UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW, PIETERMARITZBURG

Examining the scope and application of section 24G of the National Environmental Management Act 107 of 1998 (NEMA)

Poovindrin Moodley

218088111

This mini-dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Environmental Law

Supervisor: Professor Michael Kidd

2020

DECLARATION REGARDING ORIGINALITY

I, Poovindrin Moodley, declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

D. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

    a. their words have been re-written, but the general information attributed to them has been referenced;

    b. where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

E. Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.

F. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation/thesis and in the References sections.

Signed: 

Date: 20/10/2021

ABSTRACT

The purpose of section 24G of NEMA is to identify, assess and manage the damage already incurred, together with future impacts arising from an unlawful commenced activity. It is not punitive and does not derogate from criminal prosecution at any stage, due to the unlawful commencement of the listed activity. The section 24G of NEMA decision would either be a refusal to authorize or an authorisation to conduct or continue with the rehabilitation and management of future impacts and environmental damage already incurred. All activities irrespective of whether the activity has an operational aspect or not, would fall within the scope of section 24G of NEMA. Although section 24G of NEMA, in its current form, is not of perfect lucidity, it is capable of being applied with reasonable certainty. The option of the use of environmental offsets as a remedial measure for addressing the damage already incurred, and by excluding decommissioning activities that have already been completed from its application, section 24G of NEMA can be applied affectively to serve its legitimate purpose.

ACKNOWLEDGEMENTS

This dissertation would not be possible without the support and encouragement from my family. A special dedication goes to my late dad, who instilled the value of perseverance, education and hard work in me; and to my mum for her sagacious guidance and unwavering confidence in me. I am equally grateful to my brothers and sister for providing the inspiration, intellectual stimulation and motivation in completing my studies. My appreciation would not be complete without acknowledging my esteemed supervisor, Professor Michael Kidd, for his exceptional mentorship and respectable academic guidance.

LIST OF ACRONYMS AND ABBREVIATIONS

EA	Environmental Authorisation
ECA	Environmental Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
LN1	Listing Notice 1
LN2	Listing Notice 2
LN3	Listing Notice 3
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMAQA	National Environmental Management: Air Quality Act 39 of 2004
NEMWA	National Environmental Management: Waste Act 59 of 2008
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
PAJA	Promotion of Administrative Justice Act 3 of 2000
RoD	Record of Decision
S24G	Section 24G of the National Environmental Management Act 108 of 1998
SEMA	Specific Environmental Management Act

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1. Background and rationale for study

Developmental needs from a socio-economic perspective should not be to the detriment of the environment; the very environment that is needed to support future development and enhance human wellbeing. It is therefore vital that development comply with the principle of sustainable development.[1] In this regard, concerted international efforts are required to protect the planet from environmental threats and harm, by the use of various environmental management tools. One such tool is the internationally accepted Environmental Impact Assessment (EIA)[2] with the aim to identify and evaluate environmental risks and to provide mitigation measures to minimize these risks, prior to commencing the development. The EIA regime in South Africa was enacted to give effect to the environmental right entrenched in the Constitution of the Republic of South Africa.[3] Various pieces of legislation and regulations[4] were promulgated to give effect to the environmental right, and to provide for environmental authorisation[5] as part of the EIA process.

The EIA process is required only for identified listed and specified activities.[6] Regulations and schedules were promulgated to list these activities.[7] The EIA process entails

[1] The Brundtland Report (World Commission on Environment and Development report *Our Common Future*, UN Doc GA/42/427 (1987) at 43), published in 1987, provided a generally accepted definition as: 'sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'. The Rio Declaration on Environment and Development in 1992 proclaimed principle 3 that preserves 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' This principle is also contained in section 2 of the National Environmental Management Act 107 of 1998.

[2] The various international instruments and the EIA regime will be elaborated on in Chapter 3.

[3] Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter referred to as 'the Constitution').

[4] These will be detailed in subsequent chapters.

[5] Environmental authorisation processes were provided for in section 21 and 22 of the Environmental Conservation Act 73 of 1989 (hereinafter referred to as 'ECA') for identified listed activities. This pre-constitution piece of legislation was in most part repealed by the introduction of the National Environmental Management Act 107 of 1998. Presently, Chapter 5 of the National Environmental Management Act 107 of 1998 (hereinafter referred to as 'NEMA') makes provisions for environmental authorisations. Section 24(1) of NEMA provides for environmental authorisations to be obtained from the competent authority for identified listed and specified activities.

[6] Section 24(1) of NEMA. The EIA regime and scope of these listed activities would be explored in Chapter 4 of this research.

[7] These listed activities and the environmental impact assessment processes were set out in the Environmental Impact Assessment Regulations R1182, R1183 and R1184, in *Government Gazette* 18261 of 5 September 1997, as amended; included in the NEMA gazetted Environmental Impact Assessment regulations in 2006, 2010, and 2014, with the latest amendment in 2017 (listing notices), as well as lists promulgated under the specified Environmental

impact evaluation, assessment of alternatives, public participation, mitigation measures, and the decision from the competent environmental authority to either grant authorisation with conditions to commence the activity, or a refusal to grant such authorisation. Traditionally, the EIA process[8] was required for identified listed or specified activities before commencement of any physical action in furtherance of a listed activity. Commencement of a listed activity without environmental authorisation is unlawful[9] and a criminal offence.[10] Prior to 2004, environmental authorities were confronted with the problem of dealing with environmental impacts of activities commenced without the requisite EIA and environmental authorisation,[11] as an EIA was only applicable prior to commencement of the listed activity.

In 2004, the legislature introduced another environmental authorisation process in the form of section 24G of NEMA and was subsequently amended in 2008 and 2013,[12] to allow for a process of environmental authorisation after the activity was unlawfully commenced. This section provides for a process, where an offender commenced a listed activity unlawfully, to apply for environmental authorisation to continue or conduct that activity. The applicant is required to pay an administrative fine[13] before the competent authority (CA) can issue a decision to authorise the activity or refuse to authorise the activity.[14] However, the provision did not escape criticism and there is still a lacuna on how to deal with damage already incurred. Section 24G of NEMA was regarded by many academics as a retrospective authorisation process or an *ex post facto* authorisation process, and thus criticized for being inconsistent with the rule of law,

---

Management Acts (SEMAs), such as the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA); the National Environmental Management: Waste Act 59 of 2008 (NEMWA), the National Environmental Management: Protected Areas Act, Act 57 of 2003 (NEMPAA), and the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEM:ICMA).

[8] Hereinafter referred to as the 'EIA'.

[9] Section 24F of NEMA.

[10] Section 49A (1) (a) of NEMA.

[11] See King ND, Strydom HA & Retief FP (eds) Fuggle & Rabie's *Environmental Management for South Africa* 3rd ed, 2018, at 161.

[12] National Environmental Management Amendment Act 8 of 2004; National Environmental Management Amendment Act 62 of 2008; National Environmental Management Laws Second Amendment Act 30 of 2013. These amendments included change in the heading from 'rectification of unlawful commencement' to 'consequence of unlawful commencement of activity, the change in reference from EMP to EMPr to accommodate mining related activities, the inclusion of waste related activities, and deferment of the decision until criminal procedures are finalized.

[13] Section 24G Fine Regulations were published in GN R698 in *GG* 40994 of 20 July 2017.

[14] Section 24G of NEMA will be detailed and analyzed in chapter 3.

the NEMA principles and objectives, and the Constitutional imperatives.[15] Other shortcomings of section 24G of NEMA is that it is used to bypass the EIA requirements, and therefore does not deter unscrupulous developers from commencing listed activities unlawfully. It was also argued that section 24G of NEMA rubberstamps authorisation for projects that commenced unlawfully, and is feared to be the norm instead of being applied to exceptional circumstances.[16] These exceptional circumstances have not been clearly defined as yet.

The latest online academic research[17] on section 24G of NEMA still includes criticisms. These criticisms are not effectively resolved, and the provision is becoming the norm rather than conducting an EIA. There is insufficient jurisprudence on the nexus between the listed activities with an operational aspect and those without an operational aspect, and the application of section 24G of NEMA. Limited jurisprudence on the application of section 24G of NEMA with regard to specific activities and stage of development, as well as how to effectively address impacts already incurred is therefore a rationale for the study.

The vast number of criticism has prompted an examination of the scope of section 24G of NEMA and whether it can be applied effectively to serve a legitimate purpose. The outcome of this study is therefore of environmental and practical importance, and inevitably seeks to make a perceived controversial process one that is workable. By ascertaining the scope and purpose of section 24G of NEMA, the research objective is to ensure consistency in its application that is consistent with the Constitution of the Republic of South Africa,[18] rule of law and the environmental management principles.

[15] See Paschke R and Glazewski J 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' *PER/PELJ* 2006 (9) 1; Basson JHE 'Retrospective Authorisation of Identified Activities for the purposes of environmental impact assessment' (2003) *South African Journal for Environmental Law and Policy* 10.

[16] See Kohn Lauren 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' (2012) *19 South African Journal for Environmental Law and Policy* 113.

[17] These include proposed thesis such as Jessica du Toit 'A critical evaluation of the National Environmental Management Act (NEMA) Section 24G: retrospective environmental authorisation', 2016, Stellenbosch University (unpublished Masters Research); and Sarah Jane Burford 'The impact of retroactive authorisation of listed activities on sustainable development in South Africa', 2019, University of Pretoria (unpublished Masters Research).

[18] Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter referred to as 'the Constitution').

1.2. Research question and methodology

The aim of this study is therefore to examine the scope and application of section 24G of NEMA from a pragmatic and environmental perspective, by answering the following three questions: Is the scope and application of section 24G of NEMA, in its current form, effective in serving its legitimate purpose? How can section 24G of NEMA be applied to deal with the already disturbed environment or the irreversible impacts incurred? Is it practical for decommissioning activities to fall within the scope of section 24G of NEMA?

This research is not based on an empirical study, but is purely doctrinal. It involves the review of the relevant legal principles and case law in the administrative and constitutional law fields. It provides an analysis of the empowering provisions of NEMA critically, and concisely evaluates it in light of legal interpretation principles. The research deals with NEMA, the Constitution, the Promotion of Administrative Justice Act[19] (PAJA), and administrative law aspects including common law principles, law journal articles and case law in the interpretation of section 24G of NEMA.

In order to answer the research question, the identified listed and specified activities will be analysed, highlighting the distinguishable operational and non-operational aspects of the listed activities. Section 24G of NEMA will then be deconstructed and analysed, and evaluated against the scope of the listed or specified activities. This will also involve an examination of the criticisms of the provision from academics and writers, and thereafter establishing the legitimate purpose of section 24G of NEMA and its effectiveness.

1.3. Sequence of Chapters

The research is divided into five chapters. Chapter 1 introduced the dissertation by providing a background, research question, methodology, and rationale for the study. As the dissertation involves the interpretation of statutes, Chapter 2 focuses on the various principles and approaches of interpretation that would form the platform for the subsequent chapters. It is followed by Chapter 3 which provides an analysis of section 24G of NEMA, its legislative purpose, and its practical defects. As the section 24G of NEMA deals with the unlawful commencement of listed activities, Chapter 4 is dedicated to examining the EIA regime and

[19] Act 3 of 2000.

analysing the listed activities. Having evaluated and examined the legislative empowering provisions, criticisms, practical problems and the case law on the matter, Chapter 5 will provide a final conclusion in answering the research questions with recommendations.

CHAPTER 2

PRINCIPLES OF INTERPRETATION

This study does not propose major law reform, but rather maintains the presumption that legislation does not intend to change the existing law more than is necessary.[20] In this regard, it is apposite to commence with this study by introducing the principles and approaches to interpretation of legislation that will be applied to establish the scope and purpose of section 24G of NEMA.

