

# **DO MUNICIPALITIES HAVE THE POWER TO REGULATE THE KEEPING OF “DANGEROUS” DOGS?**

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## **SUMMARY**

Dog attacks and resultant deaths are frequent occurrences in South Africa. Pit bulls are responsible in many of these cases and there are calls for them to be banned. Dogs, however, are the property of their owners, and forcing people to give them up will amount to a deprivation of property and an infringement of a dog owner's right to property, which is protected by section 25 of the Constitution. Dogfighting is rife in South Africa and the conduct of dog owners contributes to dogs being aggressive and leads to dog attacks. In terms of the Constitution, animal control is a functional area of concurrent national and provincial legislative competence; on a strict interpretation, this means that municipalities do not have the power to legislate on the function. However, everyone is guaranteed the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. As such, the municipality (as part of the State) must respect, protect, promote and fulfil the right. Municipalities also have a duty to promote a safe and healthy environment, and the power to make by-laws on matters they may administer. They may also exercise powers that are reasonable and incidental to the effective performance of municipal functions, which is supported by the principle of subsidiarity, the fulfilment of the duties arising from section 12 of the Constitution, and the objective to promote a safe and healthy environment. A municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedule 4A and 5A of the Constitution, provided that such action seeks to further the objectives of Chapter 2 of the Constitution and is not in conflict with measures adopted by the national and provincial spheres. The National Society for the Prevention of Cruelty to Animals (NSPCA) is responsible for animal welfare, but the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The suite of local government law is geared towards the social and economic upliftment of communities, and there is legislative justification for interventions by municipalities to address matters such as the control of public nuisances, dog licensing, the operation of pounds, and the conduct of community members that can alleviate the pressure on those organisations tasked with animal care. There are a number of legislative instruments that apply to animals. A consolidation of the provisions of the various pieces of legislation into a single by-law aimed at regulating the keeping and treatment of dogs, may result in increased law enforcement and (it is hoped) increased sentences as a result of amplified enforcement, as well as improved deterrence.

## 1 INTRODUCTION

South Africa has the highest incidence in the world of dog-attack deaths relative to population;<sup>1</sup> and a large number of incidents go unreported,<sup>2</sup> which makes it difficult to obtain accurate statistics. Since 2004, 99 canines, of which 72 were pit bulls, have been involved in fatal attacks in South Africa, resulting in 56 deaths. Of the deaths, 38 were caused by pit bulls. Seven of the other 18 casualties were caused by rabid dogs, and no other breed of dog was responsible for more than four deaths.<sup>3</sup> The trauma unit at the Red Cross War Memorial Children's Hospital in Cape Town undertook a retrospective evaluation of children who had come in with dog-bite wounds over a 13½-year period. During the study period, 2 021 dog-bite injuries were treated on 1 871 children.<sup>4</sup>

On the one hand, more recent fatalities as a result of dog attacks have resulted in calls, including by the government, for the banning and giving-up of certain breeds of dog, especially pit bulls.<sup>5</sup> Some incidents enjoyed international attention.<sup>6</sup> On the other hand, the Pit Bull Federation of South Africa asserts that dog bites occur as a result of careless owners and that the issue must be addressed by lawmakers and responsible ownership.<sup>7</sup>

This requires a reflection on the extent of dog attacks in South Africa, the nature of the "pit bull breed" and the arguments for and against the imposition of a ban on such animals, as well as their surrender to animal welfare organisations. First, this article briefly enquires whether ownership of these animals could be considered a "basic" human right and whether the compulsory giving-up of certain breeds could amount to a deprivation of property. Secondly, it reviews legislation applicable to animal control and investigates whether municipalities have the authority to legislate on a functional area of concurrent national and provincial legislative competence.<sup>8</sup> Lastly, it proposes measures that municipalities can take to control dogs effectively in order to give effect to their duty to provide a safe and healthy

<sup>1</sup> Animals 24-7 "Pit Bull Data" (undated) <https://www.animals24-7.org/pit-bull-data/> (accessed 2023-01-31) 1.

<sup>2</sup> Khanyile "Brutal Dog Attacks" *Eye Witness* (26 March 2019) <https://www.news24.com/SouthAfrica/News/brutal-dog-attacks-20190326> (accessed 2019-09-01) 1.

<sup>3</sup> Clifton "More Dog Attack Deaths Fuel Alarm in South Africa, Australia, Ireland" (5 December 2022) <https://www.animals24-7.org/2022/12/05/more-dog-attack-deaths-fuel-alarm-in-south-africa-australia-ireland/> (accessed 2023-03-05) 2.

<sup>4</sup> Dwyer, Douglas and Van As "Dog Bite Injuries in Children: A Review of Data From a South African Paediatric Trauma Unit" 2007 97(8) *South African Medical Journal / Suid-Afrikaanse Tydskrif vir Geneeskunde* 597–600.

<sup>5</sup> SA News "Government Investigating Rise in Pitbull Attacks in South Africa" (7 December 2022) <https://businessstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/> (accessed 2023-01-31).

<sup>6</sup> BBC News "South Africa Pit Bull Attacks: We Can't Live in a World Where Dogs Eat Children" (27 November 2022) <https://www.bbc.com/news/world-africa-63727936> (accessed 2023-01-31) 1.

<sup>7</sup> 702 "Dog Attacks Not a Dog Problem but a Law Problem: Pit Bull Federation" (11 August 2022) <https://www.702.co.za/articles/451891/dog-attacks-not-a-dog-problem-but-a-law-problem-pit-bull-federation> (accessed 2023-01-31) 1.

<sup>8</sup> Animal Control and Diseases listed in Part A of Schedule 4 of the Constitution of the Republic of South Africa, 1996 ("Constitution").

environment as dog bites have been described as a major public-health concern.<sup>9</sup>

The article uses a limited number of functional municipalities as examples. It is recognised that a large number of municipalities are dysfunctional, or in distress,<sup>10</sup> and that they will not be able to cope with additional obligations. Such dysfunctionality is merely a statement of fact, and does not detract from the argument that there are municipalities that can, and want to, make an important contribution towards increased health and safety, provided they have the necessary legislative tools available and that their officials are capable of using.

## 2 THE EXTENT OF DOG ATTACKS IN SOUTH AFRICA

Apart from the statistics quoted in the introduction, fatal dog attacks have enjoyed increased attention recently. On 27 November 2022, the British Broadcasting Corporation (BBC) reported:

“Residents of Phomolong township in South Africa woke up to horrific screams last Sunday morning.<sup>11</sup> They came from a three-year-old boy as he was attacked and then mauled to death by two American pit bull terriers.”<sup>12</sup>

An angry crowd killed one of the dogs by setting it alight and the other was euthanised by the Society for the Prevention of Cruelty to Animals (SPCA). The attack led to an upswell of opposition to the keeping of pit bulls and threats of mob justice against owners of the breed. On the same day, a girl was attacked by three pit bulls in Cape Town. They were killed by community members, who stoned them and set them alight.<sup>13</sup>

On 23 November 2022, a 15-month-old from the Eastern Cape Province died after being mauled by a pit bull. On 5 December 2022, it was reported that “[t]he National Council of SPCAs has had to put down two pit bulls that mauled a man to death in North-West at the weekend.”<sup>14</sup> On 7 January 2023, it was reported that a 60-year-old man in Lichtenburg was mauled to

<sup>9</sup> Engelbrecht “Management of Common Animal Bites in the Emergency Centre” 2012 30(11) *Continuing Medical Education*, [S.l.] ISSN 2078-5143. <http://www.cmej.org.za/index.php/cmej/article/view/2566/2642> (accessed 2023-03-05) 401–405.

