 4 and 5, of the Constitution, pollution control is a functional area of concurrent responsibility between the national and the provincial spheres of government, while air pollution is of concurrent responsibility between the provincial and the municipal spheres of the government. The following statutes regulate pollution control, namely:

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<sup>158</sup> Act 63 of 1977.

<sup>159</sup> Act 45 of 1945, Act 73 of 1989, Act 107 of 1998 and Act 108 of 1996.

#### 2.3.4.1 The Atmospheric Pollution Prevention Act<sup>160</sup>

The Act regulates air pollution. However it provides guidelines not standards to prevent and control air pollution from emanating at any source. This piece of legislation is outdated and requires revisiting and updating.

#### 2.3.4.2 The Environment Conservation Act<sup>161</sup>

This legislation provides for the prevention of pollution of any nature, as a result of man-made processes. Further, it states that this should be achieved by formulating comprehensive policies, the promulgation of appropriate legislation, the establishment and maintenance of norms and standards, and the application of the best practicable environmental options based on the most suitable available technology. Noise control regulations are available for implementation by municipalities to control noise nuisances.

#### 2.3.4.3 The National Environmental Management Act<sup>162</sup>

The legislation regulates and applies to all forms of pollution and the provinces have legislative competence to implement the Act. This Act is administered by the Department of Environmental Affairs and Tourism at the national sphere of government. Good developments in the Act are the following principles: (i) the preventive principle, which states that pollution and environmental degradation should be avoided, minimised, and remedied; (ii) the precautionary principle, which sets out those risks that should be avoided and that a cautious approach should be applied; and (iii) the polluter-pays principle. The final principle holds people responsible for pollution and environmental damage, and requires them to pay the costs of remedying pollution, environmental degradation and consequent adverse health effects, and of preventing, controlling and minimising further pollution.

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<sup>160</sup> Act 45 of 1965.

<sup>161</sup> Act 73 of 1989.

<sup>162</sup> Act 107 of 1998.

#### 2.3.4.4 The South African Constitution Act<sup>163</sup>

The Act provides for the right of everyone to an environment that is not harmful to health or well-being and to have the environment protected...through reasonable legislative and other measures that ...prevent pollution and environmental degradation.<sup>164</sup> Schedules 4 and 5 of the Constitution give the provinces exclusive legislative competence over functional areas, which include pollution control, cleansing, control of public nuisance, and noise pollution control.

### **2.4 PUBLIC HEALTH MATTERS AND MUNICIPAL LEGISLATION**

The main objective of the local authority is to promote a safe and healthy environment.<sup>165</sup> All municipalities are obliged to govern their own local communities' affairs subject to the national and provincial legislation, stipulated by the Constitution.<sup>166</sup> Subject to section 44 of the Constitution, the central and the provincial government have legislative and executive authority to ensure the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5 of the Constitution.<sup>167</sup> This, they do by regulating the exercise by municipalities of their executive authority referred to in section 156(1). Section 156(1) gives local government the right to administer matters listed in Part B of Schedule 4 and Part B of Schedule 5, and any matter assigned to it by the national and provincial legislation. Both the national and provincial legislation provide for the duties and functions of the local authorities, and regulate their application. Should municipalities fail to perform their tasks in terms of the provisions of the national and provincial statutes, provinces are obliged to intervene and perform such tasks with an object to protect and promote public health.<sup>168</sup> Examples of some matters where the application of national and provincial statutes are relevant and allow for the promulgation of by-laws to regulate such matters are dealt with below.

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<sup>163</sup> Act 108 of 1996.

<sup>164</sup> *Supra* sec 24 (a) and (b) (i).

<sup>165</sup> *Supra* 163 sec 152 (1) (d).

<sup>166</sup> *Supra* sec 151 (3).

<sup>167</sup> *Supra* sec 155 (7).

<sup>168</sup> Sec 139 of Act 108 of 1996

#### 2.4.1 Air Pollution Control:

##### 2.4.1.1 Scheduled Trades and Occupations By-laws<sup>169</sup>

This by-law enables the ETHEKWINI MUNICIPALITY Health Department to regulate all trades and industries operating in the city. It requires the remedying, repairing, and alteration of any unsatisfactory condition for the purpose of preventing a nuisance, or danger to the public health and employees. The Health Officers of the department undertake assessments of physical, chemical and biological stresses within industries and offices and make recommendations from their findings. Municipalities may not enforce the provisions of the Atmospheric Pollution Prevention Act, the National Environmental Management Act and the Occupational Health and Safety Act. Instead, the Department of Environmental Affairs and the Department of Labour are empowered to enforce the provisions of these laws respectively. Should there be any pollution spilled from, or emission arising from such trades and occupations, the City Health Officers are required to notify the provincial Environmental Affairs ministry of such pollution for appropriate measures to be adopted for remedial steps. Although this is a long route, the municipalities are required to apply for authority to enforce the provisions of the NEMA because it regulates all forms of pollution, and contains excellent principles in the form of the polluter-pay-principle, the prevention-principle and the precautionary-principle.

#### 2.4.2 Municipal Health Services:

The provision of municipal primary health care services is undertaken in accordance with the directives of the Health Act under the auspices of the Local Authorities.<sup>170</sup> What constitutes the municipal health services has as yet not been finalised. However four options have been identified to be within the ambit of the municipal health services,

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<sup>169</sup> By-law P.N.134/1979Section D.6 of Durban Unicity, made from Offensive Trade Regulations promulgated under Government Notice No.2014 dated 15 December 1921. North and South Central Local Council.

<sup>170</sup> Sec 14 and 20 of Act 63 of 1977.

namely: (i) the minimalistic approach which is said to comprise of environmental health services and related preventive and promotive services, (ii) the flexible approach which is referred to as the municipal health services currently provided by municipalities, (iii) core primary health care packages which are said to comprise of comprehensive primary health care services but exclude district hospitals, and (iv) district health system packages which include comprehensive primary health care services including district hospitals. These options are still undergoing debate as the most appropriate option needs to be identified, chosen and agreed upon, and the district health system needs to be finally established and functional in all the newly established and demarcated 285 municipalities.<sup>171</sup> The provincial Health Acts for the respective provinces will allocate the appropriate duties and functions of the municipal health services and the formulation of relevant regulations and by-laws.