2.1. Orthodox text-based (literal) approach

One of the approaches to statutory interpretation is to consider the plain meaning of the words in the text to be interpreted, if it is clear and unambiguous, and shall be equated to the legislature's intention. [21] However, an interpretation that results in absurdity or ambiguity should be avoided.[22]Although there are criticisms, this approach[23] is still used by some courts,[24] even after the introduction of the Constitution.[25] In *Commissioner, SARS v Executor, Frith's Estate*,[26] it was indicated that in statutory interpretation the intention of the legislator must be ascertained by giving the words under construction their ordinary grammatical meaning, unless it results in absurdity.[27]

[20] Botha Christo *Statutory Interpretation: An Introduction for students*, 4th edition, 2010, 44.
[21] *Principal Immigration Officer v Hawabu* 1936 AD 26; *Engels v Allied Chemical Manufacturers (Pty) Ltd* 1993 (4) SA 45 531 I-J; *R v Hildick-Smith* 1924 TPD 68, 81.
[22] *Venter v R* 1907 TS 910 914.
[23] Botha Christo *Statutory Interpretation: An Introduction for students*, 4th edition, 2010, 49.
[24] *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) 934 J; *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) 794B; *Kalla v The Master* 1995 (1) SA 261 (T) 269C-G.
[25] See *Geyser v Msunduzi Municipality* 2003 (5) SA 19 (N) 321.
[26] 2001 (2) SA 261 (SCA).
[27] *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) at par 273.

Judge Wallis stated that approach is no longer appropriate. He criticized the notion of 'intention of the legislature' and 'ordinary grammatical meaning' in legislative interpretation, in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[28] It was reasoned that,

> 'there is no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation.' [29]

This approach will be applied in this study.

2.2. Purposeful (contextual) approach

In contrast to the textual approach to interpretation, the purpose-orientated approach advances that the context or purpose of the legislation is the focal factor in interpretation. In *Jaga v Dönges,*[30] Schreiner AJ provided guidelines for interpretation of legislation in the minority judgment. It was submitted that the wider context of the provision to be interpreted must be taken into consideration and is of utmost importance, irrespective of whether the text is clear or unambiguous. The text in the legislative context must then be reconciled and applied. The contextual approach was subsequently applied to other cases.[31]

According to the contextual approach, the interpretation process would involve ascertaining the 'purpose of the legislation, viewed against the fundamental rights in the Constitution, which would qualify the text.'[32] In order to ascertain the purpose of legislation, secondary and external aids may be used. These aids would include the headings of chapters and provisions, definitions, the preamble, meaning of the text in relation to other provisions, and interpretation clauses.[33]

[28] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at 24.
[29] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at 21.
[30] 1950 (4) SA 653 (A).
[31] *Mjuqu v Johannesburg City Council* 1973 (3) SA 421 (A); *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A).
[32] Botha Christo *Statutory Interpretation: An Introduction for students,* 4th edition, 2010, 68.
[33] Botha Christo *Statutory Interpretation: An Introduction for students,* 4th edition, 2010, 80-81.

The appropriate approach to statutory interpretation that is to be followed is highlighted in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[34] Meanings to words are to be ascertained by reading it in context to the legislation as a whole, the apparent purpose and the surrounding circumstances when the provision came into existence. An interpretation that does not result in absurdity, impracticality, unbusinesslike or stultify the broader operation of the legislation would be preferred.[35]

2.3. Interpretation in light of the Constitution

It is trite that constitutional supremacy implies that legislative and administrative actions must not be in conflict with the Constitution, and that these actions must serve to promote and respect the rights entrenched in the Bill of Rights.[36] This means that interpretation of legislation starts with the Constitution. Section 39 (2) of the Constitution provides that:

> 'When interpreting any legislation, and when developing the common-law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights.'

Ngcobo J explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism,*[37]

> 'The starting point in interpreting any legislation is the Constitution… first, the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable value enshrined in the Bill of Rights; second, the statute must be capable of such interpretation …must be interpreted purposefully to promote the spirit, purport and objects of the Bill of Rights… the emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous.'[38]

Apart from the interpretation not being in conflict with the Constitution, a reasonable interpretation that is consistent with international law is preferred.[39] The courts have on occasion

[34] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012.
[35] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) at 26.
[36] Section 7(2) of Chapter 2 of the Constitution of South Africa, 1996.
[37] 2004 (4) SA 490 (CC).
[38] *Botha Christo Statutory Interpretation: An Introduction for students, 4th edition, 2010, 68*at par 72, 80 and 90.
[39] Section 233 of Chapter 2 of the Constitution of South Africa, 1996.

applied a restrictive interpretation of legislative provisions or 'reading in' method, where the meaning of the text is modified or narrowed in order to make it consistent with the purpose.[40] This finds support in English law where modification of the text is required to prevent an absurdity or contradiction to the purpose.[41] 'Severance', on the other hand, is the opposite of 'reading in', where a court would try to rescue a provision by cutting out the offending part.[42]

This research will examine the purpose, interpretation approach as indicated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[43] and application of section 24G of NEMA that is consistent with section 24 of the Constitution and the effective application thereof.

2.4. Common law and the mischief rule

The common law presumption that legislation does not contain futile or nugatory provisions applies when interpreting legislation, acknowledging that legislation has a functional purpose.[44] However, the purpose of the legislation is tantamount to establishing the meaning of the words, in order to avoid futile legislation provisions. Courts must attach a meaning to the words that would promote an efficient, purposive, and practical legislation.[45]

The mischief rule provides for the use of surrounding circumstances to place a provision in context of the purpose of the legislation.[46] The mischief rule implies interpreting the legal position before the legislation was adopted; by ascertaining the defect not provided for in the existing legislation, the remedy that was provided to solve the problem, and what was the true reason for the remedy.[47]

In the chapters to follow, the position before its introduction and its amendments, together with case law and criticisms, will be analysed to determine the mischief or defect in environmental law that section 24G of NEMA aims to address, and if its application is effective.

[40] *Skinner v Palmer* 1919 WLD 39; *Trivett & Co (Pty) Ltd v WM Brandt's Sons & Co* 1975 (3) SA 423 (A).
[41] Maxwell PB and Wyatt-Paine (ed) *On the Interpretation of Statutes*, 6th ed, 2019, 406.
[42] Botha Christo *Statutory Interpretation: An Introduction for students*, 4th edition, 2010, 39.
[43] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012.
[44] Botha Christo *Statutory Interpretation: An Introduction for students, 4th edition, 2010* at 73.
[45] *SA Medical Council v Maytham* 1931 TPD 45; *Esselman v Administrateur* SWA 1974 (2) SA 597 (SWA).
[46] *Haydon's case* (1584) 3 Co Rep 7a (76 ER 637); *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A).
[47] Botha Christo *Statutory Interpretation: An Introduction for students*, 4th edition, 2010, 84.

2.5. Administrative law principles

It is an essential principle of the rule of law that administrative action must be taken in terms of an empowering provision. The Constitution further expressly necessitates lawfulness as a requirement of administrative justice. Just administrative action is encompassed in section 33 of the Constitution,

> '33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must-
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration.'[48]

The national legislation that was enacted to give effect to section 33 (3) of the Constitution is the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Parties affected by administrative action that is unlawful, unreasonable or procedurally unfair have the remedy of review on grounds provided for in PAJA. The Constitutional Court, in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,*[49] recognised this principle by stating that '[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law, to the extent at least that it expresses this principle of legality, is generally understood to be a fundamental principle of constitutional law.'[50]

If the administrator's action does not fall within the ambit of the empowering provision, then the administrator acts *ultra vires,* [51] and the action may be declared invalid by a

[48] Section 33 of the Constitution.
[49] 1999 (1) SA 374 (CC).
[50] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 58.
[51] Section 6(2) (f) (i) of PAJA.

court of law on review. If the empowering provision is misinterpreted, it may be unlawful as a ground for review based on an error of law.[52] Quinot expresses that '[A]dministrative law requires that the administrator must take the administrative action upon a correct interpretation of the applicable law, particularly the empowering provision. If the action is taken on the basis of an incorrect interpretation of the law, it may be unlawful'.[53] Therefore, it is important that section 24G of NEMA be interpreted and applied correctly in order to avoid the administrative action being declared unlawful and nullified.

In respect of the vagueness of legislative provisions, the courts have considered the doctrine of vagueness, and held that '[i]f the legislation can be applied with reasonable certainty in the majority of cases, that is enough, and the fact that in borderline cases it may be extremely difficult to apply, is not a ground for holding the legislation to be void for vagueness.'[54] The doctrine of vagueness was expounded in *Affordable Medicines Trust v Minister of Health of the RSA,*[55]

> '[L]aws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound to it what is required of them so that they may regulate their conduct accordingly…'[56]

With regard to section 24G of NEMA, it is submitted that the provision may not be of perfect lucidity, but it may be interpreted on the basis of reasonableness and rationality consistent with the purpose of the provision, thus not sanctioning the whole provision to be declared void for vagueness.

2.6. Conclusion

It is trite that all legislation and legislative actions must be consistent with the Constitution and the purpose of legislation. Whether the text is unambiguous and not futile is just a part of the

[52] Section 6(2) (d) of PAJA, Hoexter C, *Administrative law in South Africa*,2nd ed, 2012, 282.
[53] Quinot Geo, *Administrative Justice in South Africa: An introduction*, 2nd ed, 2016,140.
[54] *Smith NO and Lardener Burke NO v Wonesayi* 1972 (3) SA 289 (RA) at 296, see Bums Yvonne, *Administrative Law*, 4th ed, 2013 at 456.
[55] 2005 (6) BCLR 529 (CC), 2006 (3) SA 247 (CC).
[56] *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC), 2006 (3) SA 247 (CC).at 108.

interpretation process. The contextual and purposeful interpretation implies that irrespective of any ambiguity on the words, the words must still be interpreted in light of the purpose of the legislation. The interpretation will then be concretized if the meaning of the words or scope of a provision would not result in a futile, unreasonable, impractical and inefficient provision.

In order to ascertain the purpose of the provision or legislation, the use of secondary and external aids will be necessary. In this regard, the headings of the provision, the meaning of words in relation to one another, definitions section of the legislation, the preamble of the legislation, and the historical development or mischief that the provision seeks to address, will be a necessary consideration in the interpretation process.

The rule of law requires that the administrator can only administer an administrative action or decision if the administrator is empowered through the provision. If the administrator acts outside the scope of the empowering provision, then the administrator acts *ultra vires,* even where there was a *bona fide* incorrect interpretation.

In the coming chapters, the effectiveness of section 24G of NEMA to serve a legitimate purpose, will be considered. The meaning of 'continue' with an activity without an operational aspect that is completed, will be established Although unclear in its interpretation and application, it is submitted that section 24G of NEMA cannot be wholly declared void for vagueness, because it is capable of a reasonable, purposeful interpretation. The chapters to follow will consider the text of section 24G of NEMA in relation to other provisions and the identified listed and specified activities. Case law and criticisms from academics will be dealt with in order to ascertain the mischief that section 24G of NEMA aims to address, as well as the shortfalls of the process, in order to construe its effectiveness to serve its legitimate purpose.

CHAPTER 3

ANALYSIS OF SECTION 24G OF NEMA

In applying the contextual interpretation approach, as explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[57] consistent with the constitutional imperatives, this chapter will focus on the analysis and application of section 24G of NEMA. It is only fitting to start by analysing the text of the provision in context, and reconciling it with the purpose of section 24G of NEMA. This will include exploring the criticisms levelled against the provision, and when read in conjunction with the case law, aims to provide an insight into the mischief that the provision seeks to address. These aids will eventually be used to ascertain the purpose of the provision, and to finally examine its effectiveness.

3.1. Deconstructing section 24G of NEMA

For ease of reference and considering this study's focus, the section 24G of NEMA provision is cited in full hereunder. This section to be deconstructed is that of the current version, although an appraisal will be made against previous versions.

> **24G. Consequences of unlawful commencement of activity**
>
> (1) On application by a person who-
>
> (a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1);
>
> (b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008),
>
> the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be, may direct the applicant to-
>
> (i) **immediately cease the activity** pending a decision on the application submitted in terms of this subsection;
>
> (ii) investigate, evaluate and assess the impact of the activity on the environment;

[57] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

(iii) remedy any adverse effects of the activity on the environment;

(iv) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;

(v) **contain or prevent the movement of pollution or degradation of the environment;**

(vi) eliminate any source of pollution or degradation;

(vii) compile a report containing-

(aa) a description of the need and desirability of the activity;

(bb) **an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity**;

(cc) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(dd) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed;

(ee) **an environmental management programme**; or

(viii) **provide such other information** or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.