<sup>10</sup> South Africa, Department of Cooperative Government and Traditional Affairs “List of Dysfunctional and Distressed Municipalities” (23 May 2018) <https://www.cogta.gov.za/index.php/2018/05/23/list-of-dysfunctional-and-distressed-municipalities/> (accessed 2023-02-20) 1; and Staff Writer “More Municipalities Declared Dysfunctional in South Africa” (10 November 2022) <https://businesstech.co.za/news/government/642281/more-municipalities-in-south-africa-declared-dysfunctional/> (accessed 2023-02-20) 1.

<sup>11</sup> That would be 20 November 2022.

<sup>12</sup> BBC News <https://www.bbc.com/news/world-africa-63727936> 1.

<sup>13</sup> BBC News <https://www.bbc.com/news/world-africa-63727936> 4.

<sup>14</sup> Rall “Two Pit-Bulls Euthanised After Killing Man Who Climbed Into the Property They Were Guarding” (5 December 2022) <https://www.iol.co.za/news/south-africa/kwazulu-natal/two-pit-bulls-euthanised-after-killing-man-who-climbed-into-the-property-they-were-guarding-b662f304-5add-4f75-8b19-993403da907b> (accessed 2023-01-31).

death by his three dogs, two Staffy/pit-bull crossings and one unknown breed dog.<sup>15</sup>

After eight-year-old Olebogeng Mosime was mauled to death by a pit bull on 12 November 2022,<sup>16</sup> 49 pit bulls were handed over to the SPCA. Prior to that, 10-year-old Storm Nuku was killed by his family's two pit bulls in Gqeberha, which prompted the Sizwe Kupelo Foundation to launch a petition calling for a ban on the keeping of pit bulls as domestic pets.<sup>17</sup> At the time of writing, it had been signed by more than 138 000 people.

The non-profit group, Animals 24-7, has a dangerous dog data library that keeps a log of fatal dog attacks reported in the South African media since July 2004.<sup>18</sup> The records between 22 July 2004 and 12 November 2022 show that 65 pit bulls were involved in the deaths of 48 victims, which far exceeds the involvement of five Boerboels, four Rottweilers, two German Shepherds, and one Labrador. The frequent mention of pit bulls justifies a brief enquiry into the breed and whether they should be banned and, if so, the possible consequences of such a banning.

### 3 WHAT ARE PIT BULLS, SHOULD THEY BE BANNED OR SURRENDERED, AND WHAT ARE THE POSSIBLE CONSEQUENCES OF BANNING OR SURRENDERING THEM?

Pit bulls are a type of dog and not a specific breed. The American Pit Bull Terrier is one of the so-called "bully breeds" often labelled a pit bull. In fact, "pit bull" is a term used to describe a number of breeds, namely the American Pit Bull Terrier, the Bull Terrier, the American Staffordshire Terrier, and the Staffordshire Bull Terrier.<sup>19</sup>

According to the American SPCA, "pit bulls" are the dog of choice for dogfighting in America,<sup>20</sup> as is the case in South Africa.<sup>21</sup> One of the problems is that dogfighting is rife in South Africa; and it's not as simple as

<sup>15</sup> South African Police Service: Office of the Provincial Commissioner North West "Dogs Allegedly Mauled Their Owner to Death" (8 January 2023) <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=44203> (accessed 2023-01-31).

<sup>16</sup> Sithole "Gogo Recalls Last Moments With Grandson Before Pitbull Mauling" (21 November 2022) <https://www.iol.co.za/the-star/news/gogo-recalls-last-moments-with-grandson-before-pitbull-mauling-2269ec6e-0f10-43d8-97a0-934c4460a138> (accessed 2023-01-31).

<sup>17</sup> Sizwe Kupelo Foundation "Ban Pitt Bulls as Domestic Pets in South Africa" (undated) <https://www.change.org/p/presidencyza-dalrrdgv-za-healthza-sapoliceservice-it-s-time-to-ban-pit-bulls-as-domestic-pets-in-sa-banpitbulls> (accessed 2023-01-31) 1.

<sup>18</sup> Animals 24-7 <https://www.animals24-7.org/pit-bull-data/>.

<sup>19</sup> Dogtime.com "American Pit Bull Terrier" (undated) <https://dogtime.com/dog-breeds/american-pit-bull-terrier#/slide/1> (accessed 2023-04-11).

<sup>20</sup> ASPCA "A Closer Look at Dog Fighting" (2023) <https://www.asPCA.org/investigations-rescue/dogfighting/closer-look-dogfighting#:~:text=Although%20there%20are%20many%20breeds,the%20American%20Pit%20Bull%20Terrier> (accessed 2023-03-05).

<sup>21</sup> Geldenhuys "The NSPCA: Dogfighting – SA's Dirty Little Secret" <https://www.friendsofthedog.co.za/dogfighting-sas-dirty-little-secret.html#> (accessed 2023-03-05).

pit bulls being bred for inter-town fighting competitions – dogfighters compete right up to international level.<sup>22</sup> It was found that in some areas,

“[b]reeding or owning a fierce dog is part of the local culture – to protect one’s home from burglars, for instance. But some turn to dog fighting, a brutal and illegal activity, for fun and money, pitting pitbulls [sic] and other hounds bred and trained to kill against each other.”<sup>23</sup>

In many instances, poor control over dogs that were acquired for personal or property protection result in dog bites. This is amplified by large spreads of informal and sub-economic housing estates plagued by high crime rates. There are no proper enclosures, very little money for animal care and a high need for security.

There are different levels of sophistication within dogfighting, ranging from dogfights taking place on the streets, open veld or in abandoned buildings to higher and more organised and secret levels that are difficult to locate. At these levels, the dogs used for fighting are almost exclusively American Pit Bull terriers. At the less sophisticated levels, the perpetrators might also use similar breeds. At the lowest level, dogs were commonly sourced from adverts, stolen or bred for this criminal purpose.<sup>24</sup>

Proponents of a ban on pit bulls, such as the Sizwe Kupelo Foundation, demand the banning and castrating of pit bulls in South Africa, basing its claim on the protection of the right to life because of the number of people who have been killed by the breed. The foundation also holds the position that government should castrate existing animals, ban breeding and regulate the ownership of pit bulls.<sup>25</sup> Their aim is “to prevent further breeding” and they are asking “government to consider regulating all power breeds and ensure that anyone who wants to own such [sic] breed follows a particular process, which includes a licence requirement”. Political parties and trade unions have also joined in.<sup>26</sup>

Those opposing a ban blame irresponsible dog owners, and say “laws need to be put in place to deal with them”.<sup>27</sup> This is supported by animal behaviour expert, Dr Sonntag, from the Faculty of Veterinary Science at the University of Pretoria, who also holds the opinion that “breed-specific legislation banning certain breeds of dogs has not been successful anywhere in the world”.<sup>28</sup> While there are many calls on the SPCA to act, its

<sup>22</sup> E-mail received from the Manager: Special Investigations, NSPCA on 28 August 2019.