#### 2.4.3 Control of Public Nuisances:

##### 2.4.3.1 General By-laws<sup>172</sup>

A nuisance is constituted by noise, vibrations caused by equipment or machinery, offensive dust, harmful noise, fumes, smells, smoke, gases, quarrelling, shouting, screaming, swearing or making disturbing noises, nuisances in streets and public places, and nuisances on premises. It must be noted that the definition of a nuisance differs from that of the Health Act and hopefully it differs from the other set of by-laws of other municipal departments.

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<sup>171</sup> Barron P. Sankar U. Development Towards a District Health System South African Health Review, 2000. Health Systems Trust. Durban. 2000.

<sup>172</sup> General By-laws. City of Durban, Chapter 3. Part 1. <http://intranet.durban.gov.za/council/by-laws/general%5Fby-laws.htm>.

#### 2.4.4 Street Trading:

##### 2.4.4.1 Street Trading By-laws<sup>173</sup>

The by-laws ensure that any street business is conducted in clean and hygienic conditions, and ensures that such businesses are undertaken in such a manner as not to be a danger or threat to public health and safety. The by-laws do not allow littering, creation of nuisances, creation of traffic hazards, damage to the surfaces of public roads or public places or private property. Municipal Councils promulgate these by-laws in terms of the Businesses Act.<sup>174</sup>

#### 2.4.5 Noise Pollution:

##### 2.4.5.1 General By-laws<sup>175</sup>

Noise is defined as a nuisance under these bylaws. If the noise exceeds 85 decibels it is considered dangerous to human health as it may cause permanent hearing impairment. The Environment Conservation Act No 73 of 1989 has promulgated regulations that regulate noise nuisances.

#### 2.4.6 Refuse Collection, Refuse Dumps and Solid Waste Disposal:

##### 2.4.6.1 General By-laws<sup>176</sup>

These by-laws make provision for the proper handling of waste, rubbish and refuse. They provide for waste to be properly stored in the receptacles provided for that purpose. The by-laws make it a punishable offence to indiscriminately throw away any refuse, litter, or

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<sup>173</sup> Street Trading By-laws M.N.97/95 Section J.6. North and South Central Local Council, EThekweni Municipality.

<sup>174</sup> Act No 71 of 1991.

<sup>175</sup> *Supra* 172.

<sup>176</sup> *Supra* 175.

other waste material whether liquid or solid, because such waste or refuse can contribute to the spread of communicable diseases.

#### 2.4.7 Food Control:

##### 2.4.7.1 Food By-laws<sup>177</sup>

These by-laws regulate the sale, manufacture, preparation, storing, handling and distribution of foodstuff within the City of Durban. They stipulate the requirements which the premises should conform to and comply with in order to be permitted and licensed to operate. They also require stipulated equipment to be utilised in such an operation. Furthermore, they prescribe standards food-handlers should comply with when handling food for human consumption. These by-laws seek to prevent the introduction of food from beyond the City boundaries if it is not inspected and sampled for quality testing and bacteriological analysis to ascertain the bacterial count of such foodstuff. The by-laws are applied in conjunction with the provisions of the Foodstuff, Cosmetics and Disinfectants Act 54 of 1972.

#### 2.4.8 Municipal Transition Process:

##### 2.4.8.1 The Local Government: Municipal Demarcation Act<sup>178</sup>

This Act has made provision for the rationalization of municipalities. This process led to the amalgamation of previously disadvantaged communities with more affluent municipalities. As a result of this demarcation process about 843 municipalities were amalgamated and the process reduced the number of municipalities to 285 in the Republic of South Africa. This process led to the provision of basic health services to the previously disadvantaged communities.

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<sup>177</sup> Food By-laws P.N. 627/1950 (as amended) Section D.2. Durban City Health Department. Central Entity.

<sup>178</sup> Act 27 of 1998.

#### 2.4.8.2 The Local Government: Municipal Structures Act<sup>179</sup>

The Act requires all newly established municipalities to review and rationalise all existing health by-laws with an intention to promulgate a new set of health by-laws that will comply with the provisions of the new Constitution and the new democratic governance. The review process will facilitate the discarding of the old and diverse health by-laws that were inherited from the previous apartheid municipalities and that can no longer be applicable in the new political dispensation. At the same time, it will retain those health by-laws that are still applicable and amend those that require such a process. The review process is aimed at producing uniform health by-laws for all communities living within the new municipal boundaries. The new health by-laws will have a common vocabulary, language, terminology and definition of terminology for the municipalities.

## **2.5 CONCLUSION**

It has been noted that the existing public health laws in South Africa are very fragmented. The supreme law of the land, the Constitution, is aimed at improving the quality of life of the citizens of the Republic. All laws, which are inconsistent with the Constitution, are invalid. In closing this chapter, it is submitted that the co-operative governance by all three spheres of government is contemplated for the fulfilment by application of the relevant public health legislation. In the Health Act, the National Health Policy Council established in terms of section 10, has as one of its functions the co-ordination of the health services provided by Department of Health at all three spheres of government. This Act is fulfilling the co-operative governance required by the Constitution by co-ordinating all the health services at all these spheres of government.<sup>180</sup>

In terms of the National Health Bill, the national health department is obligated to provide health services, within the limits of available resources, for the protection, promotion, improvement and maintenance of the health of the population. Co-operative

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<sup>179</sup> Act 117 of 1998.

<sup>180</sup> Act 63 of 1977 sections 10, 12, 14, 16, 17, 18 and 20.

governance is guaranteed for, and by all three spheres of government.<sup>181</sup> However, the Bill does not refer to other public health related laws of primary importance, such as the Foodstuffs, Cosmetics and Disinfectants Act (FCD), the NEMA, the Occupational Health and Safety Act, the Atmospheric Pollution Prevention Act and other health related public health laws. The functions of the Department of health, as listed in Schedules 1, 2 and 3 of the Bill include inter-sectoral and inter-departmental collaboration, the provision of occupational health services, making norms and standards for environmental conditions that constitute a health hazard, and enforcement of environmental health legislation. However, the Bill does not mention the laws to be enforced. It is submitted that the Bill may not achieve its intended objectives of promoting, protecting and advancing public health, if it does not mention the laws that health officers are obligated to enforce.

In terms of the Constitution, legislation at the municipal level must be approved by the provincial and the national spheres of government,<sup>182</sup> which are distinctive, interdependent and interrelated.<sup>183</sup>

Does co-operative governance by the three spheres of government make the public health legislation achieve the advancement, protection and promotion of the health of the people in the Republic of South Africa? The next chapter will examine some public health issues and the application of existing legislation regulating these public health issues. In addition, an analysis of whether the legislation is achieving the purported objectives of prolonging, protecting and promoting the public health, will be conducted.