(2) The Minister, Minister responsible for mineral resources or MEC concerned must consider any report or information submitted in terms of subsection (1) and thereafter may-

(a) refuse to issue an environmental authorisation; or

(b) issue an environmental authorisation to such person **to continue, conduct or undertake the activity** subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary, **which environmental authorisation shall only take effect from the date on which it has been issued**; or

(c) direct the applicant to provide further information or take further steps prior to making a decision provided for in paragraph (a) or (b).

(3) The Minister, Minister responsible for mineral resources or MEC may as part of his or her decision contemplated in subsection (2)(a), (b) or (c) direct a person to-

(a) rehabilitate the environment within such time and subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary; or

(b) take any other steps necessary under the circumstances.

(4) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)(a) or (b).

(5) In considering a decision contemplated in subsection (2), the Minister, Minister responsible for mineral resources or MEC may take into account whether or not the applicant complied with any directive issued in terms of subsection (1) or (2).

(6) The submission of an application in terms of subsection (1) or the granting environmental authorisation in terms of subsection (2)(b) **shall in no way derogate from-**

(a) the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any specific environmental management Act;

(b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.

(7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F(1) or section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC **may defer a decision to issue an environmental authorisation until such time that the investigation is concluded** and-

(a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;

(b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or

(c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review (**emphasis added**).

It is essential to start with the amended heading of the provision. On promulgation of section 24G of NEMA in 2004, the section was headed 'rectification of unlawful commencement or continuing listed activity'. This inevitably created the misperception that the purpose of the provision is to rectify the unlawful commencement. The amendment of the heading to 'consequences of unlawful commencement of activity' in 2013 is indicative that the intention of the legislature was not to rectify unlawful commencement of a listed activity, but to provide a process after the unlawful commencement to address environmental degradation.

Section 24G (1) of NEMA by implication, suggests it is a voluntary process, where the person who commenced an identified listed or specified activity without an environmental authorisation, may submit an application to the competent authority (CA) for environmental authorisation. This voluntary aspect was principally confirmed by *York Timbers Propriety Limited v National Director of Public Prosecutions*[58] where it was held that a person who commenced an activity unlawfully was not legally required to apply in terms of section 24G of NEMA. Kidd, Retief and Alberts are unconvinced of this general application by stating 'whether this principle would be appropriate in every factual circumstance is open to query.'[59] It is submitted that the advantage of the voluntary nature of the process is that the applicant is assumed to be willing to conduct the studies adequately in order to obtain authorisation to continue with the activity. However, it is submitted that an offender is unlikely to voluntarily apply to continue with an unlawful decommissioning activity, especially when the decommissioning can be completed within a short period of time. The question that arises is what would be the position if the offender does not want to apply? The environmental impacts of the unlawful activity would not be assessed and mitigated, and other measures need to be employed such as compliance notices, abatement notices, directives and section 28 (4)

[58] 2015 (1) SACR 384 (GP), 2015 (3) SA 122 (GP).
[59] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, 1261.

procedure, to address environmental degradation. Whether the offender can be forced to apply for a section 24G of NEMA through directives or compliance notices, does not fall within the scope of this study.

On receipt of the application and before a decision on the application, the CA may direct the applicant to *inter alia* cease the activity. The competent authority may also direct the applicant to cease, modify or control any act that is causing pollution or environmental degradation; remedy any environmental effects; investigate, evaluate and analyse impacts on the environment; and compile a report. The report must contain the need and desirability; an environmental management programme; an assessment of the environmental impacts including cumulative impacts; and impacts which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity.

The competent authority may after receipt of the report or any other required information (and after payment of the administrative fine), either refuse authorisation or issue an environmental authorisation to 'continue, conduct or undertake' the activity with conditions. It is expressly required that such authorisation will only take effect on date of issue. It is not expressly indicated what is being authorised or the interpretation of 'continue.' This indicates that the effective date of a section 24G of NEMA authorisation is not retrospective but would provide that the offender may continue with the rehabilitation and other management measures to address future impacts and the damage already occurred.

An investigation by the Environmental Management Inspectorate or the National Prosecuting Authority in relation to section 24F of NEMA will have the effect of the CA deferring the decision on the application until such investigation or prosecution is dispensed with. However, considering the *Uzani* [60] judgment, private prosecution may by necessary implication is also included.

3.2. Environmental management programme

From an environmental perspective, negative environmental impacts (including cumulative impacts of what was already done) may be mitigated through an environmental management

[60] *Uzani Environmental Advocacy CC v BP South Africa* (Case No: CC 82/2017 GP).

programme [61] and conditions regarding rehabilitation. An Environmental Management Programme (EMPr) is a requirement for aiding decision making in NEMA[62] and is specifically required in a report in terms of section 24G (1) (vii) (ee) of NEMA. Section 24N (2) of NEMA prescribes what needs to be included in an EMPr:

> The environmental management programme must contain-
>
> (a) information on **any proposed management, mitigation, protection or remedial measures** that will be undertaken to address the environmental impacts that have been identified in a report contemplated in subsection 24(1A), including environmental impacts or objectives in respect of-
>
> (i) planning and design;
>
> (ii) **pre-construction and construction activities**;
>
> (iii) **the operation or undertaking of the activity in question**;
>
> (iv) **the rehabilitation of the environment**; and
>
> (v) **closure**, if applicable;
>
> (b) details of-
>
> (i) the person who prepared the environmental management programme; and
>
> (ii) the expertise of that person to prepare an environmental management programme;
>
> (c) a detailed description of the aspects of the activity that are covered by the environmental management programme;
>
> (d) information identifying the persons who will be responsible for the implementation of the measures contemplated in paragraph (a);
>
> (e) information in respect of the mechanisms proposed for monitoring compliance with the environmental management programme and for reporting on the compliance;
>
> (f) as far as is reasonably practicable, measures to rehabilitate the environment affected by the undertaking of any listed activity or specified activity to its natural or predetermined state

[61] An Environmental Management Programme is an environmental management decision-aiding tool to provide for proposed mitigation and rehabilitation measures.
[62] Section 24N (1), 1A, and 24N (2) of NEMA.

> or to a land use which conforms to the generally accepted principle of sustainable development; and
>
> (g) a description of the manner in which it intends to-
>
> (i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;
>
> (ii) **remedy the cause of pollution or degradation** and migration of pollutants; and
>
> (iii) comply with any prescribed environmental management standards or practices (emphasis added).[63]

As this provision falls under Chapter 5 of NEMA regarding environmental authorisations, it follows that the EMPr required in section 24G of NEMA would as far as possible contain this prescribed information. The EMPr would propose mitigation and remedial actions for the assessed environmental impacts for the unlawfully commenced activity. This specifically includes the proposed management, mitigation and remedial measures for the construction, operational, decommissioning and rehabilitation aspects of the unlawfully commenced activity. The EMPr therefore would undoubtedly serve to provide environmental management measures for the different phases of the listed activities that commenced unlawfully.

The problem arises when the construction activities, such as cultivation of virgin soil or removal of soil or rock from a watercourse (provided the thresholds are met and if these are the only activities triggered), are completed and no further rehabilitation is required by the CA. Environmental jurisprudence and the text do not explicitly deal with how this irreversible damage is to be dealt with, in light of the express requirement that the authorisation takes effect on the date of issue.

However, it is prescribed that the EMPr must contain information on 'any proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts that have been identified in a report.'[64] It is submitted that remedial measures relates to measures curing or correcting the damage already incurred. The question then arises as to what remedial or corrective measures can be proposed in the EMPr that

[63] 24 N (2) of NEMA.
[64] 24 N (2) (a) of NEMA.

deals with the damage already incurred. It is submitted that this can be addressed by applying environmental offsets, which is discussed further in this chapter.[65]

This interpretation and application however, must be consistent with the purpose of the empowering provision, which is the focus below. Case law, articles and the mischief rule will aid in establishing the purpose of section 24G of NEMA.

3.3. Case law

3.3.1. *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye*[66]

In casu and in the main, the applicants approached the court for an order to compel the respondent to commission an EIA process in terms of the regulations[67] promulgated under section 21 of the ECA or alternatively, in respect of section 24 of NEMA. From the facts, the cultivation of the vineyard and the construction of dams for which the EIA process was sought, were commenced, *albeit* not clear on the stage of cultivation and construction. The listed activities identified were item 1 (j) the construction or upgrading of a dam affecting the flow of a river; item 2 (c) the change of land use from undetermined use to any other land use; and item 2 (d) the change of land use from used for nature conservation to any other land use.[68] It must be noted that the activities that required environmental authorisation are construction activities without an operational aspect.

The court held that EIA is a procedure to ensure official approval is granted for listed activities before such land is put to such use. The court went further by stating that if a person commences an activity without an authorisation, such person acts unlawfully, and it would serve no legal purpose to commission an EIA once the activity has already taken place.[69]

The case is important to this study to the extent that the court recognized that environmental authorisation granted retrospectively does not serve a legitimate purpose, and that

[65] See section 3.6 of this chapter.
[66] *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C), (hereinafter referred to as '*Silvermine*').
[67] GN R1183 in *Government Gazette 18261* of 5 September 1997, as amended.
[68] GN R1183 in Government Gazette 18261 of 5 September 1997, as amended.
[69] *Silvermine*, at 49-54.

there are other civil remedies and criminal prosecution available for the unlawful activity.[70] Notice must be taken that the case was decided before the promulgation of section 24G of NEMA. With this in mind, the court stated that 'insofar as the first respondent requires no further authorisation for the continuation of the vineyard there would be no reason for him at this stage to commission such an investigation'.[71] It is hereby submitted that this obiter remark suggests that an investigation and authorisation for the continuation of the unlawful activity is possible, if legislation is enacted to authorise such. In this regard, section 24G of NEMA is regarded as such a provision, where the likely impact of continuing with the identified activity is ascertained, while taking into consideration the environmental impacts of what has occurred. In any event, the court held that section 21 of the ECA and section 24(1) of NEMA do not permit retrospective authorisation.[72]

3.3.2. *Eagles Landing Body Corporate v Molewa NO*[73]

The applicability of *ex post facto* authorisations was further considered in this case,[74]which was also decided prior to the enactment of section 24G of NEMA. The applicant sought relief to declare the competent authority's decision to authorise the partially constructed peninsula, in terms of the ECA, invalid.

The court reached a nuanced decision to the *Silvermine* case, and allowed the EIA authorisation for the partially completed activity. The court agreed with counsel that;

> 'it would mean that in every case where some construction had been undertaken without the necessary authority (subject, presumably to the *de minimis* rule), authorisation could never be given for the completion of the construction; the developer would first be obliged to remove what he had constructed and only thereafter apply for authorisation before commencing *de novo* with the construction. Counsel contended that that could never have been the intention of the Legislature. The proper approach in such circumstances would be to regard the completion of the construction as the 'proposed'

[70] *Silvermine*, at 49-54.
[71] *Silvermine*,at 49-54
[72] King ND, Strydom HA & Retief FP (eds) Fuggle & *Rabie's Environmental Management for South Africa* 3rd ed, 2018, at 161.
[73] *Eagles Landing Body Corporate v Molewa NO and Other* 2003 (1) SA 412 (T) (Jutastat Publications), (hereinafter referred to as '*Eagles Landing*').
[74] *Eagles Landing*.

> activity and, provided that the authorisation thereof was otherwise valid, that would comply with the spirit and objectives of the legislation'.[75]

Although the judgement is questionable from the doctrine of legality perspective, the *ratio decidendi* suggests that there was a need, at that time, for an authorisation process for the completion of an unlawful commenced activity. However, in identifying a mischief at the time, the court mentioned the *de minimis*[76] rule as a consideration for the continuation of the activity, which suggests that the degree or extent of progression of the activity must not be trifle from an environmental perspective. It is submitted that court suggests the extent at which the activity progressed must not be considered to be trifle to promote the purport of the legislation. On the basis of rationality, the court reasoned that it could not be the intention of the legislature to demolish what had started and completed, and then apply for authorisation *de novo*, only to be then authorised.