<sup>23</sup> France24 “Behind Cape Town’s Heavenly Beaches, the Hell of Dog Fighting” (22 February 2022) <https://www.france24.com/en/live-news/20220222-behind-cape-town-s-heavenly-beaches-the-hell-of-dog-fighting> (accessed 2023-01-31).

<sup>24</sup> Dibakwane “Pit Bulls Surrendered to SPCA Tell Tale of Dog Fighting” Pretoria News (12 June 2019) <https://www.iol.co.za/pretoria-news/pit-bulls-surrendered-to-sPCA-tell-tale-of-dog-fighting-26016011> (accessed 2019-09-01).

<sup>25</sup> Tebele “Foundation Wants Pit Bulls Castrated, Breeding of the Dogs Regulated” (19 October 2022) <https://ewn.co.za/2022/10/19/foundation-wants-pit-bulls-castrated-breeding-of-the-dogs-regulated> (accessed 2023-02-01).

<sup>26</sup> Dayimani “Pit Bull Attacks: Now EFF and Cosatu Back Calls for Ban as Saga Continues” (23 November 2022) <https://www.news24.com/news24/southafrica/news/pit-bull-attacks-now-eff-and-cosatu-back-calls-for-ban-as-saga-continues-20221123> (accessed 2023-02-01).

<sup>27</sup> BBC News <https://www.bbc.com/news/world-africa-63727936> 5.

<sup>28</sup> SA News <https://businesstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/>.

stance is that its mandate is the protection of animals, not the protection of the public, which is a government function.<sup>29</sup> This statement is borne out by the recent conviction of a dog owner who was sentenced to a fine of R6 000, or six months' imprisonment suspended for five years, after the Cape of Good Hope SPCA opened an animal cruelty case against him for entering his brown crossbreed dog in illegal fights.<sup>30</sup>

The National SPCA opposes the banning of any animals. The organisation calls for stronger regulatory measures regarding the keeping, sterilisation, castration and breeding of dangerous and aggressive animals. According to the organisation, “[p]eople have been breeding and keeping these animals for all the wrong reasons, and using these animals as weapons to sell and make a profit irresponsibly and that is where you see tragedy”.<sup>31</sup>

The stance of the Animal Welfare Society (AWS) of SA is that the public should assist by “supporting vigorous enforcement of existing laws that focus not on breed, but on owners’ responsibility for their dogs’ behaviour”. The AWS also reported an “influx of pit bulls because people are surrendering their dogs”. It proposes the introduction of “breed[-]neutral ‘dangerous dogs’ legislation” that prohibits dogs from running loose, and from being chained. The AWS is of the opinion that “[l]aws that ban particular breeds of dogs do not achieve these aims and instead create the illusion, but not the reality, of enhanced public safety”.<sup>32</sup>

Lins Rautenbach, spokesperson of the Pit Bull Federation of South Africa avers:

“[d]og bites ... happen because of negligent owners. South Africa has one of the highest [dog attack] fatalities in the world. It is not a dog problem. We have an accountability and a law problem.”<sup>33</sup>

She ascribes factors such as owners allowing dogs to roam the streets, and the failure of the police and justice system to tackle dog-bite cases. According to her, “[t]o get a mauling case opened in South Africa is almost impossible. And once it is opened, follow-through is impossible”.<sup>34</sup>

The City of Cape Town, the Cape of Good Hope SPCA and Cape Animal Welfare Forum (CAWF) also disagree with a ban on certain breeds and propose amendments to the City’s Animal Keeping By-Law, 2021.<sup>35</sup> They

<sup>29</sup> SA News <https://businesstech.co.za/news/lifestyle/649589/government-investigating-rise-in-pitbull-attacks-in-south-africa/> 4.

<sup>30</sup> Solomons “Cape Town Man Fined R6 000 for Entering His Dog in Illegal Fights” News24 (24 February 2023) <https://www.news24.com/news24/southafrica/news/pics-cape-town-man-fined-r6-000-for-entering-his-dog-in-illegal-fights-20230224> (accessed 2023-02-28).

<sup>31</sup> Dean “No to Pit Bull Ban: Welfare Groups Call for ‘Stronger Regulations’” (27 October 2022) <https://www.dailyvoice.co.za/news/no-to-pit-bull-ban-welfare-groups-call-for-stronger-regulations-db3f2951-ce30-45e2-baae-fa3a6b35fcc3> (accessed 2023-02-01).

<sup>32</sup> *Ibid.*

<sup>33</sup> 702 <https://www.702.co.za/articles/451891/dog-attacks-not-a-dog-problem-but-a-law-problem-pit-bull-federation>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Daily Voice Reporter “‘It’s the Owners, Not the Dogs’: Rearing, Not Breeding, of Pit Bulls a By-Law Amendment Issue After Attacks” (24 November 2022) <https://www.dailyvoice.co.za/news/its-the-owners-not-the-dogs-rearing-not-breeding-of-pit->

want to incorporate a stricter duty of care on pet owners, and regulations regarding the keeping of dangerous animals. Cape Town promulgated an amended Animal Keeping By-Law in December 2021.<sup>36</sup> Some of the main amendments include: a clause providing for general mandatory sterilisation<sup>37</sup> unless an exemption is granted, as opposed to mandatory sterilisation in specific circumstances; sections dealing with dogfighting;<sup>38</sup> and the development of “an environment conducive to animal care” by “providing public spaces where animals can be exercised, such as free run public spaces for dogs”.<sup>39</sup>

A downside to the call for a ban on pit bulls is that it resulted in an increased demand for the animals. According to a breeder:

“[people] buy them for the very reason many people are calling for their ban. They want them because they are vicious, and homes with pit bulls aren’t targets by criminals.”<sup>40</sup>

The statement about viciousness was confirmed by the NSPCA, which although not supporting calls for a complete ban on pit bulls, have said “their viciousness could not only be attributed to how they were raised by their owners” and “[t]hey were vicious in their genetic make-up”.<sup>41</sup>

Should the call for a ban on or the surrender of a specific breed be heeded, it gives rise to the question whether it could amount to a deprivation of property, which is discussed in the next section.

