

**The obligation on environmental authorities to consider socio-economic
factors in EIAs: A critical examination of s 24 of NEMA**

by

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Abstract

Environmental impact assessments were developed in the United States with an object to build into the decision-making processes an awareness of environmental considerations. EIAs were imported into South African law and the scope somewhat expanded. In addition to the obligation to consider the impact of activities on the environment, the obligation to consider the impact of activities on socio-economic factors was categorically stated in subsection 24(1) and further endorsed by subsection 24(7) of the National Environmental Management Act which laid down the minimum mandatory requirements for an EIA. This was further reinforced by the Constitutional Court judgment in *Fuel Retailers Association of southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*.

Both subsections 24(1) and 24(7) were amended in 2004 and 2008. The 2004 and 2008 amendment Acts removed reference to socio-economic factors from subsection 24(1) and removed the investigation of impacts on socio-economic factors from the minimum mandatory EIA requirements under subsection 24(7). This is notwithstanding the fact that the principles of environmental management and the objectives of integrated environmental management in the same Act somewhat require the procedures for investigation to take into account the socio-economic factors likely to be affected.

The main objective of this dissertation was to investigate the nature of this obligation and to critically analyse the reasons that might have prompted the parliament to enact subsequent amendments to the Act. Hansards debates and various parliamentary reports were conducted in the study in order to find the reasons for the amendments.

Declaration

I **KELELLO PULE** declare that

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As a candidate's Supervisor I agree/ do not agree to the submission of this dissertation.

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Professor Ed Couzens

Acknowledgments

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Acronyms

ANC	African National Congress
BAR	Basic Assessment Report
BUSA	Business Unity South Africa
CBA	Cost Benefit Analysis
CEQ	Council for Environmental Quality
CER	Centre for Environmental Rights
CONNEPP	Consultative National Environmental Policy Process
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DWAF	Department of Water Affairs
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act
EIA	Environmental Impact Assessment
EMI	Environmental Management Inspectors
EIR	Environmental Impact Assessment Report
EIS	Environmental Impact Statement
EU	Europe Union
GDACE	Gauteng Department of Agriculture, Conservation and Environment
I&Aps	Interested and Affected Parties
IAIA	International Association of Impact Assessment
IDRC	International Development Research Centre
IEM	Integrated Environmental Management
LRC	Legal Resource Centre
MEC	Member of Executive Council
MPA	Magaliesberg Protection Association
MPE	Magaliesberg Protected Environment
NCOP	National Council of Provinces
NEMAA	National Environmental Management Amendment Act
NEMA	National Environmental Management Act
NEMLA	National Environmental Management Laws Amendment Act
NEPA	National Environmental Policy Act
NPA	National Prosecuting Authority
PAJA	Promotion of Administrative Justice Act
RoD	Record of Decisions
S&EIR	Scoping and Environmental Impact Assessment Report
SAPS	South African Police Services
SCA	Supreme Court of Appeal
US	United States

Chapter 1

1. The Obligation on environmental authorities to consider socio-economic factors in EIAs: A critical examination of s 24 of NEMA.

1.1. Background

Concerns about environmental degradation and the optimal use of natural resources are not issues of very recent emergence. As early as the second half of the twenty-first century, opinion had already developed that certain species of animals and plants might be extirpated. Discovery of minerals, and subsequent exploitation was the key to economic growth and expansion since time immemorial. The need for expansion was reliant on the discovery of more land and resources ‘anything that was old was useless, probably unhealthy and ripe for removal if it stood in the way of progress. Only where superstition (or faith) stood in the way did temples and holy places remain unscathed’.¹

Unlimited and uncontrolled exploitation² of resources and indiscriminate³ handling of waste became a major threat to the environment and human health. For instance, several injunctions were brought before the Supreme Court of the United States, either to stop the actions of mining companies (from releasing noxious gases from their works) and federal agencies where such actions were detrimental to the environment and human health.⁴ But it was not until the burning of the Cuyahoga River⁵ in Ohio Cleveland in 1969 that the Federal government decided to introduce an environmental policy. To address these concerns the US enacted a pioneering statute directed towards environmental management – the National Environmental Policy Act (NEPA) which was passed as the law in 1970. The purpose of NEPA was to ‘build into the decision-making processes of the federal agencies an awareness of environmental considerations’.⁶ NEPA enjoined federal agencies to make a full and adequate analysis, of the environmental effects of their programs or actions.⁷ NEPA

¹ I Thomas *Environmental Impact Assessment in Australia: Theory and Practice* 2 ed (The Federation Press 1998) 9.

² *Georgia v Tennessee Copper Company* Supreme Court of United States 206 US 230; 27 Ct 618. Decided in May 1907.

³ See *Missouri v Illinois and the Sanitary District of Chicago* Supreme Court of the United States 200 US 496 February 1906. Also the *Trail Smelter* arbitration of 1926 to 1934; Award April 16, 1938, and March 11 1941- the first case of air pollution case to come before the international tribunal brought against the United States by Canada.

⁴ See cases cited in n 2 and 3 above.

⁵ The incident is discussed below.

⁶ J H Baldwin *Environmental Planning and Management* (1985 Westview Press/ Boulder and London) 244.

⁷ S 102 of NEPA.

prescribed a procedure for compiling an environmental impact statement (EIS). The primary purpose of an EIS was to disclose the environmental impacts or consequences of a proposed activity or project to alert decision-makers, the public and the president of the US Congress of the environmental consequences involved.⁸

The passing of NEPA in the US raised awareness about the importance of building into decision-making processes an awareness of environmental considerations and other countries with similar challenges developed legislation requiring EIAs to be performed in respect of activities that could adversely affect the environment. In 1973 the Federal Cabinet of Canada adopted the Environmental Assessment Review Process (EARP), which was subsequently replaced by Canadian Environmental Impact Assessment in 1992. Similar Directives were adopted by the European Union (EU).⁹ EU members were compelled under the Directive to adopt and develop mechanisms for applying Environmental Impact Assessment (EIA).

Once a settled practice in the US and other parts of the world, EIAs were introduced in South Africa by 'South African Companies which were subsidiaries of, or wished to do business with foreign companies which required high ethical standards in respect of environmental impacts';¹⁰ or 'even in the genuine interest of wise use of natural resources'.¹¹ Whatever the reason was, there was always an understanding, at least subliminal, that socio-economic aspects were an integral part of EIA processes.¹²

It would appear that the need to integrate socio-economic factors in EIAs was born out of the observation that, while unlimited development was detrimental to the environment¹³ the

⁸ S 102 (2)(c).

⁹ EIA Directive (85/337/EEC). Available at <http://ec.europa.eu/atoz> accessed 1 April 2014.

¹⁰ E Couzens and M Lewis 'South Africa' in *International Encyclopaedia of Laws: Environmental Law*, K Detetelaere, Alphen aan den Rijn, NL: Kluwer Law International, 2013 at 1009.

¹¹ J Ridl and E Couzens 'Misplacing NEMA? A consideration of some problematic aspects of South Africa's new EIA Regulations' *PER/PELJ* 2010 (2010) 13 at 82/189.

¹² See FJ Kruger, BW van Wilgen, A Weaver and T Greyling 'Sustainable Development and the environment: lessons from St Lucia Environmental Impact Assessment' (1997) 93 *South African Journal of Science* 23. In particular the process for EIA was initiated in September 1989, following the publication of an initial impact assessment by the proponent of the mining option (Richards Bay Minerals, RBM). The second EIA was initiated shortly after the commencement of the Environment Conservation Act 73 of 1989 which had come into operation on the 9th June 1989.

¹³ See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at 21G; para [44]. Ngcobo said 'unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development'.

societies' developmental needs could not be neglected. From the 1980s onward¹⁴ the Government's policy with regard to the environment was set out as follows:

[a] golden mean between dynamic development and the vital demands of environmental conservation should constantly be sought. The aim is, therefore, that man and nature should constantly exist in productive harmony to satisfy the social, economic and other expectations of the present and future populations.¹⁵

The Environment Conservation Act,¹⁶ which came into effect in 1989, introduced the requirement of mandatory EIAs. But what it failed to do at the time 'was to explain how an EIA was to be performed'.¹⁷ Even though the Act did not prescribe procedure for the EIAs, nonetheless socio-economic factors often found their way into the final environmental impact assessments reports.¹⁸ The procedure for the EIA was introduced in 1997, when EIA Regulations¹⁹ were promulgated under the ECA.²⁰ The ECA required the environmental impact assessments reports to include the identification of the economic and social interests which may be affected by the activity in question.²¹ But the ECA EIA Regulations confined the content of the report to environmental matters and made no specific reference to socio-economic factors that could suffer from adverse impacts from the proposed activity.²²

Following the Rio Earth Summit of 1992,²³ South Africa gave support to the international Agenda 21.²⁴ Participating parties were required to select the most appropriate elements of the Agenda 21 programme for implementation in their own states. South Africa choose to implement environmental policy and reported to the UN Commission on Sustainable Development in April 1997, that regulations have been passed under the Environment Conservation Act that require identified activities to go through an EIA process. South Africa also reported that the National Environmental Management Act has been adopted and this

¹⁴ See White Paper on a National Policy on National Environmental Management Systems for South Africa. Department of Environmental Affairs, 1993.

¹⁵ White Paper on a National Policy regarding Environmental Conservation. Department of Water Affairs, Forestry and Environmental Conservation, 1980.

¹⁶ Act 73 of 1989.

¹⁷ E Couzens and M Lewis. 'South Africa' in *International Encyclopaedia of Laws: Environmental Law*, edited by Kurt Deketelaere. Alphen aan den Rijn, NL: Kluwer Law International, 2013 at 1009.

¹⁸ S Bekker 'St Lucia: What rules for the referee? (1994) 11 *Indicator South Africa* 83-87.

¹⁹ GN R1183 of 5 September 1997.

²⁰ Ibid.

²¹ S 26(a)(iv).

²² See GN R 1183 of 5 September 1997.

²³ United Nations Conference on Environment and Development (UNCED), 1992.

²⁴ The United Nations Conference on Environment and Development (UNCED) 1992. Agenda 21 is a detailed blueprint for implementing sustainable development at different levels of government.

makes it a requirement that an environmental assessment be carried out in relation to any activity, which requires legal authorisation if it may significantly affect the environment.²⁵ Adoption of environmental impact assessments into environmental policy was also in line with Principle 17 of the Rio Declaration. The principle states that environmental impact assessment 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 authority.