3.3.3. *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd*[77]

In the *Hichange* case,[78] the dispute arose from the respondent's semi-processing tannery that produces offensive odours, in the form of Hydrogen Sulphide in its effluent pond, into the atmosphere. The parties to the case agreed that the Second Schedule of the Atmospheric Pollution Prevention Act No.45 of 1965 lists 'sulphide processes' as a process requiring a registration certificate. Subsequent to complaints, and the appointment of an environmental consultant, a provision certificate was issued and amended, but the offensive odours persisted. A directive was then issued to the respondent to put measures to reduce the offensive odours, which was not complied with.

The applicant thereafter sought relief in the court to amongst others, to halt the operations at the tannery, suspend the registration certificate and conduct an Environmental Impact Assessment process in terms of section 28(4) of the NEMA. The court, in its reasoning, distinguished between the facts of this case and from that of the *Silvermine* case, and held that an environmental impact assessment process under section 28(4) to evaluate and assess the impacts

[75] *Eagles Landing* at 101.
[76] The common law maxim *de minimis lex non cural* means 'the law does not notice trifling matters'.
[77] *t/a Pelts Products & Others* 2004 JDR 0040 (E), (hereinafter referred to as '*Hichange*').
[78] *Hichange*.

of the operation of the tannery is available, if the section 28(1) of NEMA[79] is proved. The court reasoned that:

> 'There the court was faced with an application to compel ex *post facto* compliance with s. 22 of ECA or s. 24 of NEMA. Both those sections specifically state that activities which may have an effect upon the environment can only be authorized once an environmental impact report has been considered. The present case, however, involves s. 28 (4) of NEMA which requires the fourth respondent to direct a person who fails to take the measures required under sub-section 28 (1) to, *inter alia,* investigate, evaluate and assess the impact of specific activities and report thereon. In turn, s. 28 (1) applies to a person who "causes, has caused or may cause significant pollution or degradation of the environment". Accordingly, the fourth respondent is entitled to call upon a person who is causing or who has caused significant pollution or degradation of the environment, to investigate, evaluate and assess the impact of his activities and to report thereon. An environmental impact assessment under s. 28 may therefore be required to prevent pollution continuing or recurring, and is not designed solely to enable prior assessment for authorisation to be granted.'[80]

The court thus introduced another form of environmental impact assessment process using section 28 of NEMA, where there is significant pollution. Nevertheless, it must be noted that the specified activity commenced with includes an operational aspect that is, conducting a scheduled process, relating to the release of emissions during the operation of the facility. It does not fall within the scope of this study to consider the correctness of the application of section 28 of NEMA, but the court's remarks suggest that an environmental impact assessment process would be possible for the operational component of the facility.

3.3.4. *Interwaste (Pty) Ltd and Others v Coetzee and Others*[81]

This case concerns a dispute about the unlawful operation of the Genesis landfill site in Johannesburg. The applicants aver that there is no requisite waste management license obtained in terms of NEMWA prior to commencement of the specified activity. The applicants sought an order to interdict the continuation of the operation of the site until a waste management license or permission is obtained.

[79] Duty of Care and Remediation of Environmental Damage.
[80] *Hichange* at 31.
[81] 2013 JDR 0875(GSJ), (hereinafter referred to as '*Interwaste'*).

The landfill site was in operation from 2001, and applications for a section 20 of ECA permit, and section 22 of ECA application were refused by the competent authorities; but the respondent was subsequently advised to apply for a section 24G of NEMA, which was not finalized at the time of judgement. The court held that,

> 'In my view the effect of the rectification applications by Waste Giant Projects in terms of section 24G of NEMA, is to suspend the penal provisions contained in section 24F and by implication any unlawfulness of the landfill operations which the applicants may want to read into these provisions. Section 24G I believe, provides an applicant, who applies for rectification in terms of that section, a moratorium against any further action being taken against the applicant pending the finalisation of the rectification application.'[82]

The court held that the application for an interdict should fail, as the applicants failed to consider other remedies. It further held that section 24G of NEMA suspends the unlawfulness of the landfill site, and that the rectification should be dealt with by the authorities, as it is inappropriate for the court to interfere with the section 24G administrative process.[83]

The criticisms of the case,[84] and the legal uncertainty the court created, undoubtedly prompted amendments to section 24G of NEMA to replace the heading 'rectification' with 'consequence of unlawful commencement'. This amendment is indicative that the purpose of section 24G of NEMA is not to rectify the unlawful commencement of activities, but to provide a process for authorising the further operation of the waste management activity.

3.3.5. *Magaliesberg Protection Association v MEC of Agriculture*[85]

The appellant, the Magaliesberg Protection Association, appealed to the Supreme Court of Appeal, to set aside the MEC's decision to dismiss an appeal brought by it, and sought to overturn the initial decision to grant an '*ex post facto'* authorisation. The appellant also sought an order to demolish the country lodge and to rehabilitate the affected environment.

---

[82] *Interwaste* at 29.
[83] *Interwaste* at 45.
[84] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, Cape Town: Juta & Co (Pty) Ltd, 2018, at 1260.
[85] *Magaliesberg Protection Association v MEC of Agriculture & Others* (563/2012) [2013] ZASCA, (hereinafter referred to as '*Magaliesberg*').

The facts of the case were that one phase of the country lodge, consisting of 47 en-suites, a conference block, a reception and office block, restaurant and a massage parlour, was complete. The development was located within a declared protected area under the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA), which commenced without the necessary environmental authorisation. The listed activity that required environmental authorisation was activity 1(d) for the 'construction of facilities or infrastructure, including associated structures or infrastructure, for resorts, lodges, hotels or other tourism and hospitality facilities in a protected area contemplated in the NEMPAA.'[86] Subsequently, a section 24G of NEMA application was initiated and granted by the competent authority. An internal appeal to the MEC, review application at the High Court, and a court order for an interdict was also dismissed.

On the distinction between pre-construction authorisation and a section 24G authorisation, the court postulated that:

> 'In the first instance it might be possible to avoid any disturbance of the environment and proper surveys could be conducted to determine the precise impact of intended development. In the second instance one is regrettably left with an already disturbed environment which then requires thought to be given to whether any further degradation might occur, coupled with how much actual disturbance of the environment has already occurred. In pre-building approvals demolition considerations are not likely to occur. As stated before, s 24G does not postulate a total prohibition on building in ecologically sensitive areas.'[87]

The court dismissed the appeal, thereby allowing the section 24G of NEMA authorisation. It is however not clear from the facts of the case whether the development was complete at the time of the decision. The significance of this case for the purpose of this study is it suggests that a section 24G of NEMA decision includes addressing future impacts (impacts for the incomplete aspect of the activity) as well as impacts already incurred. However, it is silent on how these impacts already incurred can be managed or addressed effectively.

[86] *Magaliesberg* at 28.
[87] *Magaliesberg* at 56.

3.3.6. *Uzani Environmental Advocacy CC v BP South Africa*[88]

In the first private prosecution case in South Africa on an environmental matter, Judge Spilg held that private prosecution is permitted in terms of NEMA; even after a section 24G of NEMA authorisation was granted. This means that if the competent authority does not consider prosecution for an unlawful activity, private prosecution is possible from affected parties and environmental activists. From this judgment, and section 24G (6) of NEMA, it is clear that the implication is that section 24G of NEMA does not 'rectify' the unlawful commencement of an identified activity, but the continuation of that activity. In other words, section 24G of NEMA does not intend to make the environmental crime of commencing an activity without environmental authorisation, lawful. This case undoubtedly contradicts the *Interwaste* judgment, and provides legal clarity that section 24G of NEMA does not provide immunity from prosecution. Section 24G (6) of NEMA was amended to provide for the application to be deferred until the criminal investigation and prosecution is finalized. The implication of this case is that private prosecution is available where there is no attempt from the CA or the National Prosecuting Authority to proceed with prosecution. Whether this would force the CA into initiating more cases with the National Prosecuting Authority before a section 24G of NEMA decision is made, is still to be seen. In the subsequent *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* (CC82/2017) [2020] ZAGPPHC 222 (15 May 2020) case, the matter to be dealt with is a post-conviction enquiry into the monetary quantum of the advantage that BP Southern Africa (Pty) Ltd gained as a consequence of the offences it was convicted of, in terms of section 34(3) of NEMA. This is not subject to this study, but only to reveal a remedy that may deter the unlawful commencement of activities.

3.3.7. *Supersize Investments*[89]

On its applicability, the court in this case held that section 24G of NEMA is only applicable after a person had been convicted of the unlawful commencement of the activity. Kidd, Retief and

[88] *Uzani Environmental Advocacy CC v BP South Africa* (Case No: CC 82/2017 GP), hereinafter referred to as '*Uzani*').

[89] *Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and Another* (70853/ 2011) [2013] ZAGPPPHC 98 (11 April 2013), (hereinafter referred to as '*Supersize*').

Alberts[90] suggests that the court erred in the application of the law at the time before the amendment, and argued that section 24G of NEMA was used as an alternative to, and not a consequence of prosecution. The subsequent amendments to NEMA in 2013, included, amongst others, the change of the heading of section 24G of NEMA from 'rectification' to 'consequence of unlawful commencement of the activity,' and provided clarity by requiring:

> (6) The submission of an application in terms of subsection (1) or the granting of an environmental authorisation in terms of subsection (2) (b) shall in no way derogate from-
>
> (a) the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any specific environmental management Act;
>
> (b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.
>
> (7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F (1) or section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time that the investigation is concluded and-
>
> (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
>
> (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
>
> (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.[91]

[90] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, at 1258.
[91] Section 24G (6) and (7) of National Environmental Management Laws Second Amendment Act 30 of 2013.

The amendments to NEMA with relation to the heading of the section 24G of NEMA and addition of section 24G (6) of NEMA therefore addressed the inconsistency in the interpretation created by the courts, in this and the above mentioned cases. *Uzani*[92] confirms that criminal prosecution can also follow a section 24G of NEMA authorisation.

3.4. Criticisms of section 24G of NEMA

This section provides an evaluation of common criticisms levelled against environmental authorisations granted in terms of section 24G of NEMA. This will assist, in conjunction with the case law analysed in this study, in highlighting the mischief or defect of section 24G of NEMA, that will be used to interpret the provision.

Kidd referred to section 24G of NEMA as an 'odd procedure,'[93] which was echoed by Kidd, Retief and Alberts,[94] in part because of the issues of the quantum of the administrative fines[95] that accompany section 24G of NEMA applications. In exploring the legal aspects of retrospective or *ex post facto* authorisations for activities that have commenced without environmental authorisation, Basson[96] analysed specifically the *Silvermine, Hichange* and *Eagles Landing* cases against the constitutional environmental right and administrative law principles. Basson concluded that South African law only provides for two forms of EIAs, by also considering foreign jurisdictions. First, in support of the *Silvermine* decision, that an EIA can only be conducted before commencing with an identified activity. The second is a retrospective EIA in terms of section 28 of NEMA, where the significant pollution has started and is continuing. However, the *Eagles Landing* case was criticised for failing to protect the constitutional environmental right, and advanced that retrospective authorisations do not serve environmental interests. This article was published in 2003, before the promulgation of section 24G of NEMA. The evident legal uncertainty and arguments seem to have prompted the introduction of section 24G of NEMA in 2004.

---

[92] *Uzani Environmental Advocacy CC v BP South Africa* (Case No: CC 82/2017 GP).
[93] Kidd Michael, *Environmental Law*, 2nd ed, 2011, 245.
[94] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, chapter 24, 1257.
[95] Section 24G Fine Regulations, Regulation R698, in *Government Gazette* 40994 of 20 July 2017.
[96] JHE Basson 'Retrospective Authorisation of Identified Activities for the purposes of environmental impact assessment' (2003) *South African Journal for Environmental Law and Policy* 10.

When section 24G of NEMA was introduced, it sought to provide legal certainty, but instead created the opposite. Paschke and Glazewski[97] argued that section 24G of NEMA results in an *ex post facto* authorisation that undermines the efficacy of the EIA regime and the environmental right in the Bill of Rights. It was further argued that proposed detrimental impacts to the environment is normally the reason for refusing authorisations, as it serves to prevent ecological degradation. In an *ex post facto* authorisation, the ecological damage is already done, making the reason for refusing authorisation to fall away. An *ex post facto* authorisation would have the effect of 'rubber stamping' the development. Importantly, Paschke and Glazewski pointed out that '[T]he memorandum accompanying the NEMA Second Amendment Bill did not provide a justification or motivation for section 24G. Absent knowledge of the mischief that the new section is seeking to cure, it is difficult to conceive of a reason for any part of it.'[98]

However, a few remedies were proposed that related to the mischief or defect section 24G aims to cure, and also proposed reforms to the provision. It is noted, from the article, that the authors' arguments were based on the premise that the identified activities were completed, and published when the heading was 'rectification of unlawful commencement or continuation of listed activity'. But what was assented to by the authors was that, if *ex post facto* environmental authorisation was necessary, then the provision should only apply in exceptional circumstances, to avoid section 24G of NEMA becoming the norm. These exceptional circumstances were not elaborated on though.