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<sup>181</sup> Draft National Health Bill dated 22 October 2001 sections 4, 25, 27, 29, 30, 32, 35 and 40.

<sup>182</sup> Act 108 of 1996 sec 154.

<sup>183</sup> *Supra* sec 40(1).

## **CHAPTER 3**

### **3.1 INTRODUCTION**

This chapter examines how effective the legislation is in advancing, promoting and protecting the public health for the well being of individuals, families and communities it purports to serve. An endeavour will be made to look at the relevance of the existing public health laws in relation to the issues affecting human health and the environment. An examination of the enforcement mechanisms of the legislation in terms of its application, efficacy and relevance will be conducted.

### **3.2 THE RELEVANCE AND EFFECTIVENESS OF THE SOUTH AFRICAN PUBLIC HEALTH LEGISLATION**

The law performs the role of protecting the health of individuals and communities and is characterised as the legislative framework which (i) protects and promotes health by authorising health programmes and health services, (ii) prohibits conduct that is injurious and harmful to human health and well-being, (iii) regulates the production and distribution of resources of health care, (iv) establishes and seeks to maintain surveillance over the quality of health care, (v) seeks to provide and uphold ethical issues in health care and (vi) provides for the social financing of health care.<sup>184</sup> Public health legislation applies to the public health sector, which comprises of the national, provincial and municipal health services, and it also applies to the private health sector that comprises of private hospitals and clinics. The public health law in the form of statutes that apply to all three spheres of government, shape the public health policy which, in turn, is translated into various public health programmes and health services delivery mechanisms.<sup>185</sup> The legislation provides the regulatory framework for the implementation of all health programmes and health policies.

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<sup>184</sup> Roemer Health Legislation as a Tool for Public Health and Health Policy IDHL 92 1998.

<sup>185</sup> Nadasen Public Health Law: An Introduction page 52 2000.

Public health in cities requires potable water supplies, the sanitary provision of toilet facilities, the sanitary disposal of human and other waste, household and industrial waste management, sewerage systems, street cleansing, collection transportation and disposal of waste, and the management and disposal of hazardous and unsanitary waste. Public health laws are also needed to make cities wholesome and liveable.<sup>186</sup>

The advent of the new political democratised government leaves a question of the relevance, efficacy and application of the existing health legislation. The man in the street wants to know whether these laws are still applicable to the new order. Are these laws in a position to advance, protect and promote the public health as guaranteed by the Constitution of South Africa? Communities are expecting their health status to improve. The relevance, efficacy and application of some of the existing South African public health legislation that directly regulate public health are discussed.

### 3.2.1 The Health Act<sup>187</sup>

The Act is found to be partly relevant and applicable for the following reasons: it provides for the protection and promotion of human health and well-being; it also provides for the rendering of health services by all spheres of government and provides for intergovernmental co-operation, co-operative governance and co-ordination of health services; it provides for the handling of infectious diseases including HIV/AIDS, whereby the Minister has made regulations to control the spread of the disease especially the handling of HIV infected dead persons in the Republic; the Minister delegates certain functions to the provinces, for instance, providing hospital services, clinics, maternity homes, nurses homes, the provision of medicines, the provision of ambulance and emergency services, and to supervise municipalities. Moreover, the Act provides for the functions and duties of local authorities, the abatement of nuisances by municipalities, and the prevention and control of littering.

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<sup>186</sup> Grad F P Public Health Law IDHL page 21-23 Vol 49 1998.

<sup>187</sup> Act 63 of 1977.

However, it is established that this piece of legislation is no longer completely relevant, effective and applicable enough to the present constitutional and institutional framework of this country. This Act fails the new Constitution as it does not guarantee human rights. An example of this is section 27 of the Constitution which guarantees everyone the right of access to health care services, sufficient food and water, social security and that no one may be refused emergency medical treatment. However this right has the limitation that the state should provide services within the available resources.

The Act does not contain provisions for patients' rights, for upholding the ethical norms and standards of patients in terms of their right to medical information, to confidentiality, and to make a rightful choice to medical treatment and medical procedures to be undertaken on him or her.

The Act does not provide for the establishment of the District Health System by the Provincial Governments nor for the implementation by Municipalities. Neither does it provide for active public participation in all matters concerning health for decision making, nor the formulation of community health forums and health committees. The terminology and definitions used in the Act neither fit the current state of democracy nor utilization in health sector deliberations and decision-making. This Act, for these reasons stated above, is seen as not being able to achieve its desired goals and objectives. The Act requires replacement.

### 3.2.2 The Foodstuffs, Cosmetics and Disinfectants Act<sup>188</sup>

The Act is still relevant, effective and applicable for it controls the selling, manufacturing, importing of foodstuff, cosmetics and disinfectants and prevents the sale, manufacture and import of foodstuffs, cosmetics and disinfectants which are decayed, contaminated, impure, unsound and which may be injurious, harmful and detrimental to human health.

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<sup>188</sup> Act 54 of 1972.

The Act effectively provides for surveillance by employing health officers to monitor foodstuffs, cosmetics and disinfectants and to visit food premises for inspection, sampling and monitoring. The Act is still applicable, for The Minister of Health provides for the functions of municipalities to control the selling, manufacturing and importation of foodstuffs, cosmetics and disinfectants and to make regulations for that purpose which allow for the making of by-laws to regulate the control of foodstuffs, cosmetics and disinfectants. The Municipal by-laws cannot be in conflict with the national statute, otherwise they will be invalidated or not approved.

While the Act is still relevant in its application, it requires some review and adjustments. Areas that need review are, for instance, the provision regarding the appointment of inspectors. The name, whether it should be changed to either “food inspectors” or “inspectors” or other names, is yet to be reviewed. In addition, this name should be similar and conform to the international names used for the same purpose.

The Act needs to make provisions for chemical and bacteriological standards for all foodstuffs, whether raw, uncooked or cooked. It should also conform to the international commissions that set standards for food, such as the Codex Alimentarius Commission that formulated the Statutes and Rules Procedure for the food trade, which was discussed above.<sup>189</sup>

The terminology of the Act should comply with the new political and democratic dispensation and definitions should be formulated that will conform to the new National Health Bill, and the provincial and local government food and health legislation in meaning and interpretation.