When the National Environmental Management Act²⁶ (NEMA) came into force in 1999, it introduced a section for environmental impact assessment couched in the following terms

In order to give effect to the general objectives of integrated environmental management...the potential impact on -

- (a) the environment
- (b) socio-economic conditions; and
- (c) the cultural heritage,

of activities that require authorization or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of an activity.²⁷

Whereas there are many possible interpretations to s 24 of NEMA, drawing upon academic literature²⁸ and case law²⁹ it was accepted that s 24 imposed an obligation on environmental authorities (organs of the state charged by law with authorising implementation of activities) to consider the impact of activities on socio-economic factors. One other possible interpretation could be that, the developer/proponent or the Environmental Assessment

²⁵ Economic Aspects of Sustainable Development in South Africa available at <http://www.un.org/esa/agenda21/natlinfo/countr/safrica/> accessed 23 November 2014.

²⁶ Act 107 of 1998.

²⁷ S 24(1) of NEMA.

²⁸ A Ramdhin 'The use of the EIA process to protect purely commercial interests: the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment and Environment, Mpumalanga Province and Others*' (2008) 15 SAJELP 127, 130. 'The wording of NEMA as originally promulgated, appears to make it explicitly clear that the mandate of environmental authorities includes the consideration of socio-economic conditions'. See also M Kidd 'Removing the green-tinted spectacles: The three pillars of sustainable development in South African environmental law' 2008(15) SAJELP 85, 90. 'While I agree with the finding of the Court that socio-economic considerations are integral to an environmental authorization...'

²⁹ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at 28 para 63- the Constitutional Court held '...NEMA makes it abundantly clear that the obligation of environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility'.

Practitioner (EAP) considers, investigates and assesses the impact of the proposed activity, inter alia, on socio-economic factors and prepares a report to be submitted to the authorities. Upon receipt of the report, the authority would consider whether the proponent had undertaken the tasks of assessment as prescribed by the Act. Influenced by the findings flowing from the investigation and assessment of the potential impact of the activity on the environment and socio-economic factors the authority could decide whether or not to approve the proposed activity and issue or decline a licence to commence the activity.

The courts,³⁰ and in particular the Constitutional Court, emphasized the need for both the developers and authorities to take into account socio-economic factors as mandated by s 24 of NEMA. The judgment in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*³¹ devoted a significant amount of time to considering this obligation, its origin and its import in South African law. It was decided that environmental authorities had an obligation to consider the impact of activities on the socio-economic factors. In particular, the Constitutional Court emphasized that this mandate came directly from s 24 of NEMA.

1.2. Problem Statement

However, substantive amendments were made to s 24 by the 2004³² and 2008³³ amendments. First, the heading of s 24 was changed from ‘implementation’ to ‘environmental authorisations’. Second, both amendments deleted reference to socio-economic conditions and cultural heritage in s 24(1) of the Act. The amendments also removed assessment and investigation of potential impacts of activities on the social economic conditions and cultural heritage from the minimum procedures for the investigations, assessment and communication of impacts. The Act presently reads ‘in order to give effect to the general objectives of integrated environmental management laid down in this chapter (chapter 5), the potential consequences for or impacts on the environment ... must be considered, investigated, assessed and reported on to the competent authority’.³⁴

³⁰ See *MEC for Agriculture, Conservation Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 319 (SCA). *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation Environment and Land Affairs* 2004(5) SA124 (W).

³¹ 2007(6) SA 4 (CC).

³² National Environmental Management Amendment Act 62 of 2004.

³³ National Environmental Management Amendment Act 8 of 2008.

³⁴ S 24(1) NEMAA 62 OF 2008.

When the matter in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*³⁵ was heard by the Courts, the relevant law was that which was in force at the time when the cause of action arose. The ECA, its associated Regulations and the original s 24 of NEMA was the law in force.

The amendments have not been well received. In Kidd and Retief's view the removal of reference to socio-economic factors 'may well lead to the reinforcement of the view that environmental law is concerned solely with "green" issues and not with environmental justice'.³⁶ According to Ramdhin 'this omission is undesirable as it appears to move away from a sustainable development paradigm, and casts doubt on whether or not environmental authorities are in fact obliged to take socio-economic considerations into account when deciding applications for authorisation in the EIA process'.³⁷ Assumptions too, have been made on the effect of the amendment. The Constitutional Court's statement in the footnote was that the effect of the 2004 amendment was tempered by the standing provisions of s 23(2)(b). Kidd observes that the removal of cultural heritage from the Act is tempered by close consideration of the definition of the environment in the Act.³⁸ He is also of the opinion that the removal of socio-economic conditions and cultural heritage from the Act seems unlikely to make any difference to the obligation of environmental authorities to consider these factors in the environmental authorisation process. He continues 'this is because the obligation is still imposed by s 2 and 23(2)(b) of the Act'.³⁹ But others are apprehensive about the omission of socio-economic conditions from the Act. It is thus observed that the omission 'casts doubt on whether or not environmental authorities are obliged to take socio-economic considerations into account when deciding applications for authorisation in the EIA process'.⁴⁰

Apart from the Act, the Environmental Impact Assessment Regulations promulgated pursuant to s 24 of the Act prescribe the procedure for carrying out environmental assessment. They

³⁵ 2007(6) SA 4 (CC).

³⁶ M Kidd and F Retief 'Environmental Assessment' in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 997-1047 at 1027.

³⁷ A Ramdhin, n28 above at 130.

³⁸ M Kidd and F Retief 'Environmental Assessment' in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed 97-1047 at 1026.

³⁹ M Kidd 'Removing the green-tinted spectacles: the three pillars of sustainable development in South African environmental law' (2008) 15 *SAJELP* 85-102 at 100.

⁴⁰ A Ramdhin, n28 above at 130.

also prescribe the criteria to be taken into account by environmental authorities when deciding applications for environmental authorisations. When making the decision, the authority may accept or reject the application if it does not substantially comply with the regulation. This is a directory conferring discretionary power on the authority to determine which factors should form the compliance requirement. Included in the list of information to be contained in the environmental assessment report is a description of the environment that may be significantly affected by the proposed activity and the manner in which the social, economic and cultural aspects of the environment may be affected by the proposed activity and also a description of the need and desirability of the proposed activity-socio-economic factors.

1.3. Research questions

- whether environmental authorities are under an obligation to consider the impact of activities on the socio-economic conditions;
- and, if so, the extent of that obligation?
- how does the EIA authority, the repository of the discretionary power, know which factors or facts are relevant to the exercise of discretion;
- and the extent to which the courts may control the exercise of such discretionary power?

1.4. Methodology

To answer the above research questions, the dissertation will discuss the law regulating Environmental Impact Assessments in South Africa. In particular, the dissertation will focus on Section 24 of NEMA, highlighting the significance and impact of each amendment on the obligation of environmental authorities to consider the impact of activities on the socio-economic conditions. An attempt will also be made to ascertain the differences, if any, between the phrases ‘implementation’ and ‘environmental authorisation’ and their implications.

1.5. Structure

CHAPTER ONE

The research problem is introduced.

CHAPTER TWO

The origins of EIAs and their purpose are traced. The chapter discusses the procedure for regulating EIAs under the 1997-2006 in South Africa EIA Regime. The obligation imposed on the regulator and the regulated under the regime are also discussed.

CHAPTER THREE

This chapter looks at the obligation imposed on the environmental authorities under the 2010 EIA Regime. The main focus of this chapter is to answer the first and the second research questions. The 2010 EIA Regulations are discussed in conjunction with NEMAA of 2008.

CHAPTER FOUR

The Chapter looks at the judgment in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, conservation and Environment, Mpumalanga Province and Others* and the opinions of different commentators on the judgment. The aim is to highlight differing opinions on the obligation of the environmental authorities to consider socio-economic factors.

CHAPTER FIVE

The chapter discusses the nature of discretion conferred on the environmental authorities by the regulations to determine the compliance requirements and the extent to which the courts may control the exercise of such discretionary power.

CHAPTER SIX

Conclusion and recommendations.

APPENDICES

APPENDIX A

Ex post facto EIAs are considered. The chapter looks at how the *ex post facto* EIA may adversely affect the social and economic factors. It looks at the impact of *ex post facto* on socio-economic factors.

APPENDIX B

The chapter focuses on the enforcement and implementation of EIA in South Africa. Main focus is placed on s 24F and 24G of NEMAA, 2008.

Chapter 2

2. The origins of EIAs and their purpose. The 1997-2006 EIA Regime and the obligations imposed on the regulator and the regulated by the law

2.1. Introduction

EIAs were introduced and developed in the US. They were introduced by the National Environmental Policy Act (NEPA) in 1969, which was passed as law in 1970. NEPA was the federal government's response to the growing concerns about environmental degradation. The passing of the law in 1970 could be considered a belated response, given that injunctions had been brought against federal agencies and companies where their actions caused damage to the environment as early as the 18th century.⁴¹ In *Missouri v Illinois and Sanitary District of Chicago*,⁴² the state of Missouri sought an injunction restraining the defendants an authority responsible for the construction and maintenance of an artificial canal that carried sewage off the Illinois River and deposited it into the Mississippi River. It was alleged that the maintenance of the channel created a continuing nuisance, dangerous to health of the neighbouring state. The bill also alleged that if the actions of the defendants were not restrained the accumulation of sewage deposits would poison the water supply necessary for domestic, agricultural and manufacturing purposes to the detriment of the inhabitants of Missouri. In *Georgia v Tennessee Copper Company*⁴³ a bill was filed by the state of Georgia, for a resolution to enjoin the defendant copper companies from discharging noxious gases from their works over the plaintiff's territory. It was alleged that such discharge destroyed forests, orchards and crops.

Although not the first incident, the burning of the Cuyahoga River in Cleveland on June 22, 1969 was the final straw that caught the attention of the City, the state and the nation.⁴⁴ The fire was caused by the floating pieces of oil and slicked debris, in the US's most polluted river at the time of the incident. The debris was ignited by sparks from a train passing over

⁴¹ See *Missouri v Illinois and the Sanitary District of Chicago* Supreme Court of the United States US. 496 February 1906; the *Trail Smelter* arbitration of 1926 to 1934. Award: April 16, 193, and March 11, 1941; *Georgia v Tennessee Copper Company* Supreme Court of the United States 206 US 239; 27 ct 618 May, 1907 decided.