#### 4 ARE ANIMALS PROPERTY AND IS THE KEEPING OF ANIMALS A “BASIC” HUMAN RIGHT?

Dogs are the property of their owners. Section 1(1) of the Animals Protection Act<sup>42</sup> (APA) defines “animal” as “any equine, bovine, sheep, goat, pig, fowl, ostrich, dog, cat or other domestic animal or bird, or any wild animal, wild bird or reptile which is in captivity or under the control of any person”. “[O]wner” is also defined and “includes any person having the possession, charge, custody or control of that animal”.<sup>43</sup> These definitions make it clear

[bulls-a-by-law-amendment-issue-after-attacks-492d7704-3ce1-454e-9052-728fbff3d8d0?utm\\_campaign=magnet&utm\\_source=article\\_page&utm\\_medium=related\\_articles](https://www.bulls-a-by-law-amendment-issue-after-attacks-492d7704-3ce1-454e-9052-728fbff3d8d0?utm_campaign=magnet&utm_source=article_page&utm_medium=related_articles) (accessed 2023-02-01).

<sup>36</sup> Province of the Western Cape: Provincial Gazette Extraordinary 8527 dated 9 December 2021.

<sup>37</sup> S 3 of the City of Cape Town: Animal Keeping By-Law.

<sup>38</sup> S 8 of the City of Cape Town: Animal Keeping By-Law.

<sup>39</sup> BusinessTech “Changes to Pet and Animal Keeping By-Laws in Cape Town” (17 December 2021) <https://businesstech.co.za/news/lifestyle/546600/changes-to-pet-and-animal-keeping-by-laws-in-cape-town/> (accessed 2023-02-01).

<sup>40</sup> Bhengu “Demand for Pit Bulls Increased Since Petition Calling for Them to be Banned, Say Breeders” (21 November 2022) <https://www.news24.com/news24/southafrica/news/demand-for-pit-bulls-increased-since-petition-calling-for-them-to-be-banned-say-breeders-20221121> (accessed 2023-02-01).

<sup>41</sup> Bhengu <https://www.news24.com/news24/southafrica/news/demand-for-pit-bulls-increased-since-petition-calling-for-them-to-be-banned-say-breeders-20221121> (accessed 2023-02-01).

<sup>42</sup> 71 of 1962.

<sup>43</sup> S 1(iii) of the Animals Protection Act 71 of 1962.

that a person can be the “owner” of an animal and that animals are therefore legal objects, and the owners enjoy the protection of the Bill of Rights (BoR).

The BoR is contained within Chapter 2 of the Constitution and it enshrines the rights of all people in South Africa,<sup>44</sup> subject to the limitations contained in section 36 or elsewhere in the BoR.<sup>45</sup> The BoR applies to all law, and binds the legislature, the executive and the judiciary and all organs of state.<sup>46</sup> The right to property is protected by section 25(1) of the Constitution. Section 25 provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property is not limited to land.<sup>47</sup> Even the Constitutional Court has recognised that constitutional property clauses are difficult to interpret.<sup>48</sup> The court did find that ownership of a corporeal movable lies at the heart of our constitutional concept of property and that it must enjoy the protection of section 25.<sup>49</sup>

As far as the meaning of “deprived” is concerned, if the deprivation infringes (limits) section 25(1) and cannot be justified under section 36, it is in conflict with the Constitution. A deprivation of property is “arbitrary”, as meant by section 25, when the “law” referred to in section 25(1) does not provide sufficient reason for the particular deprivation or is procedurally unfair. According to the *First National Bank* case,<sup>50</sup> sufficient reason is to be established by:

- a) evaluating the relationship between the means employed (namely the deprivation in question) and the ends sought to be achieved (namely the purpose of the law in question) – in the current case, if the municipality wants to decide to ban the keeping, breeding or inter-breeding of certain types of dog, such prohibition will have to be weighed against the purpose, which may be the promotion of a safe environment;
- b) considering a complexity of relationships, including the relationship between the purpose for the deprivation and the person whose property is affected, as well as between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation in respect of such property; and
- c) generally speaking, where the property in question is ownership of land or a corporeal moveable, establishing a more compelling purpose in order for the depriving law to constitute sufficient reason for the deprivation.

The *First National Bank* case is still considered the leading decision on the property clause in the Constitution. It also introduced a methodology for analysing section 25 disputes, which has significant implications for the

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<sup>44</sup> S 7(1) of the Constitution.

<sup>45</sup> S 7(3) of the Constitution.

<sup>46</sup> S 8(1) of the Constitution.

<sup>47</sup> S 25(4)(b) of the Constitution.

<sup>48</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)* 2002 (4) SA 768 (CC) par 47.

<sup>49</sup> *First National Bank supra* par 49.

<sup>50</sup> *Supra* par 100.

application of the section 25 requirements for a valid deprivation or expropriation of property.<sup>51</sup> The *First National Bank* methodology consists of seven stages, but for the purposes of this article, only the first four are relevant:<sup>52</sup>

1. Does that which is taken away from the property holder by the operation of the law in question amount to property?
2. Does the taking away of such property by the organ of state amount to deprivation?
3. If it does, is such deprivation consistent with the provisions of section 25(1)?
4. If not, is such deprivation justified under section 36 of the Constitution?

When applied to the circumstances prevailing in South Africa, it is concluded that the answers to the questions above are: yes, yes, no and no, respectively, meaning that the seizure of animals of a certain kind based on the fact that they are of a certain kind (which may not always be easy to establish) will amount to a deprivation of property worthy of the protection afforded by section 25 of the Constitution.

## 5 THE CURRENT LEGISLATIVE REGIME RELATING TO DOGS

Section 2(1) of the Societies for the Prevention of Cruelty to Animals Act<sup>53</sup> (SPCA Act) established the National Council of Societies for the Prevention of Cruelty to Animals (NSPCA) as a body empowered to prevent animal cruelty and promote animal welfare. It could therefore be said that the concurrent national and provincial competence of animal control<sup>54</sup> is assigned to the NSPCA by the SPCA Act. Interpreting the SPCA Act requires that it be read in conjunction with the Animals Protection Act.<sup>55</sup> The NSPCA operates in the animal welfare framework that the APA establishes. The SPCA Act has a clear purpose: to promote animal welfare and prevent cruelty to animals and it has three central functions:<sup>56</sup>

1. to set out an extensive list of offences that constitute animal cruelty;
2. to establish a broad remedial scheme of civil and criminal punishment;  
and
3. to empower societies for the protection of animals.

<sup>51</sup> Van der Walt and Siphuma "Extending the Lessor's Hypothec to Third Parties' Property" 2015 132 *South African Law Journal* 518 538.

<sup>52</sup> Roux "Property" in Woolman and Bishop (eds) *Constitutional Law of South Africa vol 3 2ed* (2013).

<sup>53</sup> 169 of 1993.

<sup>54</sup> Part A of Schedule 4 of the Constitution.

<sup>55</sup> 71 of 1962.

<sup>56</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (4) BCLR 517 (CC) (NSPCA case).

The SPCA Act gives effect to the society envisaged by the APA.<sup>57</sup> It sets out the functions and purposes of the NSPCA, which has the principal objective of protecting animal welfare as contemplated in the APA.