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<sup>189</sup>Codex Alimentarius Commission was established in 1962 by Food and Agriculture Organization (FAO) and World Health Organization (WHO) for implementation of Joint FAO/WHO Food Standards Programme. Article 5.

### 3.2.3 The International Health Regulations<sup>190</sup>

This Act ensures that maximum security is maintained against the international spread of infectious diseases. The Act is still relevant, effective and applicable because it provides for the periodical submission of epidemiological information, diseases notifications and statistics from all municipalities and provinces in the Republic, which are compiled and transmitted to the WHO by the National Department of Health. This also includes disease notifications and deaths on board all vessels and aircrafts entering the Republic, and the importation of all cadavers into the Republic. The Act stipulates the measures, sanitary requirements and conditions that must be maintained at airports and seaports in order to afford them international status and licensing as a sanitary port and airport. It regulates international traffic, travel, incoming and outgoing baggage, cargo, mail and persons. It sets special control measures for cholera, yellow fever and plague for arriving and departing passengers and provides for quarantine measures if a disease is identified.

It functions in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>191</sup> and the General Agreement on Tariffs and Trade (GATT)<sup>192</sup> treaties. In the preamble of the TRIPS treaty, member states seek to reduce distortions, impediments and barriers to legitimate international trade. Further, it ensures the promotion, enforcement and the protection of intellectual property rights, by detaining, examining and inspecting all goods that enter the country, and grants the power to destroy fake or counterfeit goods to the Customs Officers or other competent authority. In the same vein, the GATT treaty attempts to ensure that trade and economic activities are undertaken to improve the quality of life of the communities of the member states.

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<sup>190</sup>Act 28 of 1974.

<sup>191</sup>The Agreement on Trade-Related Aspects of Intellectual Property Rights Treaty as was adopted in 1961.

<sup>192</sup>The General Agreement on Tariffs and Trade, 1994.

This piece of legislation is relevant and effective in all its aspects except for some amendments that need to be effected, for example, the World Health Organization (WHO) no longer focuses only on yellow fever, plague and cholera, but also on other syndromic diseases which keep on emerging and re-emerging. These emerging diseases should be included in this legislation for the effective control and reporting to relevant government institutions and the WHO.

The penalties should be reviewed and increased from time to time to keep pace with the rate of inflation. This will deter defaulters who do not take its provisions seriously, to the detriment of the health of the public.

### 3.2.4 The Atmospheric Pollution Prevention Act<sup>193</sup>

This Act provides for the control of noxious or offensive gases, smoke pollution, dust pollution and fumes emitted by vehicles. The Minister makes regulations to control pollution and allows part 3 to be implemented by the municipalities in their jurisdictions.

To control air pollution at the national level, the Act is administered by the Department of Environmental Affairs and Tourism, while, for instance, in Ethekwini Municipality the Act is administered under the Scheduled Trades and Occupations By-laws as a nuisance. In the Durban South Basin industrial area, there has been a numerous offensive or noxious gas emissions emanating from the surrounding industries. The public in the surrounding area is affected by these emissions. This caused a big public health concern. Extensive research conducted in the area, for example, recorded sulphur dioxide at or above 80% of the recommended South African Guideline Levels. This Act has failed to make the responsible industries minimise the emission of pollutants. Furthermore, it does not permit the municipality to institute heavy fines or penalties.<sup>194</sup>

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<sup>193</sup>Act 45 of 1965.

<sup>194</sup>Personal interview with M. Chetty and N. Larret of Occupational Health Section, Department of Health, Ethekwini Municipality and Durban South Basin Strategic Environmental Assessment, Final Intergrated Report, August 1999, Prepared by CSIR Environmentek.

The Atmospheric Pollution Prevention Act does not provide for environmental assessments nor its reports, or for integrated pollution management and environmental impact management that require the assessment of projects before and after implementation.

It is submitted that this piece of legislation is inappropriate in many aspects. It has not been reviewed and amended since 1965, despite the dramatic constitutional and legislative transformation that this country has undergone. The legislation provides and specifies guidelines, not standards, to be complied with, when dealing with air pollution. In order to enforce compliance, standards will have to be formulated and legislated, whereby any non-compliance by the industries, will be heavily penalised or severely prosecuted.

Furthermore this legislation does not contain any provision for the protection of human rights as entrenched in the Constitution. This makes it further inappropriate.

There are other fragments of legislation that deal with air pollution, for example, the Health Act deals with air pollution as a nuisance. This Act is also out-dated and needs replacement. Also the Environment Conservation Act (ECA)<sup>195</sup> has been partly replaced by the new National Environmental Management Act, which is promulgated in terms of the new political dispensation. It recognizes the Constitution as the supreme law of the land.

### 3.2.5 The National Environmental Management Act<sup>196</sup>

This Act provides for an ongoing assessment of environmental impacts by those industries that are responsible for environmental damage or degradation and remedial measures. The Act contains the precautionary principle, the polluter-pay principle and the duty of care principle that make the polluter responsible for the pollution until it is

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<sup>195</sup>Act 78 of 1989.

<sup>196</sup>Act 107 of 1998.

remedied, financially and otherwise. It provides for whistle-blowers to report any form of pollution and the persons responsible for such actions. This legislation is relevant, effective and appropriate because it covers and encapsulates all forms of pollution in general. The penalties should be reviewed and re-visited from time to time in order to keep pace with the inflation rate. High and harsh penalties will deter defaulters and polluters from repeating pollution actions.

The Department of Health cannot enforce compliance in terms of the provisions of this Act, because at the national level, the Act is administered by the Department of Environmental Affairs and Tourism, and at the provincial level, it is delegated to the Department of Environment and Agriculture. An application to the Attorney General will have to be lodged to request enforcement of some relevant chapters of NEMA by the Health Department.

### 3.2.6 The Occupational Health and Safety Act<sup>197</sup>

This Act is a good piece of legislation but lacks enforcement mechanisms due to the fact that the Department of Labour has inadequate staff and manpower to enforce the provisions of the Act. The Act would be better enforced if it were to be devolved to the Local Government level for enforcement. The lack of human resources, financial resources and equipment, in the Department of Labour, to regulate the provisions of the Act has led to industries and employers acting irresponsibly and to abuse the whole system and misuse the employees in activities that are dangerous to their health. This might lead employees to contract chronic occupational diseases and other impairments, for example, asthma, respiratory diseases, blindness, deafness, dermatitis and other diseases.