⁴² Ibid.

⁴³ See n 41 above.

⁴⁴ D Stradling and P Stradling 'Perception on the burning river: deindustrialization and Cleveland's Cuyahoga River' (2008) 13 *Environmental History* 515-535. Stable URL: <http://www.jstor.org/stable/25473265> accessed on April 1, 2014.

the bridge that crossed the river.⁴⁵ Following this incident the Congress took steps towards resolving issues of pollution and environmental degradation. In the same year a National Environmental Policy Act (NEPA) was enacted and passed as law in 1970.

Under NEPA the Congress declared its national environmental policy⁴⁶ and established a Council on Environmental Quality (CEQ).⁴⁷ CEQ was enjoined by the Act to prepare annually a report indicating among others, the status and condition of major natural, manmade or altered environmental classes.⁴⁸ Under NEPA federal agencies were required to prepare an environmental impact statement (EIS) which ‘would disclose the environmental consequences of a proposed action or project to alert decision-makers, the public, the president of the US of the environmental consequences involved’.⁴⁹

The EIS ought to contain a detailed statement of the environmental impact of the proposed action,⁵⁰ any adverse environmental effects which could not be avoided were the proposal implemented,⁵¹ alternatives to the proposed action,⁵² the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,⁵³ and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁵⁴

EIA gained recognition as a mechanism for identifying environmental consequences of projects or actions which were likely to have a significant impact on the environment. Countries like Canada and the European Community began to develop mechanisms for applying EIAs in their directives and legislation.⁵⁵

⁴⁵ D Stradling and P Stradling n 44 above.

⁴⁶ See s 101 of NEPA.

⁴⁷ S 102 of NEPA.

⁴⁸ S 202.

⁴⁹ J H Baldwin *Environmental Planning and Management* (Westview Press/ Boulder and London 1985) 244.

⁵⁰ S 102(2)(C)(i).

⁵¹ S 102(2)(C)(ii).

⁵² S 102 (2)(C)(iii).

⁵³ S 102 (2)(C)(iv).

⁵⁴ S 102 (2)(C)(V).

⁵⁵ See the Canadian Environmental Assessment Review Directive of 1973 and Environmental Assessment Act (S.C 1992, C. 37). See also EIA Directive (85/337/EEC) available <http://www.ec.europa.eu/environment/eia/full-legal-text> accessed 3 April 2014.

2.2. Evolution of environmental impact assessments in South Africa

As in the US and other parts of the world, there was an increasing deterioration in environmental quality in South Africa. Scarce water supply, air pollution, and depletion of natural resources were some of the issues that confronted the country.⁵⁶ As a result there was a need for environmental protection; and the result was the enactment of legislation aimed at conserving the environment.⁵⁷ The first attempt to codify legislation aimed directly at protecting the Environment was through the enactment of the Environment Conservation Act in 1982.⁵⁸

2.2.1. The Environment Conservation Act, 100 of 1982

The 1982 Act established a number of bodies with the object of coordinating actions liable to have an influence on the environment.⁵⁹ The Act established a Council for the environment.⁶⁰ The Council had tasks similar to those of the US council (CEQ).⁶¹ It had to report annually to the Minister, but unlike CEQ the South African council was not required to prepare an environmental impact statement or report.⁶² Although the Act did not provide for EIA as a mechanism for regulating activities likely to have a significant impact on the environment, it was however regarded as ‘an adequate legislative response to the environmental imperatives which were coming to be seen as more and more important’.⁶³

EIA was not provided for in the 1982 Act, notwithstanding the fact that its significance as a tool for identifying impacts of activities that would significantly affect the environment had been recognised in South Africa as early as the 1970s.⁶⁴ In particular, 1979 marked a formal recognition of the need to include environmental considerations into the decision-making

⁵⁶ J Glazewski *Environmental Law in South Africa* (Butterworths Durban 2000) 4. See J Glazewski *Environmental Law in South Africa* 2 ed (Lexis Nexis Butterworth 2004) 5.

⁵⁷ Ibid.

⁵⁸ Act 100 of 1982.

⁵⁹ Long title of the Act.

⁶⁰ S 2 of the 1982 Act.

⁶¹ See s 8.

⁶² S 8(1)(a),(b).

⁶³ M Kidd *Environmental Law: A South African Guide* (1997) 47.

⁶⁴ M Kidd and Retief ‘Environmental Assessment’ in HA Strydom and ND King (eds) *Fuggle&Rabie’s Environmental Management in South Africa* 2 ed (2009) Ch 7 at 974. See Table 27.1 Historic EA Benchmark events in South Africa. Also see S Schewella and JJ Muller ‘Environmental Administration’ in Fuggle and Rabie (eds) *Environmental Management in South Africa* (1992 Juta&co, Ltd) 64, 72-75.

process.⁶⁵ In that year members of the general public, organizations, governments, academics gathered at a symposium on ‘shaping our environment’.⁶⁶ The main objectives of the symposium were to emphasize the value of EIA as an aid to the management of environmental changes and to examine the various methods of EIA, with a view to incorporating the principles of EIA into guidelines for use by professional planners.⁶⁷

In 1980, a White Paper on a National Policy regarding Environmental Conservation was published. It aimed at ‘the promotion of environmental education and the institutionalization of environmental studies, which were singled out, in it as possible solutions’⁶⁸ to soil conservation, noise pollution, marine pollution, radiation pollution and solid waste management.⁶⁹ Government’s policy with regard to the environment was set out as follows:

The Government policy is that a golden mean between dynamic development the vital demands of environmental conservation should constantly be sought. The aim is, therefore, that man and nature should constantly exist in productive harmony to satisfy the social, economic, and other expectations of the present and future populations.

However, it was recognised that it would be hasty and inappropriate for South Africa to adopt the US and European ‘model’ of EIAs without taking into account its own peculiar socio-economic and developmental needs.⁷⁰ It was also observed that environmental assessment directs ‘considerable attention at long-time or inter-generational ecological criteria, aesthetic

⁶⁵ <http://planet.botany.uwc.ac.za/nsl> accessed 16.11.2013 at 16:37 P.M. M Sowman, R Fuggle and G Preston Environmental Policy Making: A review of the Evolution of Environmental Evaluation Procedures in South Africa. University of Cape Town, Rondebosch, South Africa

⁶⁶ M Snowman, R Fuggle and G Preston n 65 above.

⁶⁷ GE Blight ‘Shaping our Environment’ (1980) 22 *The Civil Engineer in South Africa* 135-136.

⁶⁸ S Schewella and JJ Muller ‘Environmental Administration’ in Fuggle and Rabie (eds) *Environmental Management in South Africa* (1992 Juta&co, Ltd) 64-84 at 73.

⁶⁹ Another direct outcome of the White Paper was the Environment Conservation Act 100 of 1982.

⁷⁰ <http://planet.botany.uwc.ac.za/nsl> accessed 16.11.2013 at 16:37 PM. M Sowman, R Fuggle and G Preston Environmental Policy Making: A review of the Evolution of Environmental Evaluation Procedures in South Africa. University of Cape Town, Rondebosch, South Africa. The White Paper above- the greatest single challenge in the application of a unique South African environmental policy is without doubt to reconcile the ideals, expectations and aspirations of developed and developing components of the community. The exceptional cultural diversity of the South African population requires that a unique approach to environmental must be found. The approach to this must be based on sound economic, scientific and practical principles. It will also be necessary to guard against unrealistically high environmental standards and long-term environmental conservation objectives will have to be commensurate with the health or well-being of all components of the population. In this regard ‘south Africa should vigorously pursue economic development, subject to the maintaining the services and quality of environmental resources and the setting of environmental standards for all sectors of the economy’ (PC1/1991 4.3.1)

considerations educational interests not economic growth and development'.⁷¹ It was also recognised that 'in most less-developed countries concern for future is less pressing as present needs for food, shelter and security'.⁷² These factors constrained the immediate import of EIAs into South African environmental policy.

2.2.3. The Environment Conservation Act, 73 of 1989

However, 'pressure was exerted on the South African government by the international community to introduce EIAs as a legal mechanism for regulating activities likely to have a significant effect on the environment'.⁷³ Consequently, in 1989 the Environment Conservation Act⁷⁴ was enacted. The ECA enjoined (although the language used is 'may') the Minister to identify activities that may have a substantial detrimental effect on the environment.⁷⁵ Once identified no person was allowed to undertake such unless written authorisation had been granted by the Minister or the competent authority.⁷⁶ The Act empowered the Minister to make regulations concerning the scope and content of environmental impact report.⁷⁷

2.2.4 . Convention on Environmental Impact Assessment in a Transboundary Context 1991 (ESPOO CONVENTION)

At international level the Convention on Environmental Impact Assessment in a Transboundary Context⁷⁸ (Espoo Convention) was adopted. South Africa is not a party to the Espoo Convention but the information that was to be contained in the environmental report under the ECA EIA regulations,⁷⁹ NEMA and its associated regulations⁸⁰ mirrors the information to be included in the environmental impact assessment document as required by

⁷¹ White Paper Policy on a National Environmental Management Systems for South Africa at 2.3; The Government is committed to a programme of research on the environment in order to establish an equitable balance between the reasonable needs of man and the effective protection of the environment. The government is also committed to the promotion of environmental awareness at all levels of the society through the provision of information and through education and training as outlined in the White Paper on Environmental Education (1989).

⁷² GR Preston, N Robinson and RF Fuggle 'Integrated Environmental Management' in Fuggle and Rabie (eds) *Environmental Management in South Africa* (1992) 748.

⁷³ See the Third World Wilderness Congress, October 1983 Inverness and Findhorn, Scotland.

⁷⁴ Act 73 of 1989.

⁷⁵ S 21 of the ECA.

⁷⁶ S 22 of the ECA.

⁷⁷ S 26.

⁷⁸ On 22 February 1991.

⁷⁹ Discussion to follow below.