Section 2 of the APA creates a host of general offences in respect of animals, while section 2A criminalises animal fights by stating:

“any person who–

- (a) possesses, keeps, imports, buys, sells, trains, breeds or has under his control an animal for the purpose of fighting any other animal;
- (b) baits or provokes or incites any animal to attack another animal or to proceed with the fighting of another animal;
- (c) for financial gain or as a form of amusement promotes animal fights;
- (d) allows any of the acts referred to in paragraphs (a) to (c) to take place on any premises or place in his possession or under his charge or control;
- (e) owns, uses or controls any place or premises or place for the purpose or partly for the purpose of presenting animal fights on any such premises or place or who acts or assists in the management of any such premises or place, or who receives any consideration for the admission of any person to any such premises or place; or
- (f) is present as a spectator at any premises or place where any of the acts referred to in paragraphs (a) to (c) is taking place or where preparations are being made for such acts

shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years.”

Sections 2 and 2A of the APA are quite exhaustive and they seem to provide for sufficiently strict measures to be taken in addition to the imposition of high licence fees. The NSPCA is subject to ministerial oversight.<sup>58</sup> Together, these Acts indicate the special and central role the NSPCA plays in protecting animal welfare in South African society.

According to the court in the NSPCA case:

“Specific provisions of the legislation reinforce the wide ambit of the Act. For example, the NSPCA is empowered to investigate and police acts of animal cruelty. The objects of the NSPCA are broad and expansive, and include ‘prevent[ing] the ill-treatment of animals’ and doing ‘all things reasonably necessary for or incidental to the achievement of [its] objects’. These are sweeping functions. More so when read in light of the comprehensive list of offences in the APA. Further, section 6(2)(r) of the SPCA Act compels the NSPCA to do ‘everything which in its opinion is conducive to the performance of its functions or the achievement of [its] objects’. By design, the NSPCA is uniquely placed to robustly and responsively combat animal cruelty.”<sup>59</sup>

At the time of enactment of the SPCA Act, Parliament recognised that

“the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The state is and will

<sup>57</sup> NSPCA case *supra* par 39.

<sup>58</sup> S 13 of the SPCA Act.

<sup>59</sup> NSPCA case *supra* par 40.

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probably remain unable to provide these services ... The [Act] gives [the NSPCA] a platform to face this challenge.”<sup>60</sup>

This represents a shift towards empowering the NSPCA to fulfil functions the State is supposed to exercise but cannot. Fundamentally, it amounts to a recognition by the State that it cannot achieve the national goal of animal protection.

The NSPCA’s functions are connected to the protection of animals and closely linked with combating criminal offences set out in the animal protection regime.<sup>61</sup> The majority of the provisions in the APA concern offences, but the other statutes in the animal protection regime also include a range of offences related to the mistreatment of animals.

The SPCA Act provides that societies must “co-operate with or permit the board to institute legal proceedings where the society *is capable of instituting such proceedings* under this Act, the APA or the *associated Acts*”.<sup>62</sup> The “associated Acts” refer to:

“five statutes that form part of the current statutory regime for protecting animal welfare and preventing animal cruelty. In its entirety, this spans seven pieces of legislation (animal protection regime)”.<sup>63</sup>

The basis for the animal protection regime is the APA.

The other laws have various roles in safeguarding animals and governing how they are treated.<sup>64</sup> The treatment, training and exhibition of animals and guard dogs is regulated by the Performing Animals Protection Act,<sup>65</sup> while other applicable legislation includes the Veterinary and Para-Veterinary Professions Act,<sup>66</sup> the Medicine and Related Substances Act,<sup>67</sup> the Animal Diseases Act<sup>68</sup> and the Meat Safety Act,<sup>69</sup> which set standards of hygiene in animal slaughter for consumption.

Collectively, these laws establish the guidelines for the treatment, care, and usage of animals. They emphasise the idea that society should work to prevent needless cruelty to animals, especially animals that could be used for food or service.<sup>70</sup>

As far as the spheres of governmental functions are concerned, it should be noted that Part B of Schedule 5 of the Constitution specifically lists the licensing of dogs as a municipal function. The imposition of higher licensing fees for unsterilised females and unneutered male dogs by municipal councils is an option that is available.

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<sup>60</sup> Debates of the National Assembly (Hansard) 25 November 1993 at 14065 (Minister of Agriculture) as referenced in the *NSPCA case supra* par 41.

<sup>61</sup> *NSPCA case supra* par 46.

<sup>62</sup> S 9(2)(i) of the SPCA Act, as quoted in the *NSPCA case supra* par 43.

<sup>63</sup> *NSPCA case supra* par 43.

<sup>64</sup> *NSPCA case supra* par 44.

<sup>65</sup> 24 of 1935.

<sup>66</sup> 19 of 1982.

<sup>67</sup> 101 of 1965.

<sup>68</sup> 35 of 1984.

<sup>69</sup> 40 of 2000.

<sup>70</sup> *NSPCA case supra* par 45.

## 6 DO MUNICIPALITIES HAVE LEGISLATIVE AUTHORITY TO PROHIBIT THE KEEPING, BREEDING OR CROSS-BREEDING OF CERTAIN BREEDS OF DOGS TO PREVENT DOGFIGHTING AND OTHER NEFARIOUS ACTIVITIES?

The second certification judgment of the Constitutional Court held that municipalities have the powers and functions set out in national or provincial legislation and which must be developed within the framework provided by the Constitution.<sup>71</sup> Bekink and Pimstone support this view and state that the powers and functions of municipalities “must be determined by laws of competent authority”<sup>72</sup> and that it was the intention of the constitutional drafters that the actual powers and functions of municipalities “were to be determined by law”.<sup>73</sup> An opposite standpoint, which is supported by the author, is taken by Steytler and De Visser who opine that it “constricts a municipality in its rights to exercise powers on its own initiative”.<sup>74</sup>

The legislative authority<sup>75</sup> of a municipality is exercised by its council<sup>76</sup> and it is exercised, *inter alia*, by passing by-laws.<sup>77</sup> In this respect, municipal councils have original legislative power, as the Constitutional Court found that a municipality:

“is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised by the Constitution itself.”<sup>78</sup>

While municipalities have original legislative powers, to some extent they are still subject to, and under the control of, the provincial and national spheres of government.<sup>79</sup> This is borne out by section 151(3) of the Constitution, in terms of which “[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 in the Constitution”; municipal by-laws that are in conflict with national and provincial legislation are invalid.<sup>80</sup> National or provincial government may, on the other hand “not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions”.<sup>81</sup>

<sup>71</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) par 80.

<sup>72</sup> Bekink *Principles of South African Local Government Law* (2006) 200.

<sup>73</sup> Pimstone in Chaskalson (ed) *Constitutional Law of South Africa* (1999) 5A-17.

<sup>74</sup> Steytler and De Visser “Local Government” in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 22–46.

<sup>75</sup> S 151(2) of the Constitution.

<sup>76</sup> S 11(1) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

<sup>77</sup> S 11(3)(m) of the Systems Act.

<sup>78</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC), 1999 (1) SA 374 (CC) par 26.

<sup>79</sup> Rautenbach and Malherbe *Constitutional Law* (2012) 231–233.

<sup>80</sup> S 156(3) of the Constitution.