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<sup>197</sup>Act No 85 of 1993

### **3.3 ENFORCEMENT OF COMPLIANCE MECHANISMS**

#### **3.3.1 Appointment of Inspectors**

Many laws have provisions for the appointment of inspectors or officers who are empowered to enter any premises at any reasonable time for the purpose of carrying out inspections to enforce the requirements and provisions of the public health legislation, in order to protect and promote public health. The Foodstuffs, Cosmetics and Disinfectants Act provides for the appointment of inspectors.<sup>198</sup> Inspectors may be appointed by all three spheres of government. The Health Act also provides for the appointment of inspectors,<sup>199</sup> by local authorities and by the Minister,<sup>200</sup> for performing duties in the local authority. The Atmospheric Pollution Prevention Act provides for the appointment of inspectors as well.<sup>201</sup> It is common to all public health legislation that inspectors are appointed to protect and promote public health through inspection and the enforcement of compliance. The appointment of inspectors requires review and revisiting by legislators in order to formulate a proper designation of the personnel to carry out these inspections as well as the relevant academic requirements that make them suitable for such appointments.

An example of the duties and functions of inspectors appointed in terms of the Foodstuffs, Cosmetics and Disinfectants Act<sup>202</sup> include, *inter-alia*, the following:

- to enter premises on or in which any foodstuff, cosmetic, disinfectant is suspected to be manufactured, treated, graded, packed, marked, labelled, kept, stored, conveyed, sold, served, or administered;
- to enter premises in which any other operation or activity in connection with any foodstuff, cosmetic or disinfectant is suspected to be carried out;

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<sup>198</sup>Act 54 of 1972 sec 10.

<sup>199</sup>Act 63 of 1977 sec 24.

<sup>200</sup>*Supra* sec 25.

<sup>201</sup>Act 45 of 1965 sec 6 (3).

<sup>202</sup>*Supra* 198 sec 11 (1) (a) (b) (c) (e) (f) (g) and (h).

- to inspect or search such premises, examine, extract, take and remove samples of any foodstuff, cosmetic, or disinfectant for further bacteriological or chemical analysis;
- to examine and extract any product, material, object, or substance found in such premises which is suspected to be used, or to be destined, or intended for use in connection with the manufacture, treatment, packing, labelling, storage, conveyance and serving of foodstuff, cosmetics and disinfectants; and
- to seize for further investigation and condemnation any foodstuff, cosmetics, disinfectant, appliance, product, material, substance, books, statements and documents which appear to provide proof of contravention of the provisions of the Act.

Since public health law seeks to protect and promote human health and well-being, it also includes criminal sanctions, civil remedies and administrative procedures. This is illustrated by powers granted to enforce compliance (i) in the courts of law, (ii) civil remedies which involves court interdicts and law-suits for compensation and (iii) the confiscation and destruction of goods that pose danger or are detrimental to public health<sup>203</sup>

### 3.3.2 Criminal Sanctions

The public health legislation criminalizes the contravention of the provisions of the legislation. Any person who is found guilty is liable to imprisonment or the payment of a fine. The Foodstuffs, Cosmetics and Disinfectants Act<sup>204</sup> authorises local authorities to prosecute in respect of any contravention of or failure to comply with the provisions of the Act<sup>205</sup> as mentioned in sections 4, 5, 14, 16 and 17. The national and provincial spheres of government are authorised to enforce compliance in terms of the Act.

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<sup>203</sup>*Supra* 1 at 111.

<sup>204</sup>Act No 54 of 1972

<sup>205</sup>*Supra*

In the case of *Amalgamated Beverage Industries Natal (Pty) Ltd vs Durban City Council*,<sup>206</sup> the bottling company was convicted of contravening by-law 18(c) read with by-law 9 of City of Durban Food By-laws. A bee was discovered in a carbonated mineral-water bottle, which was sold to a supermarket. The by-law provides that “no person who carries on any business involving the manufacture, preparation, storage, handling or distribution of food shall in connection with such business cause or permit any article of food or drink which is not clean, wholesome, sound and free from foreign object, disease, infection or contamination to be kept, stored, sold or exposed for sale, or introduced into the city for the purposes of sale”.<sup>207</sup> The purpose of the law is to promote and protect the health of the public in general. Penalties, be it a fine or imprisonment should be revisited and reviewed with an objective to deter defaulters and offenders who objectively violate the laws from time to time simply because they can afford to pay more admission of guilt fines. It should be made unaffordable and highly expensive to pay fines and prison sentences should be made very long. This will deter offenders and public legislation will be respected and promoted. Ultimately, the protection of public health will be achieved.

### 3.3.3 Interdicts

This is a legal remedy aimed at averting an impending wrongful act or preventing the continuation of a wrongful act that has already commenced. There are three requirements to grant an interdict: (i) the action committed must be a threatening action, (ii) the act must be wrongful, and (iii) there should be no other remedy available to the applicant.<sup>208</sup> An interdict may be temporary or final.<sup>209</sup> In the case of the *Minister of Health vs Drums and Pails CC t/a Village Drums and Pails*,<sup>210</sup> the Minister sought an interdict to stop the respondent from continuing with certain chemical waste incineration processes that contravened the Atmospheric Pollution Prevention Act.<sup>211</sup> The incineration caused

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<sup>206</sup>1994 3 SA 170(A).

<sup>207</sup>Food By-laws P.N. 627/1950 (as amended) 18(c).

<sup>208</sup>Glazewski L *Environmental Law in South Africa* ch 17 page 648.2000.

<sup>209</sup>Neethling et al *Law of Delict* chapter 7 page 261 3<sup>rd</sup> Ed Butterworths. 1999.

<sup>210</sup>1997 3 867 (N).

<sup>211</sup>Act 45 of 1965 sec 9(1) (a)(i) and 9(b).

chemical oxidation that resulted in the emission of offensive and noxious gases thus polluting the air. The court granted the applicant an interdict after concluding that the applicant was legally responsible to administer the Atmospheric Pollution Prevention Act and to ensure that the provisions of the Act were complied with by everyone.