⁸⁰ Discussion to follow.

the Espoo Convention. This includes, but is not limited to, the description of the proposed activity, description of reasonable alternatives, and description of the environment likely to be significantly affected by the proposed activity, description of mitigation measure among others. In 1991 parties to the Espoo Convention, aware of the interrelationship between economic activities and their environmental consequences, affirmed the need to ensure environmentally sound and sustainable development. The parties agreed to apply environmental impact assessment as a necessary tool to improve the quality of information presented to decision-makers so that environmentally sound decisions could be made paying careful attention to minimizing significant adverse impacts, in a transboundary context.⁸¹

2.2.5. The Rio Declaration and Agenda 1992

States convened at Rio in 1992, at the United Nations Conference on Environment and Development, and negotiated and adopted the Rio Declaration on Environment and Development. The parties to the Declaration agreed to Agenda 21, a programme of action towards sustainable development at the national and global level. One of the principles adopted by the Rio Declaration requires parties to utilise environmental impact assessment as a national instrument to 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 authority.⁸² In addition, South Africa selected the following programmes for implementation in its jurisdiction: financial capability, technology and manpower. South Africa in its submission to the UN Commission on Sustainable Development, April 1997 noted that it had passed ECA EIA regulations and had adopted a National Environmental Management Act that made it a requirement that an environmental assessment is carried out in relation to any activity that may significantly affect the environment.⁸³

⁸¹ See the preamble of the Convention on Environmental Impact Assessment in a Transboundary Context 1991.

⁸² Principle 17 states- 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 the decision of a competent authority.

⁸³ Agenda 21-South Africa. Economic Aspects of Sustainable Development in South Africa. <http://www.un.org/esa/agenda21/natlinfo/countr/safrica> accessed 14 April 2014.

2.2.6. Integrated Environmental Management Guidelines

In 1992,⁸⁴ the Integrated Environmental Management (IEM) Guidelines, a series of six documents, were published. These were meant to ‘guide development process by providing a positive, interactive approach to gathering and analysing useful data and presenting findings in a form that can easily be understood by non-specialists’.⁸⁵

Document one⁸⁶ - the Integrated Environmental Management Procedure, outlined the objects of IEM - to ensure that the environmental (‘environmental’ used in its broad sense, to encompass biophysical and socio-economic components) consequences of development proposal were understood and considered in the planning process. It laid down the principles that underpinned IEM and the IEM procedure.

The second document⁸⁷ - ‘Guidelines for scoping’, defined scoping as a procedure for determining the extent of and approach to an impact assessment and included, among others, involvement of relevant authorities and interested and affected parties; identification and selection of alternatives; identification of significant issues to be examined in the impact assessment and determination of specific guidelines or terms of reference for the impact assessment.

If the scoping identified significant issues to be examined, this could result in a further report in accordance with Guideline Document three.⁸⁸ Either an initial assessment or impact assessment would be undertaken depending on the magnitude of the impact on the environment. The initial assessment was meant to provide just enough information to determine whether a proposal will result in a significant adverse impact or not, that is, whether to proceed to Review⁸⁹ or whether a full impact should be undertaken. It appears that

⁸⁴ J Ridl “IEM’: Lip-service and Licence?’ (1994) 1 *SAJELP* 61 at 62-64. In 1984 the Council for the Environment established a committee to formulate a national strategy to ensure the integration of environmental integration of environmental concerns into development actions. The council adopted a concept which they termed ‘integrated Environmental Management ‘IEM’. This document preceded the ECA but it was never translated into the Act and because without legislative articulation requirement to undertake environmental impact assessment would lose its effect the 1992 guidelines were published.

⁸⁵ GR Preston, N Robins and RF Fuggle ‘Integrated Environmental Management’ in Fuggle and Rabie (eds) *Environmental Management in South Africa* (1992) 742.

⁸⁶ Department of Environment Affairs 1992. The Integrated Environmental Management procedure.

⁸⁷ Department of Environment Affairs, 1992. Guideline for scoping.

⁸⁸ Department of Environment Affairs, 1992. Guideline for Report Requirements.

⁸⁹ In this context review is used to mean an evaluation of the strengths and weaknesses of a proposal or of the assessment of reports submitted.

the format outlined by this document, was applied when environmental impact assessment were undertaken under the ECA.⁹⁰

Once the report was concluded, it ought to be reviewed in accordance with Guideline Document four.⁹¹ The reviewers ought to assess the content, comprehensiveness and adequacy of the report, as well as the organizational and presentational qualities of the report and confirm whether the report complied with the requirements prescribed by Document three. Finally, the report would be evaluated against the checklist of environmental characteristics which would potentially be affected by the development actions, or which could place significant constraints on a proposed development. The checklist was available under document five.

2.2.7. Socio-economic factors and integrated environmental management

The Guideline⁹² defined the ‘affected environment’ as those parts of the socio-economic and biophysical environment impacted by the development. The proponent had to compile a list of the socio-economic characteristics of the affected public. The Guideline provided a wide but open-ended checklist of major characteristics and linkages which ought to be considered by the environmental analyst or planner.

Under section six of Guideline five the environmental analyst ought to consider whether the proposed development would have a significant impact on, or could be constrained by, any of the following; demographic aspects, economic and employment status of the affected social groups; welfare profile; health profile and the cultural profile. This particular requirement was similar to the provisions of s 26 of the ECA. The requirement under s 26 of the ECA was that the environmental impact report ought to include the identification of the economic and social interests which may be affected by the activity and alternative activities.⁹³ As the Guideline suggested, depending on the impact of the activity on socio-economic aspects of the environment, a proposed activity could be allowed or constrained. However, the guidelines were not legally binding.

⁹⁰ T Winstanley ‘Environmental Impact Assessment: one year later’ (1998) 5 *SAJELP* 387-394 at 388.

⁹¹ Department of Environment Affairs, 1992. Guideline for Review.

⁹² Department of Environment Affairs, 1992. Glossary for the terms used in Integrated Environmental Management.

⁹³ S 26(a)(iv) read together with subsection (v).

2.2.8 . White Paper, Policy on a National Environmental Management System for South Africa 1993

In 1993, the Department of Environment Affairs published a White Paper, Policy on a National Environmental Management Systems for South Africa. The White Paper endorsed the recognition that environmental matters should be managed in an integrated manner.⁹⁴ It further recognised the involvement and participation of all interested and affected parties as an integral part of environmental management.⁹⁵ The government stated its commitment to adhere to the internationally accepted principles of sustainable development in the White Paper.

The White Paper highlighted the significant role played by various line functions in environmental matters and aimed to take measures that would ensure that all government institutions gave active attention to environmental measures that emanate from or fall within their line functions. Most significantly, the government stated its intent to make a provision for an environmental right in the Bill of Rights.⁹⁶

2.2.9. The impact of the Constitution on the EIA

The Interim Constitution⁹⁷ entrenched the right of everyone to have an environment which is not detrimental to their health or well-being⁹⁸ - this provision was silent on the need to promote conservation of the environment. The present Constitution,⁹⁹ in addition to the entitlement of everyone to an environment that is not harmful to their health or well-being, enjoins the legislature to protect the environment through legislative and other measures.¹⁰⁰ Legislative and other measures adopted should be directed towards ensuring ecologically secure sustainable development and use of natural resources for the benefit of the present and future generations while promoting justifiable economic and social development.¹⁰¹

⁹⁴ White Paper, Policy on a National Environmental Management System for South Africa. Department of Environment Affairs, 1993.

⁹⁵ Ibid.

⁹⁶ At page 9 under the heading goals.

⁹⁷ Act 200 of 1993.

⁹⁸ Section 29.

⁹⁹ Constitution of the Republic of South Africa, 1996.

¹⁰⁰ Section 24.

¹⁰¹ Section 24 of the Constitution.

2.2.10. Debates of the National Assembly (Hansard) on the need for environmental policy, Thursday 18 May 1995¹⁰²

When the African National Congress took office in 1994, it was confronted with several environmental challenges, such as pollution, neglect and mismanagement of environmental resources. Another area of concern, high on the government's agenda, was the restructuring of the then Department of Environmental Affairs and Tourism (DEAT). The objective was to establish a more representative public service. Under the ECA, DEAT was not recognised as a delivery agency, and as such had no obligations. According to the then Minister of Environmental Affairs and Tourism the status of the DEAT was similar to that of a toy telephone and as such the Department was not happy with the position.¹⁰³

The Minister and the Deputy Minister of Environmental Affairs and Tourism, jointly, were of the opinion that the mission of environmental policy sponsored by the IDRC,¹⁰⁴ the ANC,¹⁰⁵ Cosatu,¹⁰⁶ the ACP¹⁰⁷ and Sanco¹⁰⁸ could not be achieved in the absence of preparedness, policy and action not only to correct the situation, but to ensure that the environmental costs were not added to the national environmental debt for future generations. The mission statement read:

The environmental toll of apartheid has created a huge environmental deficit: the loss of fertility, contaminated surface water, disappearing fisheries, and widespread air pollution. This will cost South Africa dearly over the next decades in terms of health effects, loss of productivity, clean-up costs, and therefore a permanently condemned future generation.¹⁰⁹

They pointed out that the first Budget of the Government of National Unity captured the government's lack of enthusiasm and appreciation of the critical importance of the environment. In that Budget the total allocation for the environment constituted only 0,05% of the total Budget.¹¹⁰ According to the Deputy Minister this was a negligible amount considering the tasks that confronted the Department. Most of the 0,05% was allocated to

¹⁰² Republic of South Africa, Debates of the National Assembly (Hansard) Second session-First Parliament 23 January to 11 October 1995. Thursday 18 May 1995.

¹⁰³ At 1524.

¹⁰⁴ International Development Research Centre.

¹⁰⁵ African National Congress Party.

¹⁰⁶ Congress of South African Trade Unions.

¹⁰⁷ African Christian Democratic Party.

¹⁰⁸ South African National Civic Organisation.

¹⁰⁹ At 1524.