<sup>81</sup> S 151(4) of the Constitution.

The Constitution confers upon municipalities executive authority and the right to administer the local government matters listed in Parts B of Schedules 4 and 5,<sup>82</sup> and section 156(2) gives them the power to make and administer by-laws for the effective administration of the matters that they have the right to administer.

However, animal control is a functional area of concurrent national and provincial legislative competence;<sup>83</sup> on a strict interpretation, this means that municipalities do not have the power to legislate on the function. On the other hand, everyone is guaranteed the right to freedom and security of the person,<sup>84</sup> which includes the right to be free from all forms of violence from either public or private sources.<sup>85</sup> As such, the municipality, as part of the State, must respect, protect, promote and fulfil that right.<sup>86</sup>

Nevertheless, a discussion on the legislative functions and powers of municipalities will be incomplete without consideration of the developmental duties of municipalities. "Development" is defined as

"sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at—  
(a) improving the life of its members with specific reference to the poor and the disadvantaged sections of the community; and  
(b) ensuring that development serves present and future generations."<sup>87</sup>

The developmental duties of municipalities are set out in the Constitution,<sup>88</sup> and include the promotion of a safe and healthy environment.<sup>89</sup> Safety is a basic, evolutionary need.<sup>90</sup> To give effect to their developmental obligations, the Constitution requires municipalities to structure their budgets and administration to give effect to the basic needs of the community they serve.<sup>91</sup>

Although constitutionally a local authority has executive authority and the right to administer the local government matters listed in Parts B of Schedules 4 and 5 of the Constitution,<sup>92</sup> and any matter assigned to it by national or provincial legislation,<sup>93</sup> municipal powers and functions also have other origins aside from original and assigned powers. These are discussed below.

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<sup>82</sup> S 156(1) of the Constitution.

<sup>83</sup> Part A of Schedule 4 of the Constitution.

<sup>84</sup> S 12 of the Constitution.

<sup>85</sup> S 12(1)(c) of the Constitution.

<sup>86</sup> S 7(2) of the Constitution.

<sup>87</sup> S 1 of the Systems Act.

<sup>88</sup> S 152 and 153 of the Constitution.

<sup>89</sup> S 152(1)(d) of the Constitution.

<sup>90</sup> Komninos "Safety: Maslow's Hierarchy of Needs" *Interaction Design Foundation* (2017) <https://www.interaction-design.org/literature/article/safety-maslow-s-hierarchy-of-needs> (accessed 2023-02-20).

<sup>91</sup> S 153 of the Constitution.

<sup>92</sup> S 156(1)(a) of the Constitution.

<sup>93</sup> S 156(1)(b) of the Constitution.

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## **6 1 Assignment of the administration of a matter listed in Parts A of Schedules 4 and 5 of the Constitution**

According to section 156(4) of the Constitution, the national and provincial governments must assign the administration of any matter listed in Parts A of Schedules 4 and 5 that necessarily relates to local government, by agreement and subject to any conditions, to a municipality if that matter would most effectively be administered locally and the municipality has the capacity to administer it.<sup>94</sup>

## **6 2 Powers concerning incidental matters**

Section 156(5) grants municipalities “the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions”.<sup>95</sup> Powers are “reasonably necessary or incidental” if they are necessary for the exercise of either the original powers and functions bestowed or those assigned by agreement or through legislation to municipalities.

## **6 3 Delegated powers**

Section 238 of the Constitution provides for the delegation of powers and functions from one executive organ of state (in any sphere of government) to another, provided that such delegation is consistent with any legislation in terms of which such power or function is exercised.<sup>96</sup> This section allows for the additional transfer of powers and functions to municipalities from any executive organ of state in either the national, provincial or local sphere of government (other than those originally bestowed or assigned).

## **6 4 Powers and functions in terms of agreements under the Systems Act**

Local government can also obtain powers and functions through the principle of agency. Municipalities may enter into service delivery agreements/service-level agreements and memoranda of agreements with national and provincial government entities to perform certain functions on behalf of such national or provincial government entities. It needs to be noted that political, financial and administrative accountability remains with the national or provincial government entities. As with delegation of powers and functions, the municipality as agent of an executive organ of state (the

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<sup>94</sup> The assignment of powers and functions should not be confused with the delegation of functions and powers. Assignment means a complete transfer of such power and function with no responsibility or authority remaining with the governmental institution from which the function and power is assigned. The assignee, upon transfer of the power and function, has full responsibility for the exercise of such function, which includes financial responsibility. See also the discussion of delegated powers below.

<sup>95</sup> The conditions and limitations should be noted.

<sup>96</sup> S 238(a) of the Constitution

principal) does not act in its own name and the risk, including financial risk, remains with the principal.<sup>97</sup>

This leaves the question whether municipalities can legislate on matters for which they don't have original legislative powers, where the function was neither assigned nor delegated, and where it is not the subject of an agreement.

In *Le Sueur v eThekweni Municipality*<sup>98</sup> (*Le Sueur* case), the municipality made changes to the eThekweni Town Planning Scheme by introducing the Durban Municipality Open Space System. One of the consequences of the decision was that no development on land could be proceeded with unless it was underwritten by environmental approval.<sup>99</sup> The applicants sought to have the decision set aside on the grounds, *inter alia*, that the amendments to the town planning scheme were unconstitutional, as the municipality had no executive or administrative authority over environmental matters (the environmental approval). Their contention was based on the fact that "environment" is listed as Part A of Schedule 4. As such it is a concurrent national and provincial competence and outside the functional areas listed in Part B, which is the exclusive domain of municipalities.<sup>100</sup> Referring to the Constitutional Court's judgment in *City of Johannesburg Metropolitan Municipality v Gauteng Developmental Tribunal*,<sup>101</sup> the court found that municipal planning is a function distinct to municipalities and that:

"there is no reason why the two spheres of control cannot co-exist even if they overlap ... It should be borne in mind, that the one sphere of control operates from a municipal perspective and the other from a national perspective. Each having its own constitutional and policy considerations."<sup>102</sup>

The court concluded:

"Hence, although environmental matters stood as the apparently exclusive area for National and Provincial Governance at those levels, it is clear that the authority of municipalities at Local Government level to manage the environment at that level has always been and is still recognized. It is inconceivable that the drafters of the Constitution intended by the manner in which the constitution was framed to exclude Municipalities altogether from legislating in respect of environmental matters at local level."<sup>103</sup>

There is criticism against the judgment as it fails to identify the source of municipal legislative authority; this may result in municipalities having

<sup>97</sup> It is necessary to make a clear distinction between original powers and assigned powers on the one hand, and delegated powers and agency on the other hand. The latter grouping is merely the transfer of the manner in which an executive organ of state wishes to discharge its responsibilities. It does not bestow any real executive or administrative authority upon municipalities. The functions and powers so transferred can also be revoked at any time.

<sup>98</sup> [2013] ZAKZPHC 6.

<sup>99</sup> Humby "Localising Environmental Governance: The Le Sueur Case" 2014 17(4) *PELJ* 1660 1661.