Subsequently, NEMA was amended again in 2008, with amendments to section 24G. The amendment still did not escape criticism. Kohn,[99] in labelling section 24G of NEMA as an 'anomaly' and a 'dubious addition', highlighted the shortcomings of the provision, and at the same time welcomed the administrative fine provision as a possible deterrent to unlawful commencement of identified activities. Kohn strongly argued that section 24G of NEMA disturbingly provides unscrupulous and over-hasty developers with a less stringent process to 'rubber stamp' unlawful activities that have a detrimental impact on the environment.

[97] R Paschke and J Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' *PER/PELJ* 2006 (9) 1.

[98] R Paschke and J Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' *PER/PELJ* 2006 (9) 1at 146.

[99] Lauren Kohn 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' (2012) 19 *South African Journal for Environmental Law and Policy* 113.

The possibility of abuse is great and unfortunate, even with the proposed amendments to increase the administrative fines at the time, and would not serve as an effective deterrent to unlawful commencement of activities.

In citing Kidd and Retief[100], and Paschke and Glazewski[101], Kohn stated on the mischief of section 24G of NEMA:

> '[T]he 24G anomaly' was introduced in the absence of any meaningful legislative explanation as to the nuisance sought to be addressed by the odd provision. The accompanying Explanatory Memorandum stated simply that, "[c]hapter 5 of NEMA requires certain amendments to streamline the process of regulating and administering the impact assessment process". Section 24G was introduced as one of the mechanisms aimed at achieving this broad objective. It was anticipated – *albeit* not explicitly in the Memorandum – that the section would bring developers that had proceeded without the requisite approvals (whether intentionally or inadvertently) back into the regulatory loop by providing authorities with a mechanism to evaluate those activities that had bypassed the EIA system.'

Kohn also highlighted the less stringent nature of section 24G of NEMA process juxtaposed with the minimum requirements of a section 24(1) EIA process, and contended that the section 24G of NEMA process does not make provision for assessing alternatives. This is not disputed and it is further added that the section 24G of NEMA requires a single report that is subject to public participation. There are no Scoping Report and EIA Report phases for LN2 activities,[102] as is required in the section 24(1) EIA process. Kohn argued that the provision is abused in that it is becoming the norm, rather than the exception, as it proves to be 'more cost- effective and efficient to break the law than comply with it'.

[100] Michael Kidd & François Retief 'Environmental Assessment' in H.A Strydom & N.D King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 971-1047 at 994.
[101] R Paschke and J Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' *PER/PELJ* 2006 (9) 1 at 146.
[102] The EIA process involves a two report process if a Listing Notice 2 activity is triggered; a scoping report to include a plan of study for the methodology of the proposed specialist studies is to be accepted before the final EIA report is submitted. Public participation required for each of these phases. This longer process is distinguishable from a basic assessment process required if only Listing Notice 1 and 3 activities are triggered by the project. See EIA regulations and listing notices, *Government Gazette* 38282 of 4 December 2014.

On analysing the statistics and enforcement reports, Kohn concluded that the fines payable do not serve as a deterrent to unlawful commencement, and that state institutions are also 'quick to exploit the S24G shortcut.'[103] Kohn relied on *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd*,[104] *Noordhoek Environmental Action Group v Wiley NO & Others,*[105] *Magaliesberg Protection Association v MEC of Agriculture & Others,*[106] and *The Body Corporate of Dolphin Cove v Kwadukuza Municipality*[107] cases to support the contention that section 24G of NEMA is open to practical abuse and used with vexatious intentions. Kidd, Retief and Alberts acknowledge that 'the approach of dealing with unauthorised activities remains somewhat of a can of worms and s 24G is an unconvincing way of dealing with the problem.'[108]

It is submitted that the problem is exacerbated by acknowledging that roads, bridges, sewer and water pipelines, and low income housing developments, may trigger listed activities[109] and require environmental authorisation before commencement. These projects in most circumstances are service delivery projects conducted by a state department or municipality. Prosecution is seldom an option, if not at all in light of intergovernmental relations, if these state departments or municipalities commence without environmental authorisation. In practice, section 24G of NEMA route does not serve as a deterrent to unlawful commencement, recognising the administrative fine is paid from one organ of state to another. Furthermore, irrespective of the quality of the report or information, a decision to refuse authorisation or even cease the activity is normally not an option, as such action may be met with protest from the community.

Another practical apprehension is decommissioning[110] activities completed without the necessary authorisation. It would be nonsensical, provided there are no

[103] Lauren Kohn 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' (2012) 19 *South African Journal for Environmental Law and Policy* 113.
[104] [2008] JOL 22537 (T).
[105] [2008] JOL 21943 (C)
[106] (563/2012) [2013] ZASCA
[107] (8513/10) [2012] ZAKZDHC 13 (20 February 2012).
[108] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, chapter 24, 1261.
[109] Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327, in *Government Gazette* 40772 of 07 April 2017.
[110] Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327, in Government Gazette 40772 of 07 April 2017., activity 22 and activity 31.

contamination or rehabilitation concerns, to provide for authorisation when the infrastructure is already taken out of active service, and does not exist. This amounts to 'rubber stamping' referred to by Kohn, as a refusal cannot be a competent decision. It is submitted that it would be futile and would not serve a legitimate purpose to authorise or refuse to authorise the already decommissioned facility in this circumstance. The problem is further exacerbated when one considers the possibility of land contamination or pollution that may occur during or before the decommissioning process. The section 24G of NEMA process may take a long period to finalize, during which time urgent assessment or action is required. In any event, it is not expected that an offender would want to pay the administration fine for an authorisation to remove the infrastructure. In instances of suspected pollution, section 28(4) of NEMA and part 8 of NEMWA (regarding contaminated land) may be more appropriate and a quicker option to assess and address negative environmental impacts.

3.5. Purpose of section 24G of NEMA

The approach to interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) is followed in this study. The context and purpose of the provision will be the deciding factor in interpreting section 24G of NEMA, viewed against the rights enshrined in the Constitution. In this regard, the headings of the provision, the meaning of words in relation to one another, definitions section of the legislation, explanatory memorandum, the preamble of the legislation, and the historical development or mischief that the provision seeks to address, will be a necessary consideration in the interpretation process.

The starting point in the interpretation process is the Constitution, and all legislation and administrative action must promote the rights in the Bill of Rights. The environmental right entrenched in section 24 of the Constitution, places an obligation on the state to enact legislation that serve to prevent pollution and ecological degradation, and to promote conservation. NEMA is such enactment, which substantially replaced ECA, and provides the framework for environmental management in South Africa.

The preamble of NEMA mirrors section 24 of the Constitution in that it aims to prevent pollution and ecological degradation, and promote conservation. This is achieved

through the application of the environmental management principles contained in section 2 of NEMA. Section 24G of NEMA falls under the heading 'environmental authorisations', and this implies that the environmental management principles that are applicable to original EIA environmental authorisations apply equally to section 24G of NEMA.

The mischief that section 24G of NEMA seeks to cure can be ascertained from the case law and academic articles. *Silvermine* suggests that an EIA cannot be conducted after the activity has already taken place as it would not serve a legitimate purpose, and that there are other remedies to deal with the unlawful commencement of the activity.

Eagles Landing raised the lacuna that a partially completed activity could never be authorised, and it would be impractical to demolish and then apply for environmental authorisation which would then be authorised. It further suggested that the continuation of the activity be dealt with as a 'proposed activity'. However, it suggested obiter that not all incomplete activities should be dealt with in this way, and the extent of the activity already commenced with, would be a consideration using the *de minimis* rule.

Interwaste however allowed section 24G of NEMA authorisation for a waste activity that included an operational phase. Basson also argued that retrospective authorisations would not serve environmental interests. Kohn elaborated on that assertion and envisaged that the provision was open to abuse, and that it was the norm rather than the exception. This is partly due to the fact that the section 24G of NEMA procedure is less stringent than the section 24(1) of NEMA EIA process. This finds support by Paschke and Glazewski, that section 24G of NEMA should be applicable in exceptional circumstances. The misconception that the provision rectifies the unlawful commencement of the activity was mainly created by the heading 'rectification' at the time. This has been cured by amending it by removing the word 'rectification'. *Uzani* and *Supersize* corrected *Magaliesberg* in that it confirmed the position that criminal sanction is available even though a section 24G of NEMA authorisation was granted.

Kidd, Retief and Alberts maintains the 'primary purpose of s24G is not punitive (that is the purpose of s24F), but to deal with the question of how to deal with the

environmental impacts after they ought to have been considered in an EIA process.'[111] This suggests that the scope is applicable to all activities that commenced unlawfully and at any stage of the activity. This is not disputed in this study, but the manner in which it is applied to deal with impacts already incurred will determine the effectiveness of the provision in circumstances where the activity does not have an operational aspect.

From an environmental perspective, it would seem that if the unlawfully commenced activity is not complete, future impacts will be assessed and considered together with the impacts of what has already been done. This would indeed serve a legitimate purpose and accordingly fall within the ambit of section 24G of NEMA. But from the criticisms and judgments examined in this study, the major problem with section 24G of NEMA is authorising activities where the damage has already been done. It is submitted that conditions relating to environmental offsets for negative environmental impacts already sustained, in addition to appropriate rehabilitation, would be a possible solution, This approach will be explored below.

The purpose of section 24G of NEMA as indicated by Kidd, Retief and Alberts[112] *viz* to deal with impacts that ought to have been considered in an EIA process, is not disputed. It is submitted that the provision serves to identify, evaluate and address negative environmental impacts that has already occurred as well as provide for mitigation measures for damage already incurred and future impacts. These construction and operational measures would be contained in an EMPr that includes rehabilitation. In doing so, the process should not be less stringent (where assessment of alternatives is not an express requirement or no scoping and environmental impact assessment report phases are required in the process), or more attractive than the EIA process, resulting in more developers not opting for an EIA before commencement.

The purpose of section 24G of NEMA has to be consistent with the section 24 right of the Constitution. It must be applied to prevent pollution and ecological degradation, promote conservation and advance the principle of sustainability. Section 24G of NEMA falls under Chapter 5 of NEMA where environmental authorisation processes serves to identify, address and manage environmental impacts. The legislation therefore provides for an assessment

[111] King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, 1260.
[112] . King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, 2018, 1260.

after commencement of the activity on a voluntary basis. The mischief that it seeks to address is the identification, assessment and management of future impacts and the impacts already incurred, after the activity has commenced. The CA has to decide whether it complies with the principle of sustainable development, promote conservation and prevent further pollution and ecological degradation. It is submitted that the scope of section 24G of NEMA generally includes all activities that commenced unlawfully, whether it has an operational aspect or not. It is the application of the provision that will determine whether it meets its legitimate purpose of identifying, assessing and managing impacts for the damage already occurred and for future impacts. Therefore it is submitted that section 24G of NEMA would authorize continuing or conducting the remaining aspect of the activity and allow the applicant to continue with the rehabilitation and other measures to also address the impacts and damage already incurred, after an assessment process. The question then arises as how would the damage already incurred be addressed in section 24G of NEMA?