¹¹⁰ At 1523.

autonomous bodies, which according to the Deputy Minister were doing valuable work but had no clear line of accountability to the National Parliament and the Executive.¹¹¹

Another point on the agenda was a new environmental policy. The attitude of DEAT was that all previous policies should be analysed, revised and where necessary amended or replaced.¹¹² In order to expedite this process, it was decided that a comprehensive study, done by the Canadian-based International Development Research Centre (IDRC), as well as other policy documents would be needed. In order to give an opportunity for all interested parties to participate, a National Forum conference was held (17 August 1995).¹¹³ The conference compiled a preliminary draft framework and made it available to the general public for comment. The forum formed part of the Consultative National Environmental Policy Process (CONNEPP).¹¹⁴ With regards to environmental impact assessment, the Deputy Minister said:

We must move with deliberate speed towards a position where there is a policy of integrated planning that will consider not only economic and political concerns, but also environmental impact assessments-both as a criterion and as a means of evaluating the impact of development on the environment.¹¹⁵

2.3. Environmental Impact Assessments: The period between 1989 and 1997

The powers entrusted to the Minister by the ECA were not exercised until 1997 when the ECA Regulations,¹¹⁶ together with the list of identified activities,¹¹⁷ were promulgated. Prior to the promulgation of ECA EIA Regulations EIAs were undertaken voluntarily,¹¹⁸ either ‘to appease public demand therefore to satisfy investing companies in countries with stringent environmental standards or in the interest of wise use of natural resources’.¹¹⁹ However, the challenge was that where voluntary EIAs were made and lodged with the relevant authority, the authority had no legislative guidance as to what factors to consider in the report.¹²⁰ The authority could choose to apply the IEM Guidelines as the yardstick for determining whether to accept or reject the report. Certain proposals were rejected during this period because the

¹¹¹ At 1523.

¹¹² At 1524.

¹¹³ At 1516.

¹¹⁴ At 1516.

¹¹⁵ At 1526.

¹¹⁶ Government Notice R.1182 of 5 September 1997.

¹¹⁷ NEMA Listed Activities 386 and 387 of 21 April 2006.

¹¹⁸ J Glazewski *Environmental Law in South Africa* (2000) 269.

¹¹⁹ J Ridi and E Couzens n 11 above at 3/189.

¹²⁰ T Winstanley n 90 above at 387.

EIA finding was that the proposed activity would adversely impact on the socio-economic factors.¹²¹

2.3.1. From voluntary to mandatory EIAs

After the ECA EIA Regulations came into effect, no person was allowed to undertake a listed activity without the written authorisation of the Minister or the competent authority. Authorisation was either granted or refused based on the EIA findings which included awareness of environmental considerations, while prior to a mandatory EIA requirement ‘strategic business decisions were determined by two factors: technical feasibility and financial viability. Environmental considerations were largely excluded’.¹²² The introduction of mandatory EIAs emphasised consideration of the impact of activities on the environment. Sampson¹²³ writes:

In a country thirsty for economic development, the correction of past injustices, and the optimal utilization of our available natural resources, the conducting of environmental impact assessment (EIAs) has come to play a crucial role in protecting and conserving our natural resources while allowing the much needed development.

The information contained in the report ought to include; the identification of the economic and social interests which may be affected by the activity¹²⁴ and by the alternative activity and an evaluation of the nature and extent of the effect of the activity in question and the alternative activities on social and economic interests.¹²⁵ Nonetheless, the ECA Regulations did not specifically require that the information contained in the scoping or environmental assessment report¹²⁶ include socio-economic aspects likely to be affected by the activity nor was the competent authority required to show in their record of decision¹²⁷ a description of socio-economic factors to be detrimentally affected. The ECA EIA Regulations to a large extent replicated the criteria in the Convention on Environmental Impact Assessments in a Transboundary Context on the information to be included in the EIA document.

¹²¹ See FJ Kruger, BW van Wilgen, A.v.B Weaver and T Greyling ‘sustainable development and the environment: lessons from St Lucia Environmental Impact Assessment’ (1997) 93 *South African Journal of Science* 23-33.

¹²² J Ridl and E Couzens n 11 above at 4.

¹²³ I Sampson ‘So near and yet so far with environmental impact assessments’ (2007) 15(2) *Juta’s Business Law* 77.

¹²⁴ S 26(a)(iv).

¹²⁵ S 26(a)(v).

¹²⁶ See reg 5-8.

¹²⁷ See reg 9-10.

The ECA regulations were later criticized for their inadequacies by Ridl and Couzens who wrote that ‘instead of everything being spelt out chapter and verse, it was left to environmental consultants and government to add content in the application of the law’.¹²⁸ In 1998, a year after the regulations were published the National Environmental Management Act¹²⁹ was enacted and passed as law in 1999.

2.4. NEMA EIA regime

2.4.1. The National Environmental Management Act, 108 of 1998

The tasks undertaken by the Canadian-based International Development Research through the process of CONNEPP¹³⁰ were finally completed in 1998. In May 1998 a White Paper on Environmental Management Policy for South Africa and ultimately NEMA was passed as law in 1999. It repealed¹³¹ greater portions of the ECA with an exception,¹³² of sections 21, 22 and 26. These sections deal with environmental impact assessments. The ECA EIA regulations remained in force until NEMA EIA Regulations were promulgated in 2006.

2.4.2. Objectives of Integrated environmental management

Chapter 5 of NEMA sets out the general objectives of integrated environmental management and management of environmental impact assessments. The objects of integrated environmental management as set out in s 23 are the following; to promote integration and compliance with the principles of s 2; to identify and employ modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management. Section 23 does not introduce or impose any new obligation or requirement, it simply restates the principles of s 2 and identifies them as the main object sought to be promoted by integrated environmental management. In this case the objectives of integrated environmental management should not only be promoted by environmental authorities but by other organs with actions liable to significantly affect the environment.

¹²⁸ Ridl and Couzens, above, n 11 above at 81/189.

¹²⁹ Act 107 of 1998.

¹³⁰ The Consultative National Environmental Policy.

¹³¹ S 50(1) of NEMA.

¹³² S 50(2) OF NEMA.

Integrated environmental management is not defined by NEMA but it has been used to mean different things, such as environmental impact assessment, alignment of environmental efforts, the adoption and use of EIA arrangements by other organs of state, adoption of NEMA principles by other government line functions, the adoption of numerous parameters in the development/ decision cycle.¹³³ It appears that the concept has been used to refer to EIA since it was introduced in 1992 by the Guideline documents published to inform the EIA process.¹³⁴

However, if we were to define IEM as meaning EIA, as it is commonly understood this would be a highly restrictive definition since NEMA allows for tools other than the EIA to be utilised in informing applications for environmental authorisation,¹³⁵ such as Cost Benefit Analysis (CBA).¹³⁶ Cost Benefit Analysis ‘estimates and totals up the equivalent money value of the benefits and costs to the community of projects to establish whether they are worthwhile. These projects may be dams and highways’.¹³⁷ CBA is concerned with the socio-economic benefits that would be derived from an activity that may significantly affect the environment but is not concerned with alternatives and mitigation measures like an EIA is.¹³⁸ In order to give effect to the general objectives of IEM a variety of tools have to be used. An EIA is but one tool under NEMA, independently of the other tools it cannot give effect to all the objectives in s 23. Where appropriate EIA could be replaced with more appropriate tools such as cost benefit analysis.¹³⁹

¹³³ J Nel and W du Plessis ‘unpacking integrated environmental management- a step closer to effective co-operative governance?’ (2004) *SAPR/PL* 181-190 at 181.

¹³⁴ J Nel and W du Plessis n 133 above at 182.

¹³⁵ National Environmental Management Amendment Bill [36D-2007].

¹³⁶ <http://www.environment.gov.za/sites/default/files/sites> accessed 21 April 2014.

¹³⁷ <http://www.sju.edu/faculty/watkins/cba.htm>.

¹³⁸ See National Environmental Management Amendment Bill, 2007: clause by clause explanation of the Bill for the Portfolio Committee on Environmental Affairs and Tourism.

¹³⁹ <http://www.pmg.org.za> accessed 14 April 2014; Environmental Impact Assessment: Department of Environmental Affairs and Tourism briefing 12 February 2008.

2.4.3. Environmental impact assessments

Section 24, as was originally promulgated,¹⁴⁰ provided that in order to give effect to the general objectives of IEM, the potential impact of activities on the environment;¹⁴¹ socio-economic conditions;¹⁴² and the cultural heritage¹⁴³ be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of an activity. The common understanding was that s 24 imposed an obligation on environmental authorities to consider the impact of activities, on the socio-economic conditions.¹⁴⁴

But what are socio-economic factors? These factors are not defined by NEMA. The Guideline Document¹⁴⁵ defined environment as the external circumstances, conditions and objects that affect the existence and development of an individual, organism or group. These circumstances include biophysical, social, economic, historical, cultural and political aspects. The Guideline¹⁴⁶ provided a checklist of socio-economic aspects that could be affected by the proposed development. These are divided into the following six sections; demographic aspects;¹⁴⁷ economic, employment status of the affected social groups;¹⁴⁸ welfare profile;¹⁴⁹ health profile;¹⁵⁰ and the cultural profile.¹⁵¹ But the Guideline is just what it is, it has no legal force and Courts have never applied it in the interpretation of socio-economic factors.

¹⁴⁰ A Ramdhin n 28 above at 130.

¹⁴¹ S 24(1)(a).

¹⁴² S 24(1)(b).

¹⁴³ S 24(1)(c).

¹⁴⁴ Ibid. see also *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Environment, Conservation and Agriculture Mpumalanga Province and Others* (2007) 6 SA 4 (CC). at

¹⁴⁵ Department of Environment Affairs, 1992. Glossary of terms used in Integrated Environmental Management.

¹⁴⁶ Department of Environment Affairs, 1992. Checklist of Environment Characteristics.

¹⁴⁷ This section includes growth rate of the local population; location, distribution or density of the population; existing age or gender composition of the population; existing biographical composition of the population; existing migration movements and inflow of tourists.

¹⁴⁸ It covers economic base of the area; distribution of income; local industry; rate and scale of employment growth; labour needs and the spare capacity of the area; competition through non-local labour moving into the area; non-local labour remaining in the area after completion of the development; pressure placed on particular skill, age range or gender needs; job opportunities for school-leavers and short-term and long-term unemployment trends.

¹⁴⁹ Incidence of crime, drug abuse, or violence; extent of homelessness and overcrowding; adequacy of services; adequacy of support systems such as crèches and shelters for destitute children and quality of life.

¹⁵⁰ Availability of clinics/health services; incidence of disease; incidence of illness; incidence of mental illness; threats to health from pollution.