### 3.3.4 Administrative Mechanisms

Inspectors may confiscate or seize any article of foodstuff, cosmetic, disinfectant, appliance, product, substance, or material destined for importation that is detrimental or injurious to human health. The Act provides for the confiscation, for sampling and destruction of these goods<sup>212</sup> if they are found to be detrimental and injurious to public health. Administrative procedures include taking prompt direct action to remove the offending conditions or nuisances without the need for a court hearing or authorization.<sup>213</sup>

A health officer or an inspector who finds unclean and unhealthy conditions is empowered to write notices to occupiers of premises, advising them to remedy the nuisance or to remove the unlawful act. The last notice is issued that summons the owner or occupier of premises in question to appear in court. The court usually imposes time limits for compliance or passes sentence, or issues a ceasure or close down order to operate the business. Should the order not be obeyed, the owner or occupier may be prosecuted and fined or imprisoned accordingly

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<sup>212</sup>Act 54 of 1972 sec 14(3).

<sup>213</sup>Grad F P The Public Health Law Manual 2<sup>nd</sup> Ed ch 9 page 167 1990.

### **3.4 CONCLUSION**

It should be clear that the primary objective of the public health law is to eliminate all conditions that might endanger the public health of individuals, families and the general community. The punishment of offenders is merely undertaken to facilitate the remediation of public health nuisances. Some health laws have been discussed to assess if they do fulfil their objectives as outlined in their preamble and objectives. It is clear that some are far from attaining their aims and objectives. Others are applicable, while some do not conform to the present democratic order. It is submitted that a lot of health laws are not achieving their objectives due to the lack of appropriate skills by the judiciary to deal with health related issues in the courts. Fines are in most cases very low, and offenders are repeatedly committing the same health violations.

A question that can be posed is why are the courts not imposing on public health law offenders exorbitant fines and sentences. This may deter offenders from committing health crimes repeatedly. The next and the last chapter will identify and address the gaps prevalent in the public health legislation. Furthermore, an outline for the reformation of existing health laws will be discussed. Lastly, recommendations stating what should be done in order to address the deficiencies in the public health legislation will be made.

## **CHAPTER 4**

### **4.1 INTRODUCTION**

This chapter addresses the lacunae in public health law. These gaps cause confusion to the civil society when they are supposed to interpret and apply these laws for the advancement, protection and promotion of public health. In this chapter, suggestions will be made to address the reforming and redefining of public health law in South Africa. Some examples, based on the experiences of other countries' public health laws, will be discussed. The intention is to arrive at appropriate recommendations that will enable the South African public health law to comply with the international standards.

Detels and Breslow<sup>214</sup> define public health as "the process of mobilizing local, state (provincial), national and international resources to ensure the conditions in which people can be healthy".

Mann<sup>215</sup> argues that the settings in which public health and medicine operate differ. His view is that governmental organizations, large scale public programmes, and various forums associated with developing and implementing public policy are inherently part of public health, while in contrast, private medical offices, clinics, and medical care facilities of varying complexity and sophistication are the setting in which medical care is generally operated and provided. He says that public health deals with the primary prevention of ill-health, while medicine responds to existing medical conditions.

Tobey<sup>216</sup> argues that public health law should not be confused with medical jurisprudence, which is concerned only with the legal aspects of the application of the medical and surgical knowledge to individuals. He argues further that public health is not a branch of

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<sup>214</sup>Current Scope and Concerns in Public Health OXTPH Vol 1 3-17 3.

<sup>215</sup>Mann et al *Medicine and Public Health, Ethics and Human Rights* Health and Human Rights: A Reader 1999.

<sup>216</sup>Tobey Public Health Law A Manual of Law for Sanitarians (1926) 6-7 (quoted by Gostin'Public Health Law' A Review in Current Issues in Public Health (1996) 205).

medicine but a science in itself, to which, preventive medicine is an important contributor. However, he asserts that public health law is that branch of jurisprudence, which treats the application of common and statutory law to the principles of hygiene and sanitary science.

Tobey's view is supported by Acheson<sup>217</sup> who says that public health is the science and art of preventing diseases, prolonging life and promoting health through the organised efforts of society. Public health medicine is that branch of medicine which specialises in public health. According to him, its chief responsibilities are the surveillance of the health of the population, identification of its health needs, the fostering of policies, which promote health and the evolution of health services.

It is submitted, that there is still some misconception about the definition of health care facilities, where diverse meanings are ascribed to the meaning of 'Public Health'. All statutes do not ascribe a definition of public health in the laws yet they seek to promote and protect human health and well-being. These pieces of health legislation have diverse terminology, meaning and interpretation of words and concepts, but they all aim at protecting and promoting public health.

As Grad rightly puts it, public health law does not come in a single, neat legislative package marked 'PUBLIC HEALTH LAW', but consists of many different types of legislation which have little in common except the benign purpose of advancing public health.<sup>218</sup>

Roemer<sup>219</sup> argues that legislation seeks to protect and promote the health of individuals and communities by rendering the following functions: to prohibit conduct that is injurious to health; authorise programmes and services to protect and promote health; regulate the production of resources of health care; provide for social financing of health

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<sup>217</sup> Acheson Public Health in England- Report of the Commission of Enquiry into the Future Development of the Public Function, HMSO 1988 1.

<sup>218</sup> Grad 'Public Health Law: Its Reform, Functions, Future and Ethical Parameters (1998) IDHL 21.

<sup>219</sup> Health Legislation as a Tool for Public Health and Health Policy, IDHL 92 1998.

care; establish surveillance over the quality of care; and concerns the ethical issues in health care.

The arguments advanced by Tobey, Acheson, Detels and Breslow, Mann, Grad and Roemer about public health are testimony that health services delivery is complex and is regulated by legislation. Health services delivery and legislation are intertwined, interlinked and interdependent. Legislation regulates all programmes of health services delivery. Should one fail to support the other, harmonisation of efficient and effective health delivery and rule of health law enforcement will fail. Thus the promotion and protection of health will be weakened.

## **4.2 LACUNAE, REFORMATION AND REDEFINITION OF PUBLIC HEALTH LAW IN SOUTH AFRICA.**

### **4.2.1 Gaps in Definitions in some Public Health Legislation**

One finds diverse definitions of health terms explaining the common public health issues. This diversity bears evidence to the fact that public health legislation requires reviewing in order to eliminate all forms of ambiguity of terminology and in the same vein to protect and promote public health. A few diverse definitions found in some health legislation will be highlighted to illustrate confusion within the Health Department.