3.6. An offset as a condition to section 24G of NEMA

The question on how to deal with environmental damage already incurred is still elusive. It is submitted that a requirement for offsets in the process and EMPr would address such a question. Patterson provides the definition of a biodiversity offset as "conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to aspire to no net loss of biodiversity." [113] Essentially, the irreversible damage caused by a completed activity, such as the removal of indigenous vegetation, or moving soil within a watercourse, can be mitigated through compelling the offender to offset such damage *ex situ*. These may include habitat restoration projects, removal of alien invasive species from an area, or investing in protected area projects and community based conservation initiatives. It is submitted that as may be applicable in the original EIA process, it may be an effective mechanism to remedy the damage already incurred. It is anticipated the advantages of the requirement for an offset will be twofold: first, it would promote conservation and mitigate against environmental damage, which is consistent with section 24 of the Constitution and the purpose of NEMA; and second, it creates an additional assessment and obligation that may serve as a deterrent to

[113] King ND, Strydom HA & Retief FP (eds) Fuggle & Rabie's *Environmental Management for South Africa* 3rd ed, 2018, 1260 at 570.

commencing unlawfully. The problem of unlawful commencement is exacerbated in circumstances involving commencement of activities such as clearance of indigenous vegetation or clearing of virgin soil and the area replaced by the construction of structures. The impacts are irreversible and rehabilitation would not address this net loss effectively, if authorized. It is submitted that offsets would be an option in similar circumstances, but would require clear guidelines, continuous management and monitoring to ensure its effectiveness.

3.7. Summary and evaluation

The case law relevant to the consequences of the unlawful commencement of identified listed and specified activities offered nuanced approaches to the scope and application of section 24G of NEMA. From the jurisprudence alluded to in this study, it is submitted that three approaches to environmental impact assessment for identified listed activities are evident. First, is the EIA process in terms of section 24(1) of NEMA, which provides for prospective impact identification and mitigation authorisation process before commencement. Second, is the section 28(4) of NEMA impact identification and mitigation process in circumstances of significant pollution that continues or recurring. The third is the section 24G of NEMA process, which is submitted to be both prospective and retrospective in nature. It is prospective for assessing environmental impacts of the incomplete aspect of the listed activity. The purpose of the provision will be the deciding factor in interpreting section 24G of NEMA, which is capable of surviving constitutional scrutiny. The mischief that it seeks to address is the identification, assessment and management of future and impacts already incurred after the activity has commenced. The CA has to decide whether it complies with the principle of sustainable development, promote conservation and prevent further pollution and ecological degradation. It is submitted that the scope of section 24G of NEMA generally includes all activities that commenced unlawfully, whether it has an operation aspect or not. It is the application of the provision that will determine whether it meets its legitimate purpose of identifying, assessing and managing impacts for the damage already occurred and for future impacts.

Kidd, Retief and Alberts maintains the ‘primary purpose of s24G is not punitive (that is the purpose of s24F), but to deal with the question of how to deal with the

environmental impacts after they ought to have been considered in an EIA process.' It is further submitted that in doing so, its application should not undermine or replace the EIA requirement. Therefore the purpose of section 24G of NEMA is to identify, assess and manage the already incurred damage together with future impacts arising from an unlawful commenced activity. The section 24G of NEMA decision would either be a refusal to authorize or an authorisation to continue with the rehabilitation and management of future impacts and impacts already incurred. The decision of environmental authorisation with its conditions must be consistent with promoting conservation, preventing further pollution and ecological degradation. It is not the scope of the provision, but the application of it that would determine its effectiveness.

Section 24G of NEMA does make provision for an EMPr. Section 24G of NEMA falls under the heading 'environmental authorisations', and implies that the prescribed EMPr contents for EIA also apply to section 24G of NEMA. The EMPr provides for any proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts that have been identified in a report. It is submitted that remedial measures relates to measures curing or correcting the damage already incurred. One such remedial measure can be the requirement for environmental offsets, which serves to employ conservation actions *ex situ* intended to compensate for the residual environmental damage caused by development projects, so as to aspire to no net loss of biodiversity. It is anticipated the advantages of the requirement for an environmental offset will be twofold: first, it would promote conservation and mitigate against environmental damage already incurred, which is consistent with section 24 of the Constitution and the purpose of NEMA; and second, it creates an additional assessment and obligation that may serve as a deterrent to commencing unlawfully.

CHAPTER 4

EIA REGIME AND LISTED ACTIVITIES

From the previous chapter, section 24G of NEMA was a process applicable when a listed activity commenced without the requisite EIA authorisation. It is therefore necessary to consider the original EIA framework in South Africa. It is incumbent for the identified listed and specified activities that require environmental authorisation to be analysed and evaluated, so that the scope of section 24G of NEMA can be placed in context.

4.1. International environmental law

For the purpose of completeness, it is essential to first consider the international environmental impact assessment authorisation scheme. The recognition that a concerted international effort is required to protect the planet from environmental threats and harm is found in international instruments such as the Stockholm Declaration of the United Nations Conference on the Human Environment,[114] Rio Declaration on Environment and Development,[115] the Draft Articles on State Responsibility prepared by the International Law Commission,[116] and the World Commission on Environment and Development (Brundtland Commission),[117]

The instrument recognized as a tool to identify and evaluate environmental risks is the Environmental Impact Assessment process.[118] International acceptance of the environmental impact assessment process, in the cross-border pollution context, is found in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* where it was stated an environmental impact assessment:

> 'has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a

[114] 1972 11 *ILM* 1416
[115] 1992 31 *ILM* 874
[116] Report of the International Law Commission *GAOR* 56th Session, Supplement 10 (A/56/10), Dugard, J *International Law: A South African Perspective* 4ed (2011), Juta & Co Ltd, Cape Town, 19 at 402.
[117] World Commission on Environment and Development report *Our Common Future*, UN Doc GA/42/427 (1987) at 43.
[118] Stockholm Declaration of the United Nations Conference on the Human Environment (1972) 11 *ILM* 1416.

> significant adverse impact in a transboundary context, in particular, on a shared resource.'[119]

The Espoo Convention[120] defined it as a 'national procedure for evaluation of the likely impact of a proposed activity on the environment.' [121] The Rio Declaration on Environment and Development stated the 'environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'.[122] It is clear from the use of the words 'likely', 'risk' and 'proposed activity', that the environmental impact assessment (EIA) decision process precedes the activity being undertaken. Therefore an environmental impact identification and evaluation process will be required to inform the decision to grant environmental authorisation. Accordingly, the South African environmental authorisation regime will now be considered.

4.2. South African Constitution

The EIA regime in South Africa arises from the environmental right in the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as 'the Constitution'). This fundamental right, entrenched in section 24 of the Constitution, states that:

> '24. Everyone has the right—
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

The legislative measures to prevent pollution and ecological degradation, to promote conservation, and to confirm South Africa's commitment to the principle of sustainable

[119] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Reports at 204.
[120] 1991 United Nations Convention on Environmental Impact Assessment in a trans-boundary context, Philippe Sands *Principles of International Environmental Law* 2nd ed (2003)at 799.
[121] Article 1(vi) 1991 United Nations Convention on Environmental Impact Assessment in a trans-boundary context.
[122] Principle 17 of the Rio Declaration on Environment and Development (1992) 31 *ILM* 874.

development, are enacted in NEMA which repealed most parts the Environmental Conservation Act (ECA). The identified listed and specified activities contained in both these pieces of legislation will now be analysed and evaluated.

4.3. ECA and listed activities

Most of environmental jurisprudence is based on the ECA requirements[123] although it is in most part replaced by NEMA.[124] Nevertheless, it is essential for this study to consider the authorisation requirements and the mischief that section 24G of NEMA seeks to address.

Under section 21 of the ECA, identified listed activities requiring prior environmental authorisation were promulgated.[125] It is necessary for the purpose of this study, and considering that a vast majority of the court cases evaluated relates to these activities, to include the full list of activities:

> 1. The construction, erection or upgrading of -
>
> (a) facilities for commercial electricity generation with an output of at least 10 megawatts and infrastructure for bulk supply;
>
> (b) nuclear reactors and facilities for the production, enrichment, processing, reprocessing, storage or disposal of nuclear fuels and wastes;
>
> (c) with regard to any substance which is dangerous or hazardous and is controlled by national legislation -
>
> (i) infrastructure, excluding road and rail, for the transportation of any such substance; and
>
> (ii) manufacturing, storage, handling, treatment or processing facilities for any such substance;
>
> (d) roads, railways, airfields and associated structures;
>
> (e) marinas, harbours and all structures below the high-water mark of the sea and marinas, harbours and associated structures on inland waters;
>
> (f) above ground cableways and associated structures;
>
> (g) structures associated with communication networks, including masts, towers and reflector dishes, marine telecommunication lines and cables and access roads leading to those structures, but not including above ground and underground

[123] Kidd Michael, *Environmental Law*, 2nd ed, Cape Town: Juta & Co (Pty) Ltd, 2011, at 236.
[124] NEMA expressly repealed section 21, 22 and 26 of ECA that relates to listed activities and the EIA process.
[125] Section 22(1) of ECA, GNR 1182 in *Government Gazette* 18261 of 5 September 1997, as amended.

telecommunication lines and cables and those reflector dishes used exclusively for domestic purposes;

(h) racing tracks for motor-powered vehicles and horse racing, but not including indoor tracks;

(i) canals and channel's, including structures causing disturbances to the flow of water in a river bed, and water transfer schemes between water catchments and impoundments;

(j) dams, levees and weirs affecting the flow of a river;

(k) reservoirs for public water supply;

(l) schemes for the abstraction or utilisation of ground or Surface water for bulk supply purposes;

(m) public and private resorts and associated infrastructure;

(n) sewage treatment plants and associated infrastructure;

(o) buildings and structures for industrial, commercial and military manufacturing and storage of explosives or ammunition or for testing or disposal of such explosives or ammunition;

2. Change of land use from-

(a)…

(b)…

(c) Agricultural or zoned undetermined use or an equivalent zoning, to any other land;

(d) use for grazing to any other form of agricultural use; and

(e) use for nature conservation or zoned open space to any other land use.

3. The concentration of livestock, aquatic organisms, poultry and game in a confined structure for the purpose of commercial production, including aquaculture and mariculture;

4. The intensive husbandry of, or importation of, any plant or animal that has been declared a weed or an invasive alien species.

5. The release of any organism outside its natural area of distribution that is to be used for biological pest control.

6. The genetic modification of any organism with the purpose of fundamentally changing the inherent characteristics of that organism.

7. The reclamation of land, including wetlands, below the high-watermark of the sea, and in inland water;

8. The disposal of waste as defined in section 20 of the Act, excluding domestic waste, but including the establishment, expansion, upgrading or closure of facilities for all waste, ashes and building rubble;

9. Scheduled processes listed in the Second Schedule to the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965).

10. The cultivation or any other use of virgin ground.[126]

Evident in the list of identified activities, are activities related only to 'construction' or physical activities with a limited life span, and others that include an operational aspect including mining related activities with a limited lifespan.

The EIA process[127] was set out in order to reach a decision: an environmental authorisation decision referred to as a 'record of decision'. The ECA was a pre-constitution piece of legislation and the identified listed activities did not have thresholds. Reform, in most part replacing the ECA, was introduced in the form of NEMA.

4.4. NEMA and listed activities

NEMA provides a framework for environmental management and guides the Specific Environmental Management Acts (SEMAs)[128] and the regulations promulgated thereunder. The preamble to NEMA includes the principle of sustainable development, and clearly states the purpose of NEMA is to 'prevent pollution and ecological degradation' and 'promote conservation.' In exercising its functions, the competent authority must consider and apply the principles as set out in Chapter one of NEMA. Included are the sustainable development principle, environmental justice and equity principles, environmental governance, and precautionary principle.[129]

Of pivotal importance to this study, is Chapter five headed 'integrated environmental management.' Under this Chapter, section 24 is headed 'environmental

[126] GNR 1182 in *Government Gazette* 18261 of 5 September 1997, as amended.
[127] GNR 1183 in *Government Gazette* 18261 of 5 September 1997, as amended.
[128] NEMA defines it as: "specific environmental management Act" means-
(a) the Environment Conservation Act, 1989 (Act No. 73 of 1989);
(b) the National Water Act, 1998 (Act No. 36 of 1998);
(c) the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003);
(d) the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004);
(e) the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004);
(f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008);
(g) the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008); or
(h) the World Heritage Convention Act, 1999 (Act No. 49 of 1999),
and includes any regulation or other subordinate legislation made in terms of any of those Acts;
[129] Section 2 of NEMA.

authorisations.' Section 24(1) of NEMA requires environmental authorisation[130] to be obtained from the competent authority for only identified listed and specified activities. The Minister, or MEC (member of the executive committee) in concurrence with the Minister, may identify activities that may not commence without an environmental authorisation. It is accepted a development may trigger a number of activities, and Kidd correctly points out that authorisation is granted for the activities triggered, rather than the development as a whole.[131]

Commencing [132] or continuing with a listed or specified activity without environmental authorisation is prohibited under section 24F (1) of NEMA, and it is an offence[133] to commence a listed or specified activity without first obtaining environmental authorisation, unless any of the defences[134] apply. The prohibition to 'commence, undertake or conduct a waste management activity', without compliance with the norms and standards or a waste license, is expressly provided for in NEMWA.[135] It is important to note the words 'undertake' and 'conduct' are used in connection with the waste management activities (which are mostly operational in nature) and are incorporated in section 24G of NEMA.