2.5. Proposed amendment to s 24 of NEMA

2.5.1. Proceedings of the National Council of Provinces, Thursday 28 August 2003

The promulgation of NEMA marked a transition from the ECA EIA regime to the NEMA EIA regime. However, the section on implementation of activities that may significantly affect the environment (s 24) could not be operational until the Minister had exercised the powers conferred to him under the Act to identify such activities and publish regulations that would prescribe a procedure for the investigation, assessment and communication of such impacts.¹⁵² These powers were not exercised until 2006 when EIA Regulations were promulgated.¹⁵³

It is apparent that when the first amendment took place in 2004; s 24 was not fully effective. However, between 1999 and 2006 ‘the ECA regime operated with the NEMA provisions in chapter 5, the authorities were using the ECA for identified activities and were applying section 24 of NEMA to those activities that may significantly affect the environment which were not identified activities in terms of the of the ECA’.¹⁵⁴

On 22 April 2003, the Minister of Environmental Affairs and Tourism, Mohammed Valli Moosa published a draft National Environmental Management Second Amendment Bill¹⁵⁵ which proposed to amend s 24 of NEMA. The general public and interested parties were invited to make comments and inputs on the proposed amendment.

On 1 August 2003, DEAT published the second draft of the National Environmental Management Act: Second Amendment Bill¹⁵⁶ for public information and further comments were solicited from the public. The draft Bill contained a memorandum on the objects of the Bill. The Minister noted that the amendments were necessary in order to introduce certain improvements to the system of environmental impact management. He pointed out that the system of environmental impact management was regulated in terms of ss 21, 22 and 26 of the ECA and regulations issued under the ECA. Chapter 5 of NEMA established a new

¹⁵¹ It identifies the following; existing lifestyles, households composition and family network; religious and cultural outlooks and expectation of the local population; cultural lifestyle diversity and cultural stability. It should be noted that the listing was not exhaustive.

¹⁵² Section 24D.

¹⁵³ NEMA EIA Regulations GNR 365 of 21 April 2006.

¹⁵⁴ M Kidd *Environmental Law* 2 ed (2008 Juta) 198.

¹⁵⁵ Government Notice No. 555 Department of Environmental Affairs and Tourism 22 April 2003.

¹⁵⁶ GG No 1110 I August 2003.

framework for environmental impact management. DEAT wished to bring the system of impact assessments under NEMA. In order to do so certain amendments had to be made in order to streamline the process of regulating and administering the impact assessment process at national, provincial and local level.

2.5.2. Substantive summary of the Bill

2.5.3. Removal of reference to socio-economic factors from s 24(1) and the removal of socio-economic conditions and cultural heritage from the minimum procedures for the assessment of impacts

The Bill sought to introduce and add more definitions to the list in s 1 of NEMA. The amendment included to the list, the definitions of “assessment”, “commence”, “competent authority” and “environmental assessment practitioner” among others. The Bill proposed to remove reference to socio-economic conditions and cultural heritage from s 24(1) of the Act. The Bill also sought to remove from the minimum requirements for investigation and assessment, the requirement that the investigation of the potential impact of the activities must as a minimum ensure the investigation of the potential impact of the activity on the socio-economic and cultural heritage.

Section 24(3)(a) of NEMA as was originally promulgated prescribed the minimum procedures for the investigation, assessment and communication of the potential impacts. Such investigation, assessment and communication of activities identified in subsection 24 (1) ought to take place in accordance with procedures laid down in subsection (7). The procedures for investigation, assessment and communication ought to ensure as a minimum; the investigation of the potential impact including cumulative effects of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and the assessment of the significance of that potential impact.¹⁵⁷

The Department stated that the words “socio-economic conditions and cultural heritage” were removed from s 24 (3)(b) (this section was incorrectly cited, the proper section was s 24(7)(b)) to align it with the proposed s 24 (1). Section 24(1), as was originally promulgated, required the potential impact on the environment, socio-economic conditions and the cultural heritage to be investigated. The words “including cumulative impacts” found in subsection (7) (b) were removed and the wording of s 24(3)(d) (incorrect, the correct section was s

¹⁵⁷ S 24(7) (b).

24(7)(d)), which required procedures for the investigation, assessment and communication of the potential impact of activities to ensure; public participation, independent review and conflict resolution in all phases of the investigation and assessment of impacts was also amended. The Department stated that these amendments were necessary to ensure that the minimum standard set by s 24(3) was achievable.

2.5.4. NEMLA BILL: National Council of Provinces 28 August 2003

On the 28 August 2003, the Bill was tabled before the National Council of Provinces (NCOP) where it was unanimously approved by the House and adopted. On the same date the House was considering the National Environmental Management: Biodiversity Bill and as a result the NEMA Bill and the Biodiversity Bill were considered simultaneously and at certain points members present made indistinguishable comments regarding the Bills.

The Minister of Environmental Affairs and Tourism (the Minister) introduced the two Bills and with regards to the NEMA Amendment Bill he said the following: ‘it has been said that we have a comprehensive and excellent set of environmental laws on our statute Book, but there has often been a concern that there is not sufficient teeth for enforcement of the legislation that we have’.¹⁵⁸ In order to deal with enforcement the Minister stated that DEAT together with the Department of Justice had established an environmental court in Hermanus and the target was to expand to other areas where pollution control was a problem.

The Minister stated that the amending Bill greatly beefed up the enforcement arm of the DEAT and other departments, particularly the sister departments in the provinces, by providing, among other matters, for environmental management inspectors, with powers similar to those of other inspectors in other departments.

Members were generally happy, especially with the introduction of environmental management inspectors. One Dlulane a member of the ANC stated that it was for the lack of effective enforcement that poachers continued to deplete the marine resources and medical waste companies dumped dangerous medical waste in open fields near poor residential areas to which children were exposed.¹⁵⁹ The amending Bill was therefore going to strengthen the

¹⁵⁸ National Council of Provinces, Document number 88954 of 28 August 2003 at 25/134.

¹⁵⁹ Ibid at 43/134.

government's hand to prosecute and punish perpetrators of environmental crimes. The Western Cape Government welcomed the attempts made in the Bill to rationalise and streamline administration and enforcement provisions in NEMA.¹⁶⁰

A concern raised by the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs was that the implementation of the Bill had significant personnel and financial implications. The Gauteng Department envisaged that implementation would imply the establishment of new working hours and the building of capacity and skills in relation to the environmental enforcement. Gauteng accepted that this must happen. However, it pointed out that there needed to be a realistic assessment of financial implications, and the Gauteng province would only be able to accept the new functions inherent under the Bill if they were funded through an intergovernmental transfer. Nevertheless the province stated its support for the Bill.¹⁶¹

The African Christian Democratic Party (ACDP) welcomed the Bills. It stated that the Bill was wonderful in its scope and ambitious in what it sought to achieve.¹⁶² The question posed by ACPD was whether the government had the administrative capacity to fulfil many of the objectives stated in the Bill. The ACDP noted that the Bill had to start somewhere, and that there was nothing wrong with being ambitious, particularly with being ambitious regarding conservation.¹⁶³

Generally, comments and reasons given in support for the Bill were not made in connection to particular sections but were general. This could be attributed to the fact s 24 of NEMA which the Bill sought to amend had not operated independently off the ECA and it could have been too soon for the members to make any substantive comments on the impact and implication of the proposed amendments on environmental impact assessments.

¹⁶⁰ Ibid at 51/134.

¹⁶¹ Ibid at 52/134.

¹⁶² Ibid at 78/134.

¹⁶³ Ibid.

2.6. Concurrent use of the ECA EIA Regulations and s 24 of NEMA; the interpretation and the application of the law by the Courts

Unambiguous legislation is a prerequisite to an effective EIA system;¹⁶⁴ however, where ambiguities arise from the application of the law courts play a significant role of interpreting and unravelling the provisions of the law. Any person aggrieved by any decision made by authorities in the discharge of their mandate under NEMA may invoke the provisions of s 32,¹⁶⁵ approach the courts of law and seek appropriate relief.

The body of judicial precedent reveal that socio-economic factors in EIAs¹⁶⁶ have been applied inconsistently and incoherently by both the administrators¹⁶⁷ and the courts. Part of the reason could be attributed to the fact that there is no legislative and judicial guidance on what these factors are. Support for this assertion is found in the differences between the judgments¹⁶⁸ in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Limited and Another*¹⁶⁹ on one hand; and the judgments¹⁷⁰ in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* and most importantly the difference between the majority judgment of Ngcobo J and Sachs J's dissent

¹⁶⁴ L A Sandham, A J Van Heerden, CE Jones, F P Retief and A N Morrison-Saunders 'Does enhanced regulation improve EIA report quality? Lessons from South Africa' (2013) 38 *Environmental Impact Assessment Review* 152-162. <http://www.elsevier.com/locate/eiar> accessed 30.10.2013.

¹⁶⁵ S 32 provides legal standing to enforce environmental laws to any person or group of persons to seek appropriate relief in respect of any breach or threatened breach of any provision of the Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the or the use of natural resources-

- (a) In that person's or group of person's own interest;
- (b) In the interest of, or on behalf of, a person who is for practical reasons, unable to institute such proceedings;
- (c) In the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) In the public interest; and
- (e) In the interest of protecting the environment.

¹⁶⁶ S 24(1)(a),(b) and (c) of NEMA and ss 21, 22 and 26 of the ECA.

¹⁶⁷ See E Couzens and M Dent 'Finding NEMA: The National Environmental Management Act, The De Hoop Dam, Conflict and Alternative Dispute Resolution in Environmental Disputes' (2006) 3 *PER* 1. The article considers the principles of NEMA that were disregarded in the EIA process for the construction of the De Hoop dam in Mpumalanga. It also portrays the authorities' neglect to take into account the views of the interested and affected parties. Views of the affected and interested groups could raise awareness about the socio-economic factors affected by the proposed activity.

¹⁶⁸ The decision of the High Court in *Sasol Oil (Pty) Limited v Metcalfe NO* 2004(5) SA 161 (W).decided on 29 March 2004 differs fundamentally from that of the Supreme Court of Appeal in the same matter.

¹⁶⁹ 2006 (5) SA 483 (SCA).