#### **4.2.1.1 The KwaZulu-Natal Health Act<sup>220</sup>**

This Act defines the health care establishment as “any private or public institution, facility, building or place where health care users receive treatment, diagnostic or therapeutic interventions or other health services.” In terms of this Act, the definition includes, *inter-alia*, government hospitals, clinics, community health centres and privately owned hospitals.

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<sup>220</sup>Act 4 of 2000 sec 1.

#### 4.2.1.2 The Health Act<sup>221</sup>

This Act has a different meaning, but it still refers to health care facilities as a place where people receive examination and treatment. Personal Health Service is therefore defined as “any health service for the examination and treatment of a medical condition”. In this context, medical condition means a physical and mental state that requires medical treatment. This can include diseases. These definitions include government hospitals, privately-owned hospitals, clinics, surgeries, and private clinics.

#### 4.2.1.3 The National Health Bill<sup>222</sup>

This bill defines or classifies health establishments as “the whole or part of a public or private institution, facility, agency, building or place whether organised for profit or not that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, preventative or other health services.”

#### 4.2.1.4 The Mental Health Care Bill<sup>223</sup>

This bill defines health establishments as “institutions, facilities, buildings or places where persons receive care, treatment, rehabilitative assistance, diagnostic or therapeutic interventions or other health services and includes facilities such as community health and rehabilitation centres, hospitals and psychiatric hospitals.”

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<sup>221</sup>Act 63 of 1977 sec 1.

<sup>222</sup>National Health Bill, dated 22 October 2001.

<sup>223</sup>Mental Health Care Bill Notice 344 of 2000 dated 4 February 2000 sec 1.

4.2.2 The gaps in some health related legislation are evident in the South African public health legislation. The examples are discussed below.

#### 4.2.2.1 The Health Act<sup>224</sup>

The Act does not define or mention public health, yet it is an instrument that regulates all aspects of health in hospitals, clinics, health centres, privately-owned hospitals, community health centres, National Health Departments, Provincial Health Departments and Municipal Health Services. The Act does not allow for active community participation and for non-governmental organizations (NGO's) to influence decisions regarding their expectations and obligations including those of health managers. The application of the Act does not prevail in mining activities. It does not complement mining, occupational and industrial legislation.<sup>225</sup>

This illustrates that the Health Act does not have jurisdiction in other activities. It is strongly felt that health law should extend its obligations to encompass everything where public health is involved, endangered, threatened or exposed to injurious or detrimental agents. Numerous pieces of legislation are applied to protect and promote health and safety in the work place. For example, the Mining Act, the Occupational Health and Safety Act, the Atmospheric Pollution Prevention Act. It is submitted that this Act should be replaced by the National Health Bill, which at this stage is still being drafted and reviewed. The Bill is seen as encompassing a wide range of issues and activities required for the attainment, promotion, and protection of public health and as fulfilling the Constitutional human rights concerned with health and the environment.<sup>226</sup>

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<sup>224</sup>Act 63 of 1977.

<sup>225</sup>*Supra* sec 55 (1).

<sup>226</sup>Act 108 of 1996 sections 24 and 27.

The Atmospheric Pollution Prevention Act requires replacement due to its inconsistency with the provisions of the Constitution. The Act focuses on industrial emission, and is silent on emissions and fumes from restaurants. Other forms of air pollution are classified as a nuisance in terms of the Health Act and are dealt with according to the provisions of the Health Act. This is viewed as an inconsistent definition of pollution and a nuisance.

#### 4.2.2.2 The Occupational Health and Safety Act<sup>227</sup>

The Act has, as one of its objectives, the promotion of health and safety in the work place. It is administered by the Department of Labour, which lacks the human resources to effectively enforce the provisions of the Act. The assessment and evaluation of chemical, physical and biological stresses in the work-place are conducted by personnel who lack an understanding of the health and safety risks to which employees are exposed. It is observed that in the Durban South Basin the pollution problems and deadlocks in enforcing compliance is due to the diversity of municipal departments that have different sets of norms and standards as well as diverse Provincial Departments. It is recommended that this law should be administered by Department of Health to overcome duplication.

#### 4.2.2.3 The National Environmental Management Act<sup>228</sup>

The Act endeavours to address the fragments in the applicability of environmental law to fulfil the environmental rights as guaranteed by the Constitution.<sup>229</sup> The Act advocates public participation in all matters affecting planning and assessing the rehabilitation of the environment. It further stipulates remediation measures, which require that those responsible for environmental damage should be held responsible for remedial measures and the rehabilitation of degradation. The Act addresses all forms of pollution control. The NEMA does not completely repeal the Environmental Conservation Act (ECA). The

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<sup>227</sup>Act 85 of 1993.

<sup>228</sup>Act 108 of 1998.

<sup>229</sup>Act 108 of 1998 sec 24.

ECA is still applicable to control pollution, littering and waste management, and thus, this still leaves room for fragments in the application of enforcement mechanisms.

The application of NEMA is by the different government departments, including the Health Department. This brings further inconsistencies to achieve the required objectives of the law. Human health and the environment are inextricably intertwined. Humans must live in a clean, hygienic and healthy environment in order to be healthy.

#### 4.2.3 Additional Gaps in the Public Health Law

Terminology for key public health matters in all government departments is diverse. This has culminated in different definitions for the same common health issues ascribed to the common interpretation. Coordination of government departments at the national, provincial and municipal levels is still lacking. Such co-ordination can invariably assist in setting standards for public health issues.

Further, financial resource constraints are a big stumbling block in the enforcement of public health legislation. Human resource shortages and lack of funds result in employing fewer personnel for jobs that require sufficient personnel to enforce public health legislation. The shortage of medical doctors and inspectors to monitor, control, promote, protect and enforce the laws, results in a violation of public health laws, which in turn leads to the degradation of public health.

Policing of health laws requires skilled personnel groomed for policing health matters. The policing of bakery vans, butchery vans, milk and milk products delivery vans and hygiene-hazards is not available to prevent conditions that might be conducive to the spread of diseases. Furthermore, law enforcement structures are not structured nor geared towards managing health related cases.

Different departments have fingers on hazard management, for example, the fire department, the police services, the health department, the traffic department, the

emergency services and other departments all rush to disaster sites to alleviate hazards for the protection and promotion of public health. These departments have fragmented hazard or disaster management systems.

Too many health laws exist within the health department in the form of compartments in various distinctive health services. This may be viewed as the building of compartmentalized empires. Fragmented health legislation requires reviewing and reforming in order to discard all irrelevant health legislation, and to identify all relevant health legislation for the promotion of public health.