The identified listed activities enacted under NEMA has expanded the identified ECA activities and included thresholds based on size, quantity and dimensions. These identified activities are currently listed in the listing notices[136] (Listing Notices 1, 2 and 3). A necessary list of selected activities to highlight the scope, thresholds and differentiation is provided below.

[130] Definition of environmental authorisation in NEMA: 'when used in Chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act.'
[131] Kidd Michael, *Environmental Law*, 2nd ed, 2011,245.
[132] Definition of commence in NEMA: 'when used in Chapter 5, means the start of any physical implementation in furtherance of a listed activity or specified activity, including site preparation and any other action on the site or the physical implementation of a plan, policy, programme or process, but does not include any action required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity.'
[133] Section 49A (1) (a) of NEMA.
[134] Section 30A of NEMA provides for the dispelling of the requirement for environmental authorisation under emergency situations.
[135] Section 20 of the National Environmental Management: Waste Act 59 of 2008.
[136] Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327, in *Government Gazette* 40772 of 07 April 2017, Amendments to the EIA Regulations listing Notice 2 of 2014, Regulation 325, in *Government Gazette* 40772 of 07 April 2017, and Amendments to the EIA Regulations listing Notice 3 of 2014, Regulation 324, in *Government Gazette* 40772 of 07 April 2017.

The table provides an extract of selected listed[137] and specified activities, as it is not practical to include all the identified activities:

Activities without an operational aspect	
Activity 9 of Listing Notice 1 of EIA regulations, 2014(as amended)	The development of infrastructure exceeding 1 000 metres in length for the bulk transportation of water or storm water— (i) with an internal diameter of 0,36 metres or more; or (ii) with a peak throughput of 120 litres per second or more; excluding where— (a) such infrastructure is for bulk transportation of water or storm water or storm water drainage inside a road reserve or railway line reserve; or (b) where such development will occur within an urban area.
Activity 19 of Listing Notice 1 of EIA regulations, 2014 (as amended)	The infilling or depositing of any material of more than 10 cubic metres into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 10 cubic metres from a watercourse; but excluding where such infilling, depositing, dredging, excavation, removal or moving— (a) will occur behind a development setback; (b) is for maintenance purposes undertaken in accordance with a maintenance management plan; (c) falls within the ambit of activity 21 in this Notice, in which case that activity applies; (c) occurs within existing ports or harbours that will not increase the development footprint of the port or harbour; or (d) where such development is related to the development of a port or harbour, in which case activity 26 in Listing Notice 2 of 2014 applies.
Activity 13 of Listing Notice 2 of EIA regulations, 2014 (as amended)	The physical alteration of virgin soil to agriculture, or afforestation for the purposes of commercial tree, timber or wood production of 100 hectares or more.
Activity 22 of Listing Notice 1 of EIA regulations 2014 (as amended)	The decommissioning of any activity requiring – (i) a closure certificate in terms of section 43 of the Mineral and Petroleum Resources Development

[137] EIA regulations and listing notices, *Government Gazette 38282* of 4 December 2014, Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327 in *Government Gazette* 40772 of 07 April 2017, Amendments to the EIA Regulations listing Notice 2 of 2014, Regulation 325, in *Government Gazette 40772* of 07 April 2017, Amendments to the EIA Regulations listing Notice 3 of 2014, Regulation 324, in *Government Gazette 40772* of 07 April 2017 (hereinafter referred to as EIA Regulations, 2014 as amended).

	Act, 2002 (Act No. 28 of 2002); or (ii) a prospecting right, mining right, mining permit, production right or exploration right, where the throughput of the activity has reduced by 90% or more over a period of 5 years excluding where the competent authority has in writing agreed that such reduction in throughput does not constitute closure; but excluding the decommissioning of an activity relating to the secondary processing of a – (a) mineral resource, including the smelting, beneficiation, reduction, refining, calcining or gasification of the mineral resource; or (b) petroleum resource, including the refining of gas, beneficiation, oil or petroleum products; – in which case activity 31 in this Notice applies
Activity 31 of Listing Notice 1 of EIA regulations, 2014 (as amended)	The decommissioning of existing facilities, structures or infrastructure for— (i) any development and related operation activity or activities listed in this Notice, Listing Notice 2 of 2014 or Listing Notice 3 of 2014; (ii) any expansion and related operation activity or activities listed in this Notice, Listing Notice 2 of 2014 or Listing Notice 3 of 2014; (iii) … (iv) any phased activity or activities for development and related operation activity or expansion or related operation activities listed in this Notice or Listing Notice 3 of 2014; or (v) any activity regardless the time the activity was commenced with, where such activity: (a) is similarly listed to an activity in (i)or (ii) above; and (b) is still in operation or development is still in progress; excluding where— (aa) activity 22 of this notice applies; or (bb) the decommissioning is covered by part 8 of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) in which case the National Environmental Management: Waste Act, 2008 applies.
Activity 12 of Listing Notice 3 of EIA regulations, 2014 (as amended)	The clearance of an area of 300 square metres or more of indigenous vegetation except where such clearance of indigenous vegetation is required for maintenance purposes undertaken in accordance with a maintenance management plan… **in a geographical sensitive area-emphasis added and areas not added here.**
Activity 32 of Listing Notice 1 of EIA regulations, 2014 (as amended)	The continuation of any development where the environmental authorisation has lapsed and where the continuation of the development, after the date

	the environmental authorisation has lapsed, will meet the threshold of any activity or activities listed in this Notice, Listing Notice 2 of 2014 or Listing Notice 3 of 2014.
Activities with operational component	
Activity 25 of Listing Notice 1 of EIA regulations, 2014 (as amended)	The development and related operation of facilities or infrastructure for the treatment of effluent, wastewater or sewage with a daily throughput capacity of more than 2 000 cubic metres but less than 15 000 cubic metres.
Activity 4 of Listing Notice 2 of EIA regulations, 2014 (as amended)	The development and related operation of facilities or infrastructure, for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of more than 500 cubic metres.
Activity 6 of Listing Notice 2 of EIA regulations, 2014 (as amended)	The development of facilities or infrastructure for any process or activity which requires a permit or licence or an amended permit or licence in terms of national or provincial legislation governing the generation or release of emissions, pollution or effluent, excluding— (i) activities which are identified and included in Listing Notice 1 of 2014; (ii) activities which are included in the list of waste management activities published in terms of section 19 of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) in which case the National Environmental Management: Waste Act, 2008 applies; (iii) the development of facilities or infrastructure for the treatment of effluent, polluted water, wastewater or sewage where such facilities have a daily throughput capacity of 2 000 cubic metres or less; or (iv) where the development is directly related to aquaculture facilities or infrastructure where the wastewater discharge capacity will not exceed 50 cubic metres per day.

Table 1: Selected EIA activities

On a proper examination of the identified listed and specified activities included in the table, the distinguishable operational and non-operational aspects of activities are prominent. The identified activities include the word 'development' [138] and others include the words

[138] Amendments to the EIA Regulations listing Notice 3 of 2014, Regulation 324, in *Government Gazette* 40772 of 07 April 2017 defines: "development" means the building, erection, construction or establishment of a facility,

'development and operation'. The 'development and operation of…' is identified as one activity and an environmental authorisation is required for both aspects. The list also includes activities relating to 'decommissioning' and 'expansion' of facilities. It follows that a section 24G of NEMA 'authorisation' should have the similar scope.

In terms of NEMWA, the specified activities include the construction of the waste facilities for the storage and transfer, recycling, recovery, treatment and disposal of waste.[139] The intimation is that the activities have an operational aspect. In terms of NEMAQA, the specified activities[140] are listed and relate to air emissions which rationally have an operational aspect. The section on the consequence of unlawful commencement of specified activities incorporates, in most part *verbatim,*[141] a section 24G of NEMA process.[142]

It is interesting that activity 32 of listing notice 1 of the EIA Regulations, 2014 (as amended), was included as a listed activity. It provides for an EIA authorisation for the continuation of activities where the authorisation has lapsed, where such continuation will meet the thresholds of the activity. In terms of sub-regulation 26 (d) (ii) of the EIA Regulations, 2014 (as amended), an environmental authorisation must include the period for which authorisation is granted where the scope of authorisation does not include an operational aspect. The consequence of this is that if the non-operational activity is commenced after a valid authorisation is granted, but is not complete within the validity period, the authorisation lapses and a new application must be lodged to complete the activity. Thus, this is indicative that the legislature makes provision for an environmental authorisation for the continuation of an activity after it has commenced. In this regard, an assessment and evaluation of the cumulative and proposed impacts for an incomplete activity must be considered before authorisation for the continuation of the activity is granted. It is submitted that section 24G of NEMA would in part be applied in the same manner; a non-operational activity that commenced and authorisation is required to complete the activity.

---

structure or infrastructure, including associated earthworks or borrow pits, that is necessary for the undertaking of a listed or specified activity, but excludes any modification, alteration or expansion of such a facility, structure or infrastructure, including associated earthworks or borrow pits, and excluding the redevelopment of the same facility in the same location, with the same capacity and footprint.

[139] Schedule 1(section 19) of the National Environmental Management: Waste Act 59 of 2008.

[140] Section 21 of the National Environmental Management: Air Quality Act 39 of 2004.

[141] *Verbatim* means word for word, exactly.

[142] Section 22A of the National Environmental Management: Air Quality Act 39 of 2004.

With regard to decommissioning, two activities are applicable *viz* activity 22 of Listing Notice 1 of EIA regulations, 2014 (as amended) and activity 31 of Listing Notice 1 of EIA regulations, 2014 (as amended). The former is applicable to mining related infrastructure and closure. The latter is applicable to any listed activity that has an operational aspect, but excludes infrastructure on contaminated land.[143]

The problem lies with a decommissioning activity[144] in instances where the infrastructure is already removed, and the rehabilitation is considered acceptable. It is submitted to be nonsensical and superfluous to provide for authorisation when the infrastructure is already taken out of active service, and does not exist. In this circumstance, authorisation or refusal would be absurd and not serve a legitimate purpose. It would be absurd to refuse the decommissioning or cease it, except to deal with the rehabilitation or possible pollution, which can be effectively dealt with using other administrative remedies. It may not be economically feasible or practical for an offender to pay the administrative fine when the infrastructure is already removed and the site rehabilitated. Section 28 of NEMA directives, section 31A of ECA directives or section 31L compliance notices would be appropriate and quicker administrative tools[145] in addressing the rehabilitation or pollution impacts.

4.5. Summary

It is evident that section 24G of NEMA is framed under the heading 'environmental authorisations', implying that the scope of authorisation for listed activities that are applicable to the EIA process also apply to section 24G of NEMA. The identified activities requiring environmental authorisation listed in regulations enacted under the ECA and NEMA were amended numerous times. Nevertheless, the striking feature consistent throughout are the identified and specified activities distinguishable on the basis of those having an operational aspect to those that do not, including decommissioning activities. Activity 32 of Listing Notice 1 of the EIA Regulations, 2014 (as amended), provides for an EIA authorisation, after commencement, for the incomplete part of a listed activity. This is similar to the section 24G of

[143] Part 8 of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) would apply where a contamination assessment would be required to be conducted.
[144] Activity 22 and activity 31 of EIA regulations, 2014 (as amended in Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327 in *Government Gazette* 40772 of 07 April 2017)).
[145] See Kotze (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, 2009, 225.