¹⁷⁰ The decision of the Supreme Court of Appeal judgment cited 2007 (2) SA 163 (SCA).

in the same matter. Commentators have asked ‘why do the judgments of Ngcobo J and Sachs J differ so fundamentally?’¹⁷¹

In *Sasol Oil (Pty) Ltd and Another v Metcalfe NO*¹⁷² the applicant had applied to the Department of Agriculture, Conservation and Environment (the Department) for an EIA authorisation¹⁷³ for the construction of a filling station¹⁷⁴ and a convenience store in Gauteng Province. The application was refused by the department.¹⁷⁵ The Department applied the Gauteng Guideline¹⁷⁶ which generally prohibited construction of filling stations within three kilometres of an existing filling station in urban, built-up or residential area. The Guideline also referred to a host of other activities that may be relevant. These related to the ability of the natural and social environment to assimilate cumulative stresses placed on them, the likelihood of negative synergistic effects and the socio-economic and social consequences generally of filling stations being erected, in short, the impact of the filling station on the socio-economic factors.¹⁷⁷

The proposed filling station fell within the distance stipulation. The applicants sought an order before the High Court, asking the Court to declare the EIA guidelines as *ultra vires* the ECA and/ or alternatively to review and set aside the decision. Willis J held that, ‘the guidelines, while not ultra vires, are for the most part irrelevant and inappropriate, not because they purport to take into account irrelevant considerations but they are based upon a clearly wrong premise, that the respondent has the power to regulate the construction of the filling stations *per se*’. Willis J went on to say that if the Minister intended to include filling stations as activities that had a significant impact on the environment he would have done so expressly. This view is endorsed by certain writers.¹⁷⁸ The court held ‘the minister could certainly have been more explicit by including filling stations in the list of activities that

¹⁷¹ Ramdhin n 11 above at 134. W du Plessis and L Feris ‘A rebellious step in the right direction? A note on the dissenting Judgment of Sachs J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*’ (2008) 15 SAJELP 157-168.

¹⁷² 2004(5) SA 161 (W).

¹⁷³ S 22(2) of ECA.

¹⁷⁴ A listed activity under Schedule 1, item 1(c)(ii) of GN R.1182.

¹⁷⁵ S 22(3) ECA.

¹⁷⁶ EIA Guidelines above.

¹⁷⁷ Para [10].

¹⁷⁸ I Sampson n 123 at 79. ‘Service stations’ in themselves were not listed under environment Conservation Act as activities requiring EIA authorisation. The listed activity that is generally triggered by the development of service stations is the construction, erection, or upgrading of storage or handling of facilities for a substance which is dangerous or hazardous, and which is controlled by national legislation.

trigger environmental impact assessment. But his failure to do so does not imply that he intended to exclude them'.¹⁷⁹

On appeal to the SCA,¹⁸⁰ Cachalia AJA advised that item 1(c)(iii) (construction of filling station) must be construed in the light of section 24 of the Constitution, ECA and NEMA, statutes promulgated to give effect to the constitutional provision. He went on to say

Of particular importance is NEMA's injunction that the interpretation of any law concerned with the management of the environment must be guided by its principles.¹⁸¹ At the heart of this is the principle of 'sustainable development', which requires organs of state to evaluate the 'social, economic and environmental impacts of activities'.¹⁸² This is the broad context and framework within which item 1(c)(ii) is to be construed.¹⁸³

He held further that:

To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development ... The adoption of such a restricted and literal approach, as contended for by the respondents would defeat the clear purpose of the guideline.¹⁸⁴

The judgment of Cachalia AJA reiterates the sentiments of Claassen J in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*¹⁸⁵ - the matter also concerned the distance stipulation applied in *Sasol* above. But the difference was that the parties in this matter agreed that the filling station was an activity that may have a substantial effect on the environment and listed as such by GN R.1182 and 1183. It was also common cause that the Department had the authority to issue or refuse authorisation in terms of s 22 of the ECA.

The applicant's case was that the respondent had applied the distance rigidly and unlawfully and argued that the Department's concern was not truly environmental but rather one of

¹⁷⁹ Sampson n 123 above at 79.

¹⁸⁰ *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* [2006] All SA 17 (SCA).

¹⁸¹ S 2(1)(e) of NEMA read with s 2 (1).

¹⁸² S 2(3); 2(4)(i).

¹⁸³ At para [15].

¹⁸⁴ At para [16]. Cachalia AJA also quotes the judgment of *Claassen J in BP SA (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 160A-E.

¹⁸⁵ 2004 (5) SA 124 (W). The matter was decided after the High Court judgment in *Sasol* case but before the appeal of the same matter before the SCA.

regulating the economy to protect the commercial interests of existing filling stations. To do so, the applicant argued ‘was beyond the limits of the Department’s lawful authority’.¹⁸⁶

The Record of Decision (RoD) had stated that the application was refused, among other reasons, because the development was incompatible with the Department’s Guideline as there were two other filling stations within the distance stipulation and therefore the proposed development was incompatible with s 2(3)NEMA - which states that ‘development must be socially, economically and environmentally sustainable’ and s 2(4)(vii) which requires a risk-averse and cautious approach to be applied, which takes into account the limits of the current knowledge about the consequences of decisions and actions.¹⁸⁷

The Court rejected the contention that socio-economic considerations fell outside the Department’s mandate when considering applications for environmental authorisation. The contention that the Department was not permitted to apply the principles set out in NEMA in considering the application was labelled by the Court as ‘untenable as it flies in the face of section 2(1)(e) of NEMA which obliges all organs of state concerned with the protection of the environment to apply these principles when implementing NEMA...’¹⁸⁸ Claassen J held in relevant part:

All of these statutory obligations make it abundantly clear that the Department’s mandate includes the consideration of socio-economic factors as an integral part of their environmental responsibility.¹⁸⁹

Although Cachalia AJA and Claassen J reached a common finding that the Department is under the obligation to consider socio-economic factors of proposed development, the judgments in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* respectively have limitations. The two judgments do not place us beyond the three kilometre stipulation. It is not clear whether beyond the three kilometres stipulation the application automatically becomes eligible for authorisation. Secondly, it is not clear whether the EIA guidelines are exclusively applicable in Gauteng or whether they could be applied in the other eight provinces as well.

¹⁸⁶ At 136-E-G.

¹⁸⁷ S 2(4)(vii).

¹⁸⁸ At 151F-G.

¹⁸⁹ Ibid.

In the cases discussed above the applicants' case was that socio-economic factors were not a relevant consideration and ought not to have been considered by environmental authorities when making decisions under NEMA and the ECA. On the converse the Constitutional Court had an opportunity in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*¹⁹⁰ to hear yet another filling station matter in which the applicant sought the review of the environmental authorities' decision to issue environmental authorisation on the ground that the latter had failed to take into account socio-economic factors. The decision that gave rise to the review was made in accordance with the provisions of ss 21,22 and 26 of the ECA. The application was supported by an Environmental Scoping Report (scoping report), prepared by Globecon – a firm of environmental management services.

The scoping report dealt, inter alia, with the activities that were to be undertaken during the preparation, construction and operational phases of development; the estimates of solid waste, liquid effluent and gaseous emissions from the project; biophysical description of the site, including physical, biological and social characteristics; an evaluation of impacts and concerns and recommendations. It dealt with the issues that needed to be addressed, namely, the protection of the existing aquifer,¹⁹¹ prevention of dust generation, possible noise generation during construction and operational phases. It gave details of how the impacts would be mitigated so that the development would not impact on the environment and neighbouring areas. Annexed to the report, was a Geotechnical and Hydrological Report, proof of advertisement and public participation process. However, 'the report did not ... deal with the potential impact on other filling stations in the area'.¹⁹²

The applicant alleged that the MEC had failed to consider the need and desirability for a filling station on the site, together with its sustainability. These factors were referred to by the Fuel Retailers Association as 'socio-economic considerations'.¹⁹³ The first and the second respondent accepted that such factors ought to be taken into account. The SCA noted that it

¹⁹⁰ 2007 (6) SA 4 (CC).

¹⁹¹ The aquifer supplied the water needs of the town of Whiteriver in times of drought.

¹⁹² E Couzens 'Filling Station Jurisprudence: Environmental Law in South African Courts and the judgment in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*' (2008) 15 SAJELP 23at 34. The author above, also gives a detailed account of the facts in the matter.

¹⁹³ Para [14].

was apparent from a number of decisions¹⁹⁴ and statutory provisions¹⁹⁵ that socio-economic considerations ought to be taken into account in making decisions and under s 22 of the ECA.

It was contended by the respondents that the practice in Mpumalanga, which was consistent with the Town Planning Ordinance was to examine these factors at the stage when rezoning was under consideration.¹⁹⁶ The Court found that ‘indeed there has to be a report on need and desirability before property is rezoned’.¹⁹⁷ Lewis JA held:

It is not clear to me what additional factors should be considered by the environmental authorities in assessing need, desirability once the local authority has made its decision. The environment may well be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict, but there was no evidence to suggest that this was a possibility.¹⁹⁸

The SCA after analysing the evidence before it rejected all the grounds of review raised by the applicant. The applicant appealed to the Constitutional Court.¹⁹⁹ The Court decided that ECA and NEMA are legislation that gave effect to s 24 of the Constitution.²⁰⁰ The Court cited the following provisions of NEMA; ss 2(2), 2(3), 2(4)(g), 2(4)(i), 23 and 24. It held ‘to sum up therefore NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility’.²⁰¹

The scoping report had dealt with the socio-economic factors that would be affected. The report included mitigatory steps to be taken if authorisation were to be granted; but what was not indicated was the impact of the filling station on other filling stations in the area. The Constitutional Court remitted the matter back for consideration because the environmental authorities had not considered the impact of the proposed filling station on other filling stations in the vicinity.

In a brief dissent, Sachs J’s opinion on the matter was that, the procedural default (failure to consider the impact of the proposed filling station on other filling stations) did not warrant

¹⁹⁴ The Court cited *Sasol Oil, BP Southern Africa* and others. Cachalia AJA who decided *Sasol Oil* formed the Coram.

¹⁹⁵ S 2, 3 and 4 NEMA.

¹⁹⁶ Para [15].

¹⁹⁷ Ibid.

¹⁹⁸ Para [17].

¹⁹⁹ 2007(6) SA 4(CC).

²⁰⁰ At para 40.