<sup>100</sup> *Le Sueur supra* par 16.

<sup>101</sup> 2010 (9) BCLR 859 (CC).

<sup>102</sup> *Le Sueur supra* par 20.

<sup>103</sup> *Le Sueur supra* par 39.

undefined legislative power,<sup>104</sup> and in municipalities having to rely on assignment “from competent legislature”. The argument in favour of assignment before municipal action was disputed by Du Plessis and Fuo,<sup>105</sup> who opine that the argument

“flies in the face of the constitutional demand for ‘developmental local government’, the principle of subsidiarity entrenched in section 156(5) of the Constitution, and the fulfilment of the duties arising from section 24 of the Constitution.”<sup>106</sup>

The authors justify their view by arguing that the exercise of powers that are reasonable and incidental to the effective performance of municipal functions (referred to in section 156(5) of the Constitution) (even if these are not defined and not included in Part B of both Schedules 4 and 5) is competent. According to them,

“[a] municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedule 4A and 5A of the Constitution provided that such action seeks to further the objectives of section 24 of the Constitution and is not in conflict with measures adopted by national and provincial spheres.”<sup>107</sup>

In the matter under consideration, reference to section 24 of the Constitution can be replaced by the right to freedom and security of the person, which includes the right “to be free from all forms of violence”<sup>108</sup> and the objective to promote a safe and healthy environment.<sup>109</sup> The judgment in *Nel v Hessequa Local Municipality*<sup>110</sup> follows the approach in *Le Sueur*. In this instance, the municipality adopted by-laws relating to the management of rivers within its area of jurisdiction. The applicant, *inter alia*, took issue with the by-laws, arguing that they were unconstitutional as municipalities have no legislative authority over the use of waters. In his judgment, Meer J stated:

“It is therefore entirely permissible for a municipality under its authority to administer public amenities, public spaces and recreation, to make by-laws requiring *inter alia* that persons wishing to use boats on rivers and/or to fish in rivers in its area of jurisdiction, be licensed and to authorise officers to enforce such by-laws. It is important to note that the fact that organs of state in the national and/or provincial spheres of government may also have functional competence over rivers under the Respondents’ jurisdiction, does not mean that the Respondent municipality’s competence is excluded.”<sup>111</sup>

<sup>104</sup> Bronstein “Mapping Legislative and Executive Powers Over ‘Municipal Planning’: Exploring the Boundaries of Local, Provincial and National Control” 2015 132 (3) *SALJ* 661.

<sup>105</sup> Du Plessis and Fuo “Governing Authorities in the Same Boat and Tale of Two Schedules: *Marius Nel v Hessequa Local Municipality*” 2017 20 *Commonwealth Journal of Local Governance (CJLG)* 71.

<sup>106</sup> Du Plessis and Fuo 2017 *CJLG* 77.

<sup>107</sup> Du Plessis and Fuo 2017 *CJLG* 77.

<sup>108</sup> S 12(1)(c) of the Constitution.

<sup>109</sup> S 152(1)(d) of the Constitution.

<sup>110</sup> WCC (unreported) 2015-12-14 Case no 12567/2013.

<sup>111</sup> *Nel v Hessequa supra* par 13 and 14.

The judge found authority for his decision in the *Le Sueur* case and the Constitutional Court case of *Maccsand v City of Cape Town*,<sup>112</sup> where the court held:

“[T]he Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of the powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate the actions of one another.”<sup>113</sup>

*Nel v Hessequa Local Municipality* highlights the need to understand that although the three spheres of government are distinct, coordination and cooperation between them remains of paramount importance if the objectives set out in sections 152 and 153 of the Constitution are to be realised. It also demonstrates an acceptance of the existence of municipal legislative authority outside of the functional areas of Parts B of Schedules 4 and 5 to the Constitution.

## 7 MEASURES MUNICIPALITIES CAN TAKE TO CONTROL DOGS

The SPCA Act provides that societies must “co-operate with or permit the board to institute legal proceedings where the society *is capable of instituting such proceedings* under this Act, the APA or the *associated Acts*”.<sup>114</sup> The phrase “associated Acts” refers to five statutes that form part of the current statutory regime for protecting animal welfare and preventing animal cruelty. In its entirety, this spans seven pieces of legislation (animal protection regime).<sup>115</sup> In the jurisdiction of the Hessequa Local Municipality, for example, its By-Law Relating to the Prevention of Public Nuisances and Nuisances Arising from the Keeping of Animals<sup>116</sup> (Nuisances By-Law) and the Municipal Health By-Law of the Garden Route District Municipality<sup>117</sup> are applicable to the keeping of dogs. That increases the count to nine pieces of legislation.

The Hessequa Nuisances By-Law does not deal with animal welfare and the prevention of animal cruelty, as strictly speaking these are not municipal functions and the matters are dealt with extensively in the Animal Welfare Act. As far as enforcement is concerned, members of the South African Police Services have the power to enforce all South African legislation,<sup>118</sup> but this is not the case for municipal law enforcement officers.<sup>119</sup> However, the

<sup>112</sup> 2012 (4) SA 181 (CC).

<sup>113</sup> *Maccsand v City of Cape Town supra* par 47.

<sup>114</sup> S 9(2)(i) of the SPCA Act.

<sup>115</sup> *NSPCA case supra* par 43.

<sup>116</sup> Published in Provincial Gazette Extraordinary 6588 dated 19 December 2008.

<sup>117</sup> Published in Provincial Gazette Extraordinary 8018 dated 10 December 2018.

<sup>118</sup> South African Police Service Act 68 of 1995.

<sup>119</sup> GN R1114 in GG 41982 of 2018-10-19.

latter do have the power to enforce municipal by-laws and other legislation identified in R1114.<sup>120</sup>

It is proposed that functional municipalities would benefit from a by-law that consolidates the relevant provisions of the assortment of legislation listed above into a single by-law aimed at addressing the behaviour of the owners of animals to prevent or reduce dog attacks, which in many cases have their origin in the maltreatment of animals. Such a by-law would enable municipal law enforcement officers to act within the ambit of R1114. The promulgation of such a by-law should be subject to the proviso that:

- a) there is no SPCA or institution aligned to the SPCA in its jurisdiction;
- b) SAPS lack enforcement capacity; and
- c) it is a function that the municipality wishes to exercise for the purpose of providing a safe and healthy environment.

The proposal is based on the discussions above, the fact that the enforcement of the APA is not allocated to law enforcement officers appointed by municipalities,<sup>121</sup> and the powers granted to peace officers in the Criminal Procedure Act.<sup>122</sup> The training of municipal law enforcement officers for appointment as peace officers in terms of section 334 of the Criminal Procedure Act does not provide for the interpretation of multiple pieces of legislation, often resulting in a failure to enforce.

A further question arises as to whether a municipality should enact legislation to address the keeping of certain breeds of dog? This requires a brief comparative study.