NEMA authorisation; except that in the section 24G of NEMA no authorisation was granted for the completed part of the activity. With regard to decommissioning activities, it is submitted that it would be impractical to provide for authorisation when the infrastructure is already taken out of active service, and does not exist, apart from rehabilitation or pollution control conditions. Other administrative tools may be a more effective option, in these circumstances. In any event, the offenders would not willingly pay for administrative fines for authorisation for infrastructure that is already taken out of service.

CHAPTER 5

CONCLUSION

5.1. Conclusion

This study sought to answer the primary question: is the scope and application of section 24G of NEMA, in its current form, effective in serving its legitimate purpose? In doing so, two secondary questions are proposed; how can section 24G of NEMA be applied to deal with the already disturbed environment or the irreversible impacts incurred and, is it practical for decommissioning activities to fall within the scope of section 24G of NEMA?

It was prudent to first establish the purpose and scope of the provision. The purpose of section 24G of NEMA is to identify, assess and manage the damage already incurred, together with future impacts arising from an unlawful commenced activity. The resultant section 24G of NEMA decision would either be a refusal to authorize or an authorisation to conduct or continue with the rehabilitation and management of future impacts and impacts already incurred. This however, does not derogate from criminal prosecution for commencing the activity without environmental authorisation, both during or after the process. From the purpose, it is submitted that all activities irrespective of whether the activity has an operational aspect or not, would fall within the scope of section 24G of NEMA. However, it is the application of the provision that would determine its effectiveness.

The major issue is how to deal with impacts or damage already incurred. The EMPr is an important aspect of section 24G of NEMA process in that it proposes management measures for future construction and operational impacts of the listed activity, as well as remedial measures for damage already incurred, after the assessment. It is submitted that remedial measures would relate to measures correcting or remedying the irreversible damage already incurred. One such remedial measure can be the requirement for environmental offsets that can be assessed in the process, and the EMPr would set out the responsibility, management and monitoring of it. The offset serves to employ conservation actions ex situ intended to compensate for the residual environmental damage caused by development projects, so as to aspire to no net loss of biodiversity or ecological integrity. It is anticipated the advantages of the

requirement for an environmental offset will be twofold: first, it would promote conservation and mitigate against environmental damage already incurred, which is consistent with section 24 of the Constitution and the purpose of NEMA; and second, it creates an additional assessment and obligation that may serve as a deterrent to commencing unlawfully. When applied in this way, section 24G of NEMA will serve its legitimate environmental purpose of managing future impacts, as well as the environmental damage already incurred.

On the question regarding completed decommissioning activities,[146] it is submitted that although decommissioning activities falls within the scope of section 24G of NEMA, in certain circumstances it would be impractical and superfluous to provide for authorisation or refuse authorisation when the infrastructure is already taken out of active service, and does not exist. In this circumstance, authorisation or refusal would be impractical, absurd and not serve a legitimate purpose. A section 28 of NEMA directive, section 31A of ECA directive or section 31L of NEMA compliance notice would be appropriate and a quicker administrative tool[147] in addressing the rehabilitation or pollution impacts. An offender may not voluntarily apply for removing the infrastructure that is no longer needed and is completed, from an economic perspective. The undesirable effect of including a completed decommissioning activity within the section 24G of NEMA net from an environmental perspective is resultant delay in addressing pollution issues in comparison to other quicker administrative options. For these reasons, it is not practical for decommissioning activities that have already been taken out of service, to be considered by the CA in section 24G of NEMA.

It is therefore concluded that although section 24G of NEMA is not of perfect lucidity, it is capable of being applied with reasonable certainty. The use of environmental offsets as a remedial measure for addressing the damage already incurred, and by excluding decommissioning activities that have already been completed from its application, section 24G of NEMA can be applied effectively to serve its legitimate purpose.

[146] Activity 22 and activity 31 of EIA regulations, 2014 (as amended).
[147] See Kotze (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, 2009, 225.

5.2. Recommendations

In the absence of major law reform, the following is recommended:

1. The EMPr is a fundamental aspect of section 24G of NEMA. It proposes mitigation measures for future construction and operational impacts, as well as remedial measures for damage already incurred. The future impacts and rehabilitation is not contentious and would be dealt with as in an EIA. To effectively deal with the environmental damage already incurred, it is proposed that environmental offsets or offset agreements be an obligatory inclusion in the requisite process and EMPr of a section 24G of NEMA report. A guideline on the implementation of environmental offsets in the section 24G of NEMA process would be necessary to ensure consistency.
2. Decommissioning activities that is at an advanced stage should be excluded from the application of section 24G of NEMA. Rehabilitation and pollution mitigation measures, if required, can be effectively and urgently addressed by the use of other administrative tools such as compliance notices and directives.

BIBLIOGRAPHY

Case Law

South Africa

Affordable Medicines Trust v Minister of Health of the RSA 2006 (3) SA 247 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC).

BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W).

Commissioner, SARS v Executor, Frith's Estate 2001 (2) SA 261 (SCA).

Eagles Landing Body Corporate v Molewa NO and Other 2003 (1) SA 412 (T).

Engels v Allied Chemical Manufacturers (Pty) Ltd 1993 (4) SA 45.

Esselman v Administrateur SWA 1974 (2) SA 597 (SWA).

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC).

Geyser v Msunduzi Municipality 2003 (5) SA 19 (N) 321.

Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelts Products & Others 2004 JDR 0040 (E).

Interwaste (Pty) Ltd and Others v Coetzee and Others 2013 JDR 0875(GSJ).

Jaga v Dönges 1950 (4) SA 653 (A).

Kalla v The Master 1995 (1) SA 261 (T) 269C-G.

Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd [2008] JOL 22537 (T).

Kruger v Presidential Insurance Co Ltd 1994 (2) SA 495 (D).

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga Province 2007 (6) SA 4 (CC).

Magaliesberg Protection Association v MEC of Agriculture & Others (563/2012) [2013] ZASCA.

Mjuqu v Johannesburg City Council 1973 (3) SA 421 (A).

Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

Noordhoek Environmental Action Group v Wiley NO & Others [2008] JOL 21943 (C).

Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South African and Others 2000 (3) BCLR 241 (CC).
Principal Immigration Officer v Hawabu 1936 AD 26.
Public Carriers Association v Toll Road Concessionaries (Pty) Ltd 1990 (1) SA 925 (A) 934.
R v Hildick-Smith 1924 TPD 68.
SA Medical Council v Maytham 1931 TPD 45.
Santam Insurance Ltd v Taylor 1985 (1) SA 514 (A).
South African Transport Services v Olgar 1986 (2) SA 729 (C).
Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others 2002 (1) SA 478 (C).
Skinner v Palmer 1919 WLD 39.
Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and Another (70853/ 2011) [2013] ZAGPPPHC 98 (11 April 2013).
Smith NO and Lardener Burke NO v Wonesayi 1972 (3) SA 289 (RA.
Swanepoel v Johannesburg City Council 1994 (3) SA 789 (A).
The Body Corporate of Dolphin Cove v Kwadukuza Municipality (8513/10) [2012] ZAKZDHC 13 (20 February 2012).
Transnet Ltd v Ngcezula 1995 (3) SA 538 (A).
Trivett & Co (Pty) Ltd v WM Brandt's Sons & Co 1975 (3) SA 423 (A).
University of Cape Town v Cape Bar Council 1986 (4) SA 903 (A).
Uzani Environmental Advocacy CC v BP South Africa (Case No: CC 82/2017 GP).
Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2020] ZAGPPHC 222 (15 May 2020).
Venter v R 1907 TS 910 914.
York Timbers Propriety Limited v National Director of Public Prosecutions 2015 (1) SACR 384 (GP), 2015 (3) SA 122 (GP).

International

Haydon's case (1584) 3 Co Rep 7a (76 ER 637).
Pulp Mills on the River Uruguay (Argentina v Uruguay) 2010 ICJ Reports at 204.

Legislation

Amendments to the 2010 EIA Regulations and Listing Notices, Regulation R1159, in Government Gazette 33842 of 10 December 2010.

Amendments to the EIA Regulations listing Notice 1 of 2014, Regulation 327, in Government Gazette 40772 of 07 April 2017.

Amendments to the EIA Regulations listing Notice 2 of 2014, Regulation 325, in Government Gazette 40772 of 07 April 2017.

Amendments to the EIA Regulations listing Notice 3 of 2014, Regulation 324, in Government Gazette 40772 of 07 April 2017.

Atmospheric Pollution Prevention Act No.45 of 1965.

Constitution of the Republic of South Africa, Act 108 of 1996.

Environmental Conservation Act 73 of 1989.

EIA Regulations R1182, R1183 and R1184, in Government Gazette 18261 of 5 September 1997.

EIA Regulation R385, in Government Gazette 28753 of 21 April 2006.

EIA Regulation R386, in Government Gazette 28753 of 21 April 2006.

EIA Regulation R387, in Government Gazette 28753 of 21 April 2006.

EIA Regulation R543, in Government Gazette 33306 of 18 June 2010.

EIA regulations and listing notices, Government Gazette 38282 of 4 December 2014.

Interpretation Act 33 of 157.

Interpretation Amendment Act of 1961.

Interpretation Amendment Act 42 of 1977.

National Environmental Management Act 107 of 1998.

National Environmental Management Amendment Act 8 of 2004.

National Environmental Management Amendment Act 62 of 2008.

National Environmental Management Laws Second Amendment Act 30 of 2013.

National Environmental Management: Air Quality Act 39 of 2004.

National Environmental Management: Biodiversity Act 10 of 2004.

National Environmental Management: Integrated Coastal Management Act 24 of 2008.

National Environmental Management: Protected Areas Act 57 of 2003.

National Environmental Management: Waste Act 59 of 2008.

Promotion of Administrative Justice Act 3 of 2000.

Section 24G Fine Regulations, Regulation R698, in Government Gazette 40994 of 20 July 2017.

Literature

Books

Botha Christo *Statutory Interpretation: An Introduction for students,* 4th edition, Cape Town: Juta & Co (Pty) Ltd, 2010.

Bums Yvonne, *Administrative Law,* LexisNexis Pty (Ltd): South Africa, 4th ed, 2013.

Currie Iain & de Waal Johan, *The Bill of Rights Handbook* 6ed (2015).

Higginson Chris, *Common law Latin maxim reference dictionary*: Createspace Independent Publishing Platform, 2017.

Hoexter Cora, *Administrative law in South Africa*, Cape Town: Juta & Co, 2nd ed, 2012.

Kotze (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta & Company (Pty) Ltd, 2009, 148.

Kidd Michael, *Environmental Law*, 2nd ed, Cape Town: Juta & Co (Pty) Ltd, 2011.

King ND, Strydom HA & Retief FP (eds) *Fuggle & Rabie's Environmental Management for South Africa* 3rd ed, Cape Town: Juta & Co (Pty) Ltd, 2018.

Maxwell PB and Wyatt-Paine (ed) *On the Interpretation of Statutes*, 6th ed, Sweet and Maxwell Ltd, London, 2019.

Quinot Geo, *Administrative Justice in South Africa: An introduction*, 2nd ed, Oxford University Press Southern Africa (Pty) Ltd, 2016.

Articles

Basson JHE 'Retrospective Authorisation of Identified Activities for the purposes of environmental impact assessment' (2003) *South African Journal for Environmental Law and Policy* 10.

Kohn Lauren 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' (2012) 19 *South African Journal for Environmental Law and Policy* 113.

Paschke R and Glazewski J 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' *PER/PELJ* 2006 (9) 1.

International Instruments

Draft Articles on State Responsibility, prepared by the International Law Commission Report of the International Law Commission GAOR 56th Session, Supplement 10 (A/56/10).

Rio Declaration on Environment and Development 1992 31 ILM 874.

Stockholm Declaration of the United Nations Conference on the Human Environment 1972 11 ILM 1416.

World Commission on Environment and Development report Our Common Future, UN Doc GA/42/427 (1987) at 43.

Espoo Convention, 1991 United Nations Convention on Environmental Impact Assessment in a trans-boundary context.

Appendix 1: Ethical Clearance Certificate

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Poovindrin Moodley (218088111)
School Of Law
Pietermaritzburg

Dear Mr Poovindrin Moodley,

Protocol reference number: 00007322
Project title: Examining the scope and application of section 24G of the National Environmental Management Act 107 of 1998 (NEMA).

Exemption from Ethics Review

In response to your application received on 10/02/2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law