²⁰¹ At 27; para [62].

the referral of the matter back to the environmental authorities for consideration.²⁰² His finding was that ‘economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection’.²⁰³ He continued ‘economic sustainability is thus not part of the checklist that has to be ticked off as a separate item in sustainable development inquiry’.²⁰⁴

2.7. Transition from the ECA EIA regime to NEMA EIA regime

2.7.1. NEMA EIA Regulations

In 2006, EIA regulations²⁰⁵ were promulgated pursuant to s 24 of NEMA. It had been a goal of DEAT to draft new EIA regulations by May 2003, the same year as the amendment Bill was proposed. DEAT had intended to publish the same regulations for public comment by September 2003, promulgate and gazette the regulations by February 2004.²⁰⁶ This never took place until the 21 April 2006. NEMA EIA regulations repealed the ECA EIA regulations. One of the reasons for the repeal was that ‘too many EIA triggered, which placed increasing pressure on the administrative capacity of government, in addition to costly delays for developers’.²⁰⁷ As result the main focus of NEMA EIA regime was to introduce a refined screening mechanism in order to reduce the number of EIA applications.²⁰⁸

The 2006 EIA Regulations were later criticized by Ridl and Couzens for failing to address the shortcomings perceived to have caused failure of the ECA EIA Regulations such as, fixing time limits, identification of activities, receipt of authorisation, consideration of the application and lack of guidance in the public participation process among other points.²⁰⁹ In their opinion certain issues which were considered to be problematic under the ECA regulations were not sufficiently addressed by the 2006 EIA regulations either. For instance,

²⁰² Para 113.

²⁰³ At para 113.

²⁰⁴ At para 113.

²⁰⁵ NEMA EIA Regulation GNR 385 of 21 April 2006.

²⁰⁶ Department of Environmental Affairs and Tourism Business Plan 01 April 2003- March 2004. Available on http://www.westerncape.gov.za/text/2003/dea_business_plan accessed on 15 May 2014. Department of Environmental Affairs and Tourism Business Plan 01 April 2003- March 2004. Available on http://www.westerncape.gov.za/text/2003/dea_businessplan accessed on 15 May 2014.

²⁰⁷ F Retief, CNJ Welman and L Sandham ‘Performance of environmental impact assessment EIA screening in South Africa: a comparative analysis between the 1997 and 2006 EIA regimes’ (2011) 93 *South African Geographical Journal* 154-171 at 156.

²⁰⁸ F Retief, CNJ Welman and L Sandham n 207 above.

²⁰⁹ J Ridl and E Couzens n 11 above at 9/189.

they noted that even though the 2006 regulations fixed time limits, these were triggered a long way down the process. As a result ‘the causes of the delays that plagued the scoping and assessment of the old Regulations were not addressed in the NEMA EIA Regulations. As a result, the challenge of ensuring a speedy but complete and adequate process rested with the participants’.²¹⁰

The 2006 NEMA EIA Regulations were short-lived as they were replaced in 2010 by a set of new EIA Regulations notwithstanding the fact that latter did not bring any material change to the regulation of environmental impact assessment.²¹¹ This will be discussed in more depth in the succeeding chapter.

2.8. Conclusion

South Africa invested extensive time and resources lobbying public comment and support for an environmental policy suitable for its own peculiar socio-economic and environmental needs. It was decided that such a policy ought to provide a golden mean between development and the vital demands of environmental conservation. This had the consequent for rapid changes in the law. Finally, EIAs were imported into South African law but South Africa differed in its approach to the management of environmental impact assessment. Unlike in the US, in South Africa EIA was extended to cover private processes that may significantly affect the environment while NEPA requires an EIS to be prepared for major Federal actions significantly affecting the quality of the human environment. The scope of an EIA was also expanded to include the consideration of the impact of the activities on the socio-economic conditions and the cultural heritage.

However, the inclusion of socio-economic factors in EIAs was never without challenges. There is great deal of inconsistencies in the application and interpretation of the obligation of environmental to authorities to consider the impact of activities on socio-economic factors by both the courts and environmental authorities.

The amendment of s 24 of NEMA in 2004 was intended to mark a transition from the ECA EIA regime to the NEMA EIA regime. However, NEMA EIA regime began to be fully operational when the NEMA EIA regulations were published in 2006. Both the amended s 24 and the regulations were short-lived as they were replaced in 2008 and 2010 respectively.

²¹⁰ J Ridl and E Couzens n 11 above at 4.

²¹¹ A detailed discussion on the 2010 NEMA EIA Regulations to follow in the succeeding chapter.

CHAPTER 3

3. An obligation to consider the impact of the activity on the socio-economic conditions under the 2010 EIA Regime

3.1. Introduction

EIA is a tool at the disposal of environmental authorities to ensure sustainability of activities that require authorization in terms of the law. The regulations²¹² promulgated in terms of the Environment Conservation Act²¹³ introduced a procedure for mandatory EIAs in South Africa. The ECA regulations were later replaced by the 2006 EIA Regulation because ‘the consensus at the time was that too many unnecessary EIAs were triggered,²¹⁴ which placed increasing pressure on the administrative capacity of the government, in addition to costly delays for developers’.²¹⁵ The 2006 EIA Regulations were intended to reduce the number of applications for EIA but in sharp contrast the number of applications continued to increase.²¹⁶ The 2006 EIA regulations were subsequently replaced by the 2010 EIA Regulations.²¹⁷

Consequently in order to improve the efficiency and effectiveness of the process, drastic changes had to be made to the law regulating EIAs. In this regard s 24 of NEMA was further amended in 2008 and to reflect this change in law the 2010 EIA regulations were introduced repealing the 2006 EIA regulations. Section 24 provides that in order to give effect to the general objective of integrated environmental management ... the potential impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act. This section, like its predecessor,²¹⁸ omits reference to the investigation of impacts of activities on the socio-economic conditions and cultural heritage. The assumption is that the aim of this removal was to reduce the load on environmental authorities; that is, to confine the inquiry to the physical-environmental factors.²¹⁹

²¹² ECA EIA Regulations GN R1182 of 5 September 1997.

²¹³ Act 79 of 1989.

²¹⁴ Couzens Ed, Lewis Melissa. ‘South Africa’. In *International Encyclopedia of Laws: Environmental Law*, edited by Kurt Deketelaere. Alphen aan den Rijn, NL: Kluwwer Law International, 2013.

²¹⁵ F Retief, CNJ Welman and L Sandham n 207 at 156; see J Ridl and E Couzens n 11.

²¹⁶ F Retief, C NJ Welman and L Sandham n 207 above at 154.

²¹⁷ J Ridl and E Couzens n 11 above at 6.

²¹⁸ Act 8 of 2004.

²¹⁹ M Kidd n 39 above at 100.

Again the amendment has changed the heading of the section from ‘implementation’ to ‘authorization’. There is a material difference between the two words both in law and in practice. This change in terminology is crucial as it demonstrates a shift in the understanding of the obligation of both the EAPs and environmental authorities. To implement means to put a plan into action.²²⁰ The act of implementing the activity remains with the EAP not the environmental authority. The phrase would be applicable where the competent is the body undertaking the tasks of environmental assessment.

To authorize means to give legal or official approval for something such as legal authorization to commence a listed activity.²²¹ Under the current heading, the understanding is that the environmental authority gives legal approval once the EAP has undertaken all the tasks required of her by the Act.

The requirement to investigate, assess and consider the impact of activities on the socio-economic factors was the central theme running through s 24 of NEMA, as was originally promulgated, and was considered to be in line with a number of NEMA principles.²²² This mandate was further endorsed by the highest courts²²³ of the land in a number of judgments. In the light of these changes the question is whether environmental authorities are under an obligation to consider the impact of activities on the socio-economic conditions in environmental impact assessments. The common consensus is that an EIA ‘requires a balancing of environmental, social and economic impacts, both positive and negative, in a

²²⁰ Oxford Dictionary available at www.oxforddictionaries.com/definition/english/implement.

²²¹ Ibid. available at www.oxforddictionaries.com/definition/english/authorise.

²²² Chapter 1 of NEMA sets out the National Environmental Management Principles that apply throughout the Republic to the actions of all organs of the state that may significantly affect the environment. Among others, these principles require that, development must be socially, environmentally and economically sustainable-s 2(3). Chapter 5-Integrated Environmental Management (IEM) lays down the general objectives of IEM; to promote the integration of the principles of environmental management set out in section 2 into making of all decisions which may have a significant effect on the environment; identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts, maximizing benefits, and promoting compliance with the principles of environmental management set out in section 2.

²²³ The Constitutional Court judgment in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC). The judgments of the Supreme Court of Appeal in *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment and Land Affairs* 2006 (5) SA 138 and *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA). See also M Kidd and F Retief ‘Environmental assessments’ in HA Strydom and ND King (eds) *Fuggle and Rabie’s Environmental Management in South Africa* 2 ed (2009) 971, 1027.

way that benefits derived from a particular development outweigh the costs borne by the society, and that the development is sustainable'.²²⁴

The principal Act required that the potential impact of activities on the environment, socio-economic conditions and the cultural heritage be considered, investigated and assessed prior to their implementation.²²⁵ Seemingly, such investigation and assessment of impacts on socio-economic factors ought to happen on the ground and not be considered later as a part of relevant considerations when a decision to issue environmental authorization was made. From the onset an applicant or EAP ought to investigate, assess and consider the impact of the proposed activity on the socio-economic conditions. Ramdhin²²⁶ in 2007, after the first NEMA amendment, stated 'omitting reference to 'socio-economic conditions ... casts doubt on whether or not environmental authorities are in fact obliged to take socio-economic considerations into account when deciding applications for authorization in the EIA process'.

This chapter will try to answer the first and the second research questions, namely whether environmental authorities are under an obligation to consider the impact of activities on the socio-economic factors, and if so the extent of that obligation. This debate would benefit from the discussion of all the reasons as stated by parliament and DEAT as to why s 24 was amended again in 2008.

3.2. The Western Cape Chapter of the International Association for Impact Assessment (South Africa) 29 May 2007²²⁷

In 2007, DEAT made presentations of the objects of the proposed NEMA Bill. One of the presentations was made in the Western Cape. Members of the International Association for Impact Assessment (South Africa) Western Cape Chapter and other members of the public attended the seminar. Smith Ndlovu and Summers Attorneys, a firm of environmental law specialists, prepared a Memorandum summarizing the information disseminated in the seminar. One