The Schedules 4 and 5 list of functions in health related matters of national, provincial and municipal competency requires reviewing and reforming. This is necessitated by the seeming uncertainty as to who is supposedly required to carry out certain functions in the list. The Constitutional reforms will also clarify the institutional conflict that has caused confusion as to which sphere of government should be tasked to perform certain tasks.

Trained personnel with appropriate knowledge, skills and technology to carry out specific tasks are unavailable. Where available they are limited. The lack of capacity results in low work input and output, which is detrimental to public health. The Health Department has to rely on the services of foreign doctors and health administrators to promote the capacity of the Department in order to deliver health services for the protection of the health of the public.

## **4.3 REDEFINING PUBLIC HEALTH LAW IN SOUTH AFRICA**

### **4.3.1 Recommendations**

#### **4.3.1.1 Institutional Arrangements**

Health legislation should be framed so as to prevent conflict in the different spheres of government and should be delivered in terms of the constitutional requirements. Any health legislation that is inconsistent with the Constitution should be invalidated. The status quo as entrenched in the Constitution for the three spheres of government and functional areas in terms of Schedules 4 and 5 should be reviewed to produce a holistic and integrated public health legislation that will eliminate conflicts. The institutional framework should be more pro-active rather than reactive.

#### **4.3.1.2 Public Health Dictionary**

Terminology that is common to all spheres of government should be formulated and compiled in a dictionary of terms, for use by all personnel in the employ of health and related fields. This dictionary will eliminate diverse terminology, definitions, meanings and interpretations.

#### **4.3.1.3 International Standards**

Although South Africa is a third world, poor and developing country, there is a need to work for and towards compliance with international standards by formulating public health legislation that complies with international norms and standards. Ratification of Treaties should be weighed against the country's capacity to comply with the Treaties' provisions and standards.

#### 4.3.1.4 Capacity Development

Staff should be trained and skilled in appropriate technologies and programmes, as lack of capacity to enforce health legislation will render relevant laws useless if they cannot be enforced. Courts should be empowered to handle health related cases.

#### 4.3.1.5 Multi-Skilling of Personnel

A number of personnel require multi-skilling training in all fields that are necessary to control public health hazards. Training of Health Officers as multi-skilled specialized unit or agents of Health Maintenance Officers (HMO) is required. This may save the government from the wastage of funds in the fragmented units and services. This includes the police, fire, health, welfare, water, environment and other government departments.

#### 4.3.1.6 Public Health Law Discipline

This discipline should be recognized and incorporated into all three spheres of government as an essential branch of public health. It should incorporate the public health issues collectively and formulate “PUBLIC HEALTH LAW” as is known in first world countries. The legislation is designed to advance, promote and protect public health<sup>230</sup>. The health legislation shapes the way the health policy is translated into health programmes and services.<sup>231</sup> It is submitted that public health law should be incorporated in the new National Health Bill and eventually in all health legislation.

#### 4.3.1.7 District Health System

Envisaged public health law, as a discipline, should be formulated and structured to fit precisely into the District Health System based on the Primary Health Care approach.

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<sup>230</sup>Nadasen Public Health Law in South Africa: An Introduction page 54 2000.

<sup>231</sup>Roemer Health Legislation as a Tool for Public Health and Health Policy 1998 IDHL page 89-91.

This system must be coterminous with the provisions of the Constitution and the National Health System.

#### 4.3.1.8 Politics and Public Health Issues

Public health issues should find a place in politics. Politicians should use health issues in their political persuasion and manifestos by stating what they intend to do in order to promote, advance and protect public health.

### **4.4 CONCLUSION**

According to Lee (et al)<sup>232</sup> the core public health functions in the United States of America, were redefined to include, *inter alia*, promoting community health, empowering communities about health issues, and the beefing up of human resources to promote community and public health. In the same vein, the South African National Health Bill, in Schedules 1, 2 and 3 at the national, provincial, local and district levels, attempts to address the imbalances of the past regime by seeking to provide comprehensive health services based on the Primary Health Care approach, in the form of the District Health System. However, personal health will require to be ascribed a different definition and meaning and non-personal public health will need its own different definition and meaning.

Public health concerns itself with advancing and promoting human health, the prevention of the occurrence of conditions that are likely to endanger human health, and the control of the spread of diseases. The State requires laws that will ensure the effective realization and achievement of these objectives. Hence, public health law deals with the implementation and enforcement of legislation that is promulgated by parliament. Public health officers should be responsible for the administration and enforcement of public

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<sup>232</sup>Lee et al, Policies and Strategies for Health in the United States of America OXTPH Volume 1 page 297-321.

health laws concerning the financial provisions for health resources, and programmes to advance the quality of health care.

The policies of health programmes, and the provision of all health services are governed and limited by law. The powers of public health officers are governed, regulated, and limited by law. The State needs the advice of lawyers in its dispensation of public health functions at the national, provincial and municipal spheres of government. Public health law is essential to assist the State to deliver public health services effectively and efficiently.

Public health law in South Africa still has to gain ground as in other first world countries. There are many public health related laws, which do not have a common and coherent definition of “public health” and “health establishments.” This implies that “Public Health Law” is yet to be defined within the legal framework, and given an appropriate meaning.

With regard to the definitions of public health and public health law by other countries, and the definitions of diverse health issues affecting human health and the environment in South Africa, it is submitted that the White Paper for the Transformation of Health Systems in South Africa<sup>233</sup> and the new National Health Bill<sup>234</sup> should embrace all health activities affecting human health, services delivery, financing, legislation, public health law, human resources, pollution control, occupational health and safety, pharmaceuticals, laboratories, private and public health facilities, diseases control, preventive health care, the treatment of the sick, nutrition, food control, empowerment, skills development, medicine provision, health personnel provisioning, primary health care services, non-personal health services and personal health services for the provision, protection and promotion of public health.

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<sup>233</sup>Notice 667 of 1997 Vol 382 No17910 dated 16 April 1997 Department of Health.

<sup>234</sup>Supra 35.

This will be achieved by reviewing and revisiting old public health statutes and updating them into manageable public health legislation that will avoid fragmentation and duplication which serves to defeat the enforcement mechanisms. Within the constitutional, legislative and institutional framework, public health must be regulated under well-run and organized government health departments who talk the same language, have the same vision, and collaborate their work without conflict and antagonism.

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