In 1991, the Dangerous Dogs Act of the United Kingdom outlawed certain breeds/types of dog to protect the public from attacks. Its stated aim was to:

“prohibit persons from having in their possession or custody dogs belonging to types bred for fighting [...] to enable restrictions to be imposed in relation to other types of dog which present a serious danger to the public; to make further provision for securing that dogs are kept under proper control; and for connected purposes.”

However, since the promulgation of the law, the annual number of fatalities has continued to rise. It was found that hospital admissions for dog attacks increased by 81 per cent between 2005 and 2017.<sup>123</sup> Dog attack fatalities have also increased.<sup>124</sup> In its 2018 report, the UK House Commons Committee called on government to increase support for local authorities and police forces to ensure they have the capacity to fulfil their duties.

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<sup>120</sup> Van As “Kan Munisipale Wetstoepassingsbeamptes Goedsmoeds op die Publiek Losgelaat Word?” (Can Municipal Law Enforcement Officers Be Released on the Public Without Reservation) 2019 *Litnet* 504 510.

<sup>121</sup> GN R1114 in GG 41982 of 2018-10-19.

<sup>122</sup> S 334 of the Criminal Procedure Act 51 of 1977.

<sup>123</sup> UK House of Commons (Environment, Food and Rural Affairs Committee) “Controlling Dangerous Dogs” HC 1040 published on 17 October 2018 3.

<sup>124</sup> UK House of Commons 10.

In Scotland, Dog Control Notices were implemented as an early intervention measure; a trained municipal officer would assess the dog and situation and impose suitable restrictions or requirements on the owner.<sup>125</sup>

Other places across the world have achieved a substantial reduction in bite incidences by channelling resources into targeted prevention and responsible ownership strategies, rather than focusing on breed-specific legislation. The “Calgary model”, for example, is widely cited as an effective approach that has achieved substantial bite reductions. This model adopted a different approach aimed at widespread education programmes, ensuring a high number of dog registrations, and enforcing strict penalties for owners of dogs involved in attacks. It boils down to education and enforcement.<sup>126</sup>

In 2016, the Netherlands became the first country without street dogs<sup>127</sup> and it was achieved through a mixture of hosting sterilisation days, enacting laws against abandonment, higher taxes, awareness campaigns, and improved policing.

In view of the discussions above, it is concluded that legislation aimed at prohibiting the keeping and breeding of certain types of dog is an exercise in futility.

Globally, over time, a variety of measures have been implemented to deal with dangerous dogs. These include:

- a) requiring owners to register and license their dogs so that authorities can keep track of potentially dangerous dogs (although in the Netherlands, the introduction of a dog tax resulted in more stray dogs as people could no longer afford to keep their dogs, or refused to pay);<sup>128</sup>
- b) introducing breed-specific legislation in terms of which the ownership of certain breeds that are believed to be dangerous were either banned or regulated more strictly;
- c) making the purchase of liability insurance to cover damages for harm caused by dogs compulsory for dog owners;
- d) compulsory attendance of training programmes so that owners can learn how to handle and train their dogs;
- e) requiring dogs to be on leashes in public places to prevent attacks; and
- f) stricter enforcement of animal cruelty and animal control legislation, which may include seizing dangerous canines.

Some of these measures have proved not to be effective and therefore it is proposed that, for South African conditions, a by-law should provide for and regulate: licensing and permission to keep dogs; breeding and hawking; dogs in streets or public places; the manner in which animals are kept and treated; euthanasia and sterilisation; conditions for permission to keep dogs;

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<sup>125</sup> UK House of Commons 26.

<sup>126</sup> UK House of Commons 31.

<sup>127</sup> Sawbridge “How Did the Netherlands Become the First Country Without Stray Dogs?” (27 July 2022) <https://dutchreview.com/culture/how-did-the-netherlands-become-the-first-country-to-have-no-stray-dogs/> (accessed 2023-02-20) 1.

<sup>128</sup> Sawbridge <https://dutchreview.com/culture/how-did-the-netherlands-become-the-first-country-to-have-no-stray-dogs/> 3.

restrictions; withdrawal of permission; exemptions; and the right of entry and inspection.

## 8 CONCLUSION AND RECOMMENDATIONS

As far as functions are concerned, Part B of Schedule 5 of the Constitution, lists the licensing of dogs as a municipal function. The imposition of higher licensing fees for unsterilised females and unneutered male dogs by council is an option that is available.

Animal control is a functional area of concurrent national and provincial legislative competence,<sup>129</sup> which means that municipalities do not have the power to legislate on the function. On the other hand, everyone is guaranteed the right to freedom and security of the person,<sup>130</sup> which includes the right to be free from all forms of violence from either public or private sources.<sup>131</sup> The municipality, as part of the State, must respect, protect, promote and fulfil that right<sup>132</sup> as part of their developmental duties. The exercise of powers that are reasonable and incidental to the effective performance of municipal functions (referred to in section 156(5) of the Constitution) (even if they are not defined and not included in Parts B of Schedules 4 and 5 of the Constitution) is competent. This approach is supported by the “principle of subsidiarity entrenched in section 156(5) of the Constitution”,<sup>133</sup> and the objective to promote a safe and healthy environment.<sup>134</sup> A municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedules 4A and 5A of the Constitution, provided that such action seeks to further the objectives of Chapter 2 of the Constitution and is “not in conflict with measures adopted by the national and provincial spheres”.<sup>135</sup>

The NSPCA operates in the animal welfare framework that the APA establishes. The Act’s purpose is to promote animal welfare and prevent cruelty to animals, but the responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. On the other hand, the suite of local government law is geared towards the social and economic upliftment of communities and there is legislative justification for interventions by municipalities to address matters such as the control of public nuisances, dog licensing, the operation of pounds and the conduct of community members that can alleviate the pressure on those organisations tasked with animal care.

A consolidation of the provisions of the various pieces of legislation into a single by-law aimed at regulating the keeping and treatment of dogs may result in increased law enforcement and, it is hoped, in increased sentences

<sup>129</sup> Part A of Schedule 4 of the Constitution.

<sup>130</sup> S 12 of the Constitution.

<sup>131</sup> S 12(1)(c) of the Constitution.

<sup>132</sup> S 7(2) of the Constitution.

<sup>133</sup> Du Plessis and Fuo 2017 *CJLG* 71 77.

<sup>134</sup> S 152(1)(d) of the Constitution.

<sup>135</sup> Du Plessis and Fuo 2017 *CJLG* 77.

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(as a result of amplified enforcement), as well as improved deterrence. In 2019, for example, 12 people were sentenced to prison time – ranging from 12 months to five years – for their participation in dogfighting activities.<sup>136</sup> The judiciary and national prosecution authority should also be sensitised in these regards so that stricter sentences can be imposed. This is a role that the South African Local Government Association can assume.<sup>137</sup>

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<sup>136</sup> Van Diemen “6 Sent to Jail for Illegal Dog Fighting, 14 Pit Bulls Rescued” *News 24* (27 May 2019) <https://www.news24.com/SouthAfrica/News/6-sent-to-jail-for-illegal-dog-fighting-14-pit-bulls-rescued-20190527> (accessed 2023-02-14).

<sup>137</sup> S 163 of the Constitution.