

Municipal Accountability in Service Delivery: Featherbrooke Homeowners Association v Mogale City Local Municipality

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Abstract

In the case of *Featherbrooke Homeowners Association NPC v Mogale City Local Municipality* the Johannesburg High Court presided over a matter which considered the role of municipal accountability in stormwater management. Schedule 4B of the *Constitution of the Republic of South Africa, 1996* provides for basic municipal services such as stormwater management. Schedule 4B outlines other functional areas linked to promoting the right to an environment that is not harmful to one's well-being. This constitutional right is often infringed upon, and the courts must decide to what extent local government is responsible for the alleged infringements. The courts must further decide to what extent local government accountability can be enforced through structural interdicts. This note contemplates the role of municipal accountability and responsibility in the pursuit of adequate service delivery in urban areas. It highlights the role of legislative interpretation in constitutional matters that relate to government accountability and overlapping mandates. It argues that state entities often shift the blame for their responsibilities. Furthermore, it evaluates the challenges of enforcing municipal accountability in service delivery and argues that public participation plays a key role in holding local government accountable for the delivery of such services.

Keywords

Local government; basic service delivery; municipal accountability; stormwater management; right to the environment; municipal service delivery; public participation.

1 Introduction

The enactment of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) provided municipalities with a more significant, autonomous role in providing good governance to their communities.¹ Municipalities are also legally obliged to ensure the adequate provision of basic services.² Communities rely on municipalities to deliver these services and to provide amenities to ensure a good quality of life and human well-being.³

Municipal service delivery forms a part of the municipal-community support structure necessary to ensure good health and well-being in both rural and urban residential areas.⁴ Basic municipal services may be defined as services that local government provides to ensure a reasonable quality of life for the community.⁵ Where these services are not provided, public health, safety and the environment may become endangered.⁶ If services such as electricity supply and health care are not maintained or provided sufficiently, the well-being of individuals may be negatively impacted and sustainable economic growth may suffer.⁷ Numerous issues have been identified in the past few years concerning the lack of adequate service provision in municipal areas across South Africa.⁸ These include insufficient budgets, improper planning strategies, the short tenure of municipal leadership while the lifecycle of infrastructure planning is long-term, and a lack of accountability.⁹ Moreover, inadequate municipal service delivery affects the geographical areas in which communities are situated as the

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¹ The *Constitution of the Republic of South Africa, 1996* (the Constitution); Makoti and Odeku 2018 *AJPA* 69.

² Section 4(2)(d) and (f) of the *Local Government: Municipal Systems Act 32 of 2000* (the MSA); GN R423 in GG 18739 of 13 March 1998 (White Paper on Local Government); Van der Waldt "Municipal Service Delivery and the Environment" 2.

³ Van der Waldt "Municipal Service Delivery and the Environment" 2.

⁴ Wall "Service Delivery Back to Basics" 33.

⁵ Section 1 of the MSA.

⁶ Section 1 of the MSA.

⁷ Wall "Service Delivery Back to Basics" 33-34.

⁸ Wright, Dube and Du Plessis 2022 *World Comparative Law* 105, 107 and 108; SAHRC 2022 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/3244-local-government-cannot-be-allowed-to-fail>; Wall "Service Delivery Back to Basics" 35; also see the *Unemployed People's Movement v Eastern Cape Premier* 2020 3 SA 562 (ECG) (the *Makana* case).

⁹ AGSA 2022 https://www.agsa.co.za/Portals/0/Reports/MFMA/2020-21/FINAL_MFMA%202020-21%20GR_15%20June_2022%20tabling.pdf?ver=2022-06-15-095648-557 3; Wall "Service Delivery Back to Basics" 35.

ensuing pollution and environmental degradation cause harm to the local ecosystems. Norms and standards for the overall regulation of municipal service delivery can be found in various provisions of South African legislation and the related policies.¹⁰

In *Joseph v City of Johannesburg* the Constitutional Court made the following statement with regard to the importance of municipalities providing basic municipal services:

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider.¹¹

The right to basic municipal services can be linked to various constitutional provisions. The lack of fulfilment of the constitutional rights related to housing, access to sufficient food and water, and an environment which is not harmful to a person's well-being may be challenged over time by community members who allege that their basic needs are not being met by local government.¹² Community concerns may further relate to issues such as municipal accountability, responsibility, and the maintenance of state infrastructure, which can negatively impact on the well-being of communities.¹³ In holding municipalities accountable, legislative frameworks have provided communities with the necessary tools to demand transparency and the delivery of services from local government. Examples of these tools having worked for communities and community organisations can be found in judgments such as *Unemployed People's Movement v Eastern Cape Premier* (the *Makana* case) and *Mafube Business Forum v Mafube Local Municipality*.¹⁴

This case note considers in more detail the case of *Featherbrooke Homeowners Association NPC v Mogale City Local Municipality* (hereafter the *Featherbrooke* case).¹⁵ In this matter, the Homeowners Association of Featherbrooke estate took the Mogale City Local Municipality (hereafter

¹⁰ Examples of relevant South African law and policy include the *National Framework for Municipal Indigent Policies* (Department of Provincial and Local Government 2006

https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf) 14 and the MSA.

¹¹ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 34.

¹² Sections 24, 26 and 27 of the Constitution.

¹³ Wright, Dube and Du Plessis 2022 *World Comparative Law* 107-109; Kalonda and Govender 2021 *AJPA* 10.

¹⁴ The *Makana* case; *Mafube Business Forum v Mafube Local Municipality* (1969/2021) [2022] ZAFSHC 86 (28 April 2022).

¹⁵ *Featherbrooke Homeowners Association NPC v Mogale City Local Municipality* (unreported) case number 11292/2020 of 25 January 2021 (the *Featherbrooke* case).

MCLM) and five others to court over the lack of stormwater management of a river adjacent to the estate.¹⁶ The objective of this note is to explain the relevance of the case at hand in confirming the significant role of municipal accountability and responsibility in ensuring adequate municipal service delivery. It does so by examining the facts of the case and relevant sources of law that explore the enforcement of basic municipal service obligations and the responsibility of local government. A discussion of the lack of delineation between some of the local government duties and functions is necessary. In the case under discussion, the argument of the MCLM was based on a lack of legislative competency, to the extent that municipalities are responsible for stormwater management in urban areas.¹⁷ The MCLM's argument was based on a narrow interpretation of Schedule 4B of the Constitution.¹⁸

This paper is structured as follows: firstly, there is an introduction presenting the background of the case. Secondly, an analysis of municipal responsibility in service delivery is conducted, along with legislative direction to understand public accountability. Thirdly, an evaluation of the legislative provisions that support the notion of municipal accountability is provided. Finally, the paper concludes by discussing the role of municipal accountability in basic service delivery, as illustrated in the *Featherbrooke* case. This case note is based purely on a literature review and is informed by applicable South African legislation, the Constitution, relevant case law and other primary and secondary sources of law.

2 Facts of the case

In the case under discussion the applicant, Featherbrooke Homeowners Association, sought relief from the High Court of Johannesburg against various state entities.¹⁹ The relief sought was an interim structured supervisory interdict followed by an application confirming the interdict requested.²⁰

The applicant alleged that the respondents had neglected their duties to deliver stormwater management services of the Muldersdrift se Loop River.²¹ Because of the failure of the respondents to provide adequate

¹⁶ *Featherbrooke* case para 27.

¹⁷ *Featherbrooke* case paras 1, 2, 7 and 29.

¹⁸ Schedule 4B of the Constitution.

¹⁹ *Featherbrooke* case para 1; the respondents included the MCLM, the City of Johannesburg Metropolitan Municipality, the Minister of the Department of Water Affairs and Sanitation, the MEC of the Gauteng Department of Agriculture and Rural Development, the Johannesburg Road Agency (Pty) Ltd and the West Rand District Municipality. See *Featherbrooke* case paras 3 and 4.

²⁰ *Featherbrooke* case para 1.

²¹ *Featherbrooke* case para 1.

stormwater management, the river began to flood.²² The severe floods caused state infrastructure to be damaged, leading to exposed electrical wires and sewer lines.²³ The damage to the infrastructure subsequently jeopardised the health and safety of the community and caused harm to the surrounding environment.²⁴ The lack of adequate stormwater management further caused the Featherbrooke estate to flood and led to the collapse of the river embankments.²⁵

The applicant's argument was based on two legal principles. The first principle relied on the constitutional right to an environment that is not harmful to one's health and well-being and to an environment protected from pollution and degradation.²⁶ The second principle concerned local government's accountability, duties and responsibilities, and the functional areas of municipalities.²⁷ The first respondent's argument centred on competency and accountability regarding stormwater management. In contrast, the other five respondents argued that they lacked jurisdiction in the matter.²⁸

Based on the facts above, the following discussion will consider the context of the arguments presented to the court to determine the validity of the applicant's argument and to analyse the court's decision in response to that. This discussion will consider accountability and the interpretation of the legislation relevant to municipal duty and responsibility.

3 The legal issue

In the *Featherbrooke* case the court evaluated the arguments presented against the backdrop of government accountability towards local communities. The central issue was whether the relevant state entities had failed to uphold their obligations to the Featherbrooke community in terms of section 24 of the Constitution. The court also considered whether this failure to provide stormwater management services had caused an

²² *Featherbrooke* case para 1; Nkosi 2021 <https://www.iol.co.za/the-star/news/featherbrooke-wins-court-case-against-mogale-city-over-flooding-at-the-estate-760bd11a-79cf-4494-a58e-d8ee7a65dd82>.

²³ *Featherbrooke* case para 1; Nkosi 2021 <https://www.iol.co.za/the-star/news/featherbrooke-wins-court-case-against-mogale-city-over-flooding-at-the-estate-760bd11a-79cf-4494-a58e-d8ee7a65dd82>.

²⁴ *Featherbrooke* case para 1; Nkosi 2021 <https://www.iol.co.za/the-star/news/featherbrooke-wins-court-case-against-mogale-city-over-flooding-at-the-estate-760bd11a-79cf-4494-a58e-d8ee7a65dd82>.

²⁵ Human 2021 <https://krugersdorpnews.co.za/452810/its-featherbrooke-vs-mogale-high-court-decides/>.

²⁶ Section 24 of the Constitution.

²⁷ Chapter 7 and Schedule 4B of the Constitution.

²⁸ Human 2021 <https://krugersdorpnews.co.za/452810/its-featherbrooke-vs-mogale-high-court-decides/>.

infringement upon the community's right to a safe environment which was not a hazard to their well-being.

4 The judgment

The applicant in the case sought relief in the form of a structural interdict against the various respondents.²⁹ The relief was granted by the court as the requirements for such an interdict had been met, but the court did not deem it necessary to grant the relief claimed by the applicant in terms of the cost of rehabilitation.³⁰ The applicant argued that, should the respondents fail to comply with the court's order, they should be allowed to claim the cost of rehabilitation.³¹ The court did not grant the relief sought and held that it was unnecessary and could potentially be an abuse of the legal process by the applicants.³²

After the above-mentioned issues had been dealt with, the court ruled that the first respondent had a duty to provide adequate services for stormwater management.³³ The duty to provide basic municipal services is based on several legislative provisions that mandate municipalities to provide basic municipal services and to protect the community's safety and well-being.³⁴ As such, the first respondent was ordered to repair and adequately manage the riverbeds along the Muldersdrift se Loop river, neighbouring the Featherbrooke estate.³⁵ The first respondent was further ordered to implement a new stormwater management plan and repair all state infrastructure damaged by floods over the years.³⁶ Finally, the court ordered that the first respondent should provide the applicant with a report on the implementation of the interdict within 30 days of the order's being granted.³⁷

5 The *ratio decidendi*

The court ruled in favour of the applicant's argument that the first respondent had infringed on the community's constitutional right to an environment that

²⁹ The request for such an interdict is based on the notion that the court has the necessary powers to order mandatory structural interdicts. These court orders ensure that the courts themselves play an active role in monitoring the enforcement of their orders to ensure accountability in government structures. See *Featherbrooke* case paras 52-53.

³⁰ *Featherbrooke* case para 55.

³¹ *Featherbrooke* case para 55.

³² *Featherbrooke* case para 55.

³³ *Featherbrooke* case para 57.

³⁴ *Featherbrooke* case paras 32-47; ss 40, 41, 152 and 156 of the Constitution; the *National Environmental Management Act* 107 of 1998; Sections 42, 54, 55 and 56 of the *Disaster Management Act* 57 of 2002 (the DMA); the preamble and s 25 of the MSA.

³⁵ *Featherbrooke* case para 57.

³⁶ State infrastructure includes sewer lines, damaged or uncovered electric wires and damaged sewer lines. See *Featherbrooke* case para 57.

³⁷ *Featherbrooke* case para 57.

is not harmful to their health or their well-being.³⁸ The court granted the interim interdict against the first respondent and held that the MCLM had neglected its constitutional duty towards the community.³⁹ This judgment was based on the applicant's evidence, to which the respondents did not raise a *bona fide* dispute.⁴⁰

The basis of the court's ruling was that the estate had experienced flooding of the river since 2010 due to the inadequate and compromised stormwater system.⁴¹ This had led to infrastructure damage which constituted a risk to health and safety.⁴² It was discovered that Featherbrooke estate had sought assistance from various state departments, such as the MCLM, to assist in the rehabilitation of the river.⁴³ The respondents did not dispute that they had failed to comply with their constitutional obligations to the community.⁴⁴ Instead, the state departments focussed on shifting the blame for the lack of maintenance to the stormwater system and service delivery.⁴⁵ Additionally, the court acknowledged that no stormwater management plan had been developed or established for the community's area.⁴⁶

The court found that the stormwater system had been jeopardised by the first respondent's inadequate management and that a critical health hazard now threatened the estate's residents.⁴⁷ This health hazard included the risk of electrocution, pollution, and the threat of physical harm.⁴⁸ The court confirmed that there was a legislative duty on all spheres of government to work towards mitigating disaster situations.⁴⁹ However, the court also referred to section 56(2)(b) of the *Disaster Management Act 57 of 2002* (hereafter the DMA), which states that the organ of state responsible for maintaining public sector infrastructure should bear the cost of repairing or replacing it.⁵⁰

According to Judge Mahalelo, the evidence presented showed that the Respondents had not taken any steps to resolve the issue.⁵¹ The court further found that the first respondent had neglected its duty to provide

38 Section 24 of the Constitution; *Featherbrooke* case para 49.

39 *Featherbrooke* case para 47.

40 *Featherbrooke* case para 48.

41 *Featherbrooke* case para 48.

42 *Featherbrooke* case para 48.

43 *Featherbrooke* case para 48.

44 *Featherbrooke* case para 48.

45 *Featherbrooke* case para 48.

46 *Featherbrooke* case para 48.

47 Human 2021 <https://krugersdorpnews.co.za/452810/its-featherbrooke-vs-mogale-high-court-decides/>.

48 *Featherbrooke* case paras 26, 34, 48.

49 *Featherbrooke* case para 48.

50 Section 56(2)(b) of the DMA.

51 *Featherbrooke* case para 48.

adequate municipal services.⁵² As a result, the health and safety of both the environment as well as that of the Featherbrooke community had been put at risk.⁵³ Judge Mahalelo further held that the respondents had indeed infringed upon the applicant's rights under section 24 of the Constitution.⁵⁴ In delivering its judgment the court conducted a thorough reading of relevant cases and legislative provisions, as the applicant argued that years of infrastructure neglect had become a threat to public well-being.

6 Case analysis

6.1 *Accountability of the municipal sphere in service delivery*

To understand local government's responsibility towards communities, one must first understand the concept of accountability in the public sphere. Public accountability refers to the assurance that state entities responsible for the provision and management of state resources are held accountable for their actions.⁵⁵ In essence, accountability in the public domain allows communities to hold government entities responsible for all decisions which may impact on their quality of life.⁵⁶ Municipal duties cover a wide range of responsibilities, including aspects of public well-being⁵⁷ and promoting safe and healthy environments for communities.⁵⁸

The provision of adequate services must be based on accountability and transparency as well as combatting corruption and poor public administration.⁵⁹ Accountability and transparency are two critical requirements necessary to ensure good municipal governance.⁶⁰ Section 152(1) of the Constitution refers to the objectives of local government and states that municipalities must ensure an accountable government for local communities, encourage public participation in municipal matters and provide sustainable service delivery.⁶¹ Municipal accountability is further supported by the MSA as section 4(2)(b) states that municipal councils must provide for an accountable government that functions democratically and without fear or prejudice.⁶² Transparency is necessary for good governance

⁵² *Featherbrooke* case para 48.

⁵³ *Featherbrooke* case paras 34, 48.

⁵⁴ *Featherbrooke* case para 35.

⁵⁵ Rulashe and Ijeoma 2022 *APSDPR* 2.

⁵⁶ Rulashe and Ijeoma 2022 *APSDPR* 2; Ardigó 2019 <https://www.u4.no/publications/local-government-accountability-mechanisms.pdf> 3.

⁵⁷ Plan H 2013 <https://squamish.ca/assets/planH/d0e40f740e/planh-local-government-guide-web.pdf> 5.

⁵⁸ Section 152(1)(d) of the Constitution; City of Tshwane date unknown <https://www.tshwane.gov.za/sites/residents/Services/HealthMedical/Pages/The-Role-and-Function-of-The-Municipal-Health-Services.aspx>.

⁵⁹ Rulashe and Ijeoma 2022 *APSDPR* 2.

⁶⁰ Nel, Du Plessis and Retief "Key Elements for Municipal Action" 36.

⁶¹ Section 152(1)(a), (b) and (e) of the Constitution.

⁶² Section 4(2)(b) of the MSA.

as it may be utilised to foster a healthy relationship with the community and ensures municipal integrity.⁶³ Transparency in basic service delivery is essential as both transparency and openness form part of the *Batho Pele Principles* on transforming public service delivery in South Africa.⁶⁴ Even though a legislative duty is placed on municipalities to administrate basic service delivery through transparent governance and accountability, several court cases assess public frustrations in terms of underperforming municipalities. These include cases such as the *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* (the *Kgetlengrivier* case) and the *Makana* case.⁶⁵

In the *Kgetlengrivier* case the local municipality was accused of failure to provide residents with potable water and that the water purifying systems were unmanaged and damaged, leading to a raw sewage overflow in the area.⁶⁶ This overflow had caused environmental damage, pollution, and health concerns for the *Kgetlengrivier* community.⁶⁷ The focus of this matter was placed on the right to access water and the right to an environment that is not harmful to one's health or well-being. Although the case is applicable to the discussion at hand, no further information other than the court's order is available in the public domain.⁶⁸ Nevertheless, cases such as this must be considered when examining the nexus between underperforming municipalities and poor community welfare and environmental well-being.

While it may be accepted that municipalities should be operational enough to function autonomously (as indicated by the Constitution), accountability in the local sphere does not necessarily end with local government.⁶⁹ Various constitutional and other legislative provisions allow for cooperative government strategies and intervention initiatives by the provincial spheres of government.⁷⁰

For instance, in the *Makana* case an application was brought against the *Makana* municipality for its failure to maintain its financial obligation to the community and to provide sustainable, basic service delivery, a failure

⁶³ Karsten *Local Government Accountability* 88.

⁶⁴ The *Batho Pele Principles* refers to a people centred approach, utilised in service delivery. See GN R388 in GG 1459 of 1 October 1997; Nel, Du Plessis and Retief "Key Elements for Municipal Action" 36.

⁶⁵ The *Makana* case; *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* (UM 271/2020) [2020] ZANWHC 95 (18 December 2020).

⁶⁶ Cowan-Harper-Madikizela Attorneys 2021 <https://www.chmlegal.co.za/cautionary-tale-to-municipalities>.

⁶⁷ Cowan-Harper-Madikizela Attorneys 2021 <https://www.chmlegal.co.za/cautionary-tale-to-municipalities>.

⁶⁸ *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* (UM 271/2020) [2020] ZANWHC 95 (18 December 2020).

⁶⁹ Section 41(1) of the Constitution.

⁷⁰ Chapter 3 of the Constitution makes specific reference to co-operative government while s 139 refers to provincial intervention in local government.

which impacted on the health and safety of the local community.⁷¹ In this matter the Makana municipality was found to have failed to uphold the principles of good governance towards the community.⁷² The court held that the conduct of the Makana municipality towards the community had been inconsistent with various provisions related to ensuring a healthy environment, proper administrative planning processes and the provision of basic municipal services.⁷³ The court further held that the requirements necessary for provincial intervention had continuously been present and as such, an order was made that the second respondent (the Eastern Cape Provincial Executive) had to provide a financial recovery plan to assist the Makana municipality in its duty to provide basic municipal services in a sustainable manner.⁷⁴ The Makana case provides a clear example of communities holding government structures accountable for the provision of basic services. The case acts as an example of communities using the judicial system to enforce municipal accountability and, as in the instance of the Makana municipality, to provide sufficient arguments that support the dissolution of municipalities.

It is worth noting that alternative recourses are available to communities to address underperforming municipalities.⁷⁵ Relevant forms of recourse include following dispute resolution procedures or escalating matters by lodging complaints with the municipal manager.⁷⁶ However in this instance the case note places a greater emphasis on litigation in the pursuit of interim supervisory interdicts to hold municipalities accountable for poor service delivery.

The *Featherbrooke* case provides further guidance on multi-sphere accountability in local service delivery matters. The applicant's argument was brought before the High Court against multiple state organs, ranging from various levels of government to city-level entities.⁷⁷ In terms of the order for part A of this matter, the court referred only to the MCLM and not to the other five respondents.⁷⁸ The court did not indicate as to why the

⁷¹ The *Makana* case para 4.

⁷² The *Makana* case para 5.

⁷³ The *Makana* case para 97.

⁷⁴ The second respondent was the Provincial Executive for the Province of the Eastern Cape. See the *Makana* case para 1. The financial recovery plan that is to be implemented by the second respondent must be mindful of the February 2015 financial recovery plan that was originally ordered by the previous court. See the *Makana* case para 97.

⁷⁵ Gladwin-Wood and Gohl 2021 <https://www.schindlers.co.za/news/what-do-residents-do-when-a-municipality-is-infringing-on-their-rights/>.

⁷⁶ Gladwin-Wood and Gohl 2021 <https://www.schindlers.co.za/news/what-do-residents-do-when-a-municipality-is-infringing-on-their-rights/>; Greyvenstein 2023 *Servamus* 70-71.

⁷⁷ *Featherbrooke* case paras 3-4.

⁷⁸ *Featherbrooke* case para 57.

judgement order was placed solely on the first respondent, as the accountable party in this matter. In this author's opinion this was a missed opportunity to hand down a decision which might have contributed to how cooperative governance or provincial interventions may be interpreted in future cases.⁷⁹ It would be possible to speculate as to why the order did not refer to the other respondents, but this discussion focusses on the matter at hand and not on potential postulations to explain the court's reasoning.

6.2 A matter of interpretation

The arguments presented to the court by the respondents focussed on blame-shifting - which is a tactic commonly used by state entities when discussing inadequate service delivery.⁸⁰ The MCLM raised an argument based on overlapping mandates, stating that the municipality is responsible for stormwater management systems in built-up areas only and not for stormwater management in general.⁸¹ This argument was based on the interpretation of Schedule 4B of the Constitution, which states that stormwater management systems in built-up areas form part of local government matters, to the extent set out in section 155(6)(a) and (7).⁸²

Schedule 4B of the Constitution is an essential provision as far as the power and functionality of municipalities are concerned.⁸³ It provides a scope of areas and duties for which municipalities are responsible and accountable. Schedule 4B is written in such a manner that the wording has the potential to cause uncertainty relating to accountability and responsibility.⁸⁴ If a municipal function is listed under Schedule 4B, the municipality is accountable for it. However, if a function is not explicitly mentioned under Schedule 4B, accountability could be misinterpreted and attempts could be made to shift government responsibility.⁸⁵ Regardless of this lack of clarity, municipalities cannot escape accountability where human rights are affected.⁸⁶ Section 156(1) of the Constitution supports this notion by stating the following under the powers and functions of a municipality:

⁷⁹ Although the *Featherbrooke* case makes no reference to the usage of provincial interventions, it is still an important South African government tool that should be discussed and considered. See Wright, Dube and Du Plessis 2022 *World Comparative Law* 109-111.

⁸⁰ Pieterse 2020 *Urban Forum* 13.

⁸¹ *Featherbrooke* case para 29.

⁸² Schedule 4B of the Constitution.

⁸³ The Constitution is the highest law in the land and all other laws, legislation and policies stem from it. Schedules 4B and 5B of the Constitution are therefore central when discussing the functional areas of municipalities as well as their powers and duties to these areas. See the Preamble and Schedules 4B and 5B of the Constitution; Fuo 2022 *Stell LR* 486.

⁸⁴ Fuo and Du Plessis 2017 *CJLG* 79.

⁸⁵ Fuo and Du Plessis 2017 *CJLG* 79.

⁸⁶ Sections 7(2), 152(1), 156 of the Constitution.

- (1) A municipality has executive authority in respect of, and has the right to administer—
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.⁸⁷

The MCLM argued that Schedule 4B places an obligation in terms of stormwater management on municipalities only in built-up areas and not in general.⁸⁸ However, the court rejected this defence and emphasised the importance of other legislative provisions that work together with Schedule 4B of the Constitution.⁸⁹ The second defence by the MCLM was focussed on the *National Water Act 36 of 1998* (hereafter the NWA).⁹⁰ The MCLM argued that under the NWA the onus to prevent water pollution in the river should lie with the applicant, as stated in section 19(1) of the NWA.⁹¹ However, Judge Mahalelo stated in his evaluation that the applicant's *bona fide* evidence established that the Featherbrooke estate's development in 1996 was approved before the provisions that the MCLM relied on came into effect.⁹²

6.3 Legislation supporting municipal accountability in service delivery

In evaluating the case at hand the court focussed on numerous legislative provisions and court cases related to service delivery, municipal governance and the affected community's rights.⁹³ A key aspect of his evaluation was that the respondents had failed to provide evidence that contradicted the applicant's claims.⁹⁴ The arguments presented by the respondent were insufficient to provide an adequate defence, as no proper response had been provided to the allegations made by the applicant.⁹⁵

⁸⁷ Section 156(1)(a) and (b) of the Constitution.

⁸⁸ *Featherbrooke* case para 29.

⁸⁹ The legislation that the court based its decision on focusses on numerous provisions, including ss 24, 40, 41, 152 and 156 of the Constitution, the *National Environmental Management Act 107 of 1998*, the DMA and the MSA.

⁹⁰ *National Water Act 36 of 1998* (the NWA).

⁹¹ NWA states that any person or owner who is in control/occupies land on which any activity or other situation has taken place, and may cause possible pollution of water resources, bears the onus to take reasonable steps in mitigating the risk and implementing measures to prevent further or recurring pollution. See s 19(1) of the NWA.

⁹² *Featherbrooke* case para 48.

⁹³ *Featherbrooke* case paras 32-49.

⁹⁴ *Featherbrooke* case para 48.

⁹⁵ *Featherbrooke* case paras 29 and 48.

Instead, the arguments presented had focussed on blame-shifting to other government departments, budgeting restrictions and irrelevant legislation.⁹⁶

Before making the court's order Judge Mahalelo focussed on the legislative provisions related to the community, disaster risk management and the municipal sphere of government.⁹⁷ He concluded that the MCLM was the party to be held accountable, as the community's right in terms of section 24 of the Constitution had been infringed upon.⁹⁸

Although the court referred to section 24, the accountability may be viewed more precisely in the light of subsections (a) and (b)(i).⁹⁹ These subsections state that everyone has the right to an environment which is not harmful to their well-being, and to have the environment protected through reasonable legislative and other measures in order to prevent pollution and ecological degradation.¹⁰⁰

It is important to reiterate that the *Featherbrooke* case focussed on the lack of maintenance and damage to the stormwater management system.¹⁰¹ The damaged infrastructure caused severe pollution and environmental degradation, impacting on the community's environmental rights.¹⁰² Municipalities must respect, protect and promote section 24 of the Constitution through adequate, well-maintained service delivery which may be deemed part of the "other measures" referred to in section 24(b).¹⁰³

The rights contained in the Bill of Rights create a constitutional duty on all spheres of government to protect and promote the fundamental rights of all those who reside in South Africa.¹⁰⁴ A burden is thus placed on local government to act in the best interest of the local community and the surrounding environment.

Although the MCLM was held responsible, the *Featherbrooke* case provided little information on the legislative duty placed on municipalities to provide effective and efficient local governance¹⁰⁵ - particularly on the duty imposed

⁹⁶ *Featherbrooke* case para 29; Human 2021 <https://krugersdorpnews.co.za/452810/its-featherbrooke-vs-mogale-high-court-decides/>.

⁹⁷ *Featherbrooke* case paras 34-47.

⁹⁸ *Featherbrooke* case paras 34, 35 and 49.

⁹⁹ Section 24(a) and (b)(i) of the Constitution.

¹⁰⁰ Section 24(a) and (b)(i) of the Constitution.

¹⁰¹ *Featherbrooke* case para 1.

¹⁰² *Featherbrooke* case paras 1, 12, 26 and 48.

¹⁰³ "Other measures" could refer to maintaining state infrastructure that had been damaged by the floods and providing adequate stormwater management plans to ensure that such damage does not occur in the future. See *Featherbrooke* case paras 1, 26 and 27; s 24(b) of the Constitution; Du Plessis 2015 *PELJ* 1858 and 1862; Osiele *Municipal Planning Law* 41 and 42.

¹⁰⁴ Section 7(2) of the Constitution.

¹⁰⁵ *Featherbrooke* case para 47.

by regulatory frameworks such as the MSA.¹⁰⁶ Although the order given by the courts was sufficient in determining the responsible party, a more thorough discussion could have been given on the role of the MSA in holding municipalities accountable for service delivery.

Concerning the prevention of floods and similar disasters, the DMA provides guidelines on managing infrastructure related to disaster prevention and mitigation strategies.¹⁰⁷ In this instance the increased flood risk in the Featherbrooke area had steadily become more dangerous and had reached a point where the community members could not safely deal with the situation on their own.¹⁰⁸ The DMA has numerous provisions that deal with the responsibility of municipalities in terms of local disasters.¹⁰⁹ In terms of the *Featherbrooke* case, one section of the DMA seems to stand out against the backdrop of the arguments presented. Section 56(2)(b) of the DMA refers specifically to the costs of the repairs to the state infrastructure.¹¹⁰ In this case the state entity responsible for maintaining the state infrastructure (such as stormwater supply systems) assumes responsibility for the repair and costs of the damaged infrastructure.¹¹¹ Based on these provisions, the High Court found the MCLM to be the responsible party and granted the interim supervisory interdict the applicant had initially requested.¹¹²

6.4 The value of public participation in service delivery

Public participation is a powerful tool in providing essential services to the community.¹¹³ In South Africa public participation is an intrinsic part of democracy and is at the heart of a people-centred approach to basic service delivery.¹¹⁴ The importance of public participation and community engagement is further reiterated by the *Batho Pele* Principles.¹¹⁵ According to these principles citizens must be included in all discussions that concern the quality of service delivery and should be informed of the services available to them and what to expect from these services.¹¹⁶ The MSA reiterates that a fundamental aspect of local governance is the inclusion of community engagement in municipal affairs such as service delivery.¹¹⁷

¹⁰⁶ Preamble of the MSA.

¹⁰⁷ *Featherbrooke* case para 42.

¹⁰⁸ Section 1 of the DMA; *Featherbrooke* case para 43.

¹⁰⁹ Chapter 5 of the DMA.

¹¹⁰ Section 56(2)(b) of the DMA.

¹¹¹ *Featherbrooke* case para 48.

¹¹² *Featherbrooke* case para 57.

¹¹³ Chapter 4 of the MSA; s 152(1)(b) and (e) of the Constitution; *Fuo Local Government's Role* 201; De Villiers, Van As and Botha 2020 *Stell LR* 337.

¹¹⁴ Masuku and Molohe 2020 *JAAS* 447; Masuku and Jili 2019 *Journal of Public Affairs* 5.

¹¹⁵ GN R388 in GG 1459 of 1 October 1997.

¹¹⁶ Item 4.1 and 4.2 in GN R388 in GG 1459 of 1 October 1997.

¹¹⁷ Preamble of the MSA.

Chapter 4 of the MSA addresses community involvement in depth and states that local government has a duty to develop a municipal governance culture based on community participation.¹¹⁸ The judgement handed down by the Court in the *Featherbrooke* case demonstrates that local communities have the power to hold government entities responsible for the dereliction of their duties and that municipalities cannot shrink from their responsibilities without adequate evidence to support their argument.

The *Featherbrooke* case is indeed a clear example of communities holding state entities accountable for their actions. The applicant sought to prove a dereliction of duty by the respondents to protect the community's right to an environment that is not harmful to their health and well-being.¹¹⁹ The argument presented by the applicant focussed on the lack of stormwater management – a duty the applicant alleged should be that of the respondents.¹²⁰

To support the applicant's argument, evidence was presented to support the claim of poor service delivery and inadequate maintenance of the stormwater management system. The applicant submitted numerous reports and had meetings with the respondent to request assistance in mitigating the risk to public health and safety, but to no avail.¹²¹ Over the years the applicant had taken the initiative to mitigate the increasingly dangerous situation,¹²² but evidence was provided to show that the situation had reached a disastrous level that the estate could not deal with alone.¹²³ The situation could have been resolved without resorting to judicial proceedings had the respondents acted in support of the public good, but instead the focus was placed on the denial of state accountability.

7 Conclusion

This case note attests to the importance of local government accountability in providing basic municipal services to communities. It has found that basic municipal service delivery is essential to ensuring community well-being in the South African context. The case at hand does not argue for the development of legislation relevant to municipal accountability or responsibility. Instead, the argument is based on enforcing pre-existing obligations on local government to ensure the delivery of basic municipal services and the maintenance of relevant state infrastructure. In order to fulfil these obligations, local government accountability must be enforced

¹¹⁸ Chapter 4 and s 16(1)(a) of the MSA.

¹¹⁹ *Featherbrooke* case para 1.

¹²⁰ *Featherbrooke* case para 1.

¹²¹ *Featherbrooke* case paras 15, 16, 23, 24 and 48.

¹²² *Featherbrooke* case paras 22-24.

¹²³ *Featherbrooke* case para 43; s 1 of the DMA.

under section 156(1)(a) and Schedule 4B of the Constitution, as well as the relevant provisions of the MSA.

The *Featherbrooke* case reiterates the role that communities play in holding local government accountable for the lack of adequate municipal service delivery. The case note further contributes towards the discussion on municipal responsibility for the environment under section 24 of the Constitution. It has been established that there is a constitutional and legislative obligation on municipalities to prevent environmental degradation that has the potential to affect the well-being of communities negatively. A further contribution has been made in response to the role of the courts in promoting municipal accountability by handing down mandatory supervisory interdicts. This paper found that while the order given by the court did not create a new objective for the MCLM, instead it was mandated that a pre-existing obligation be fulfilled.

The judgement of the *Featherbrooke* case confirms the duty that is placed on local municipalities to act in the community's best interest and maintain the state infrastructure for which it is responsible. This paper has argued that municipalities must provide for the basic needs of the communities, and that a narrow interpretation of municipal functional areas may have profound implications that could hinder public well-being. Furthermore, it has found that communities play an important role in holding state entities responsible for the infringement of their constitutional rights.

In this author's opinion the court provided a necessary judgement in confirming municipal accountability related to service delivery and provided a straightforward discussion supporting this judgement. In future cases one would hope for a more detailed judicial analysis of cooperative governance and provincial interventions in matters that concern basic municipal service delivery in South African cities.

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List of Abbreviations

AGSA	Auditor-General South Africa
AJPA	African Journal of Public Affairs
APSDPR	Africa's Public Service Delivery and Performance Review

CJLG	Commonwealth Journal of Local Governance
DMA	Disaster Management Act 57 of 2002
JAAS	Journal of Asian and African Studies
MCLM	Mogale City Local Municipality
MSA	Local Government: Municipal Systems Act 32 of 2000
NWA	National Water Act 36 of 1998
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
Stell LR	Stellenbosch Law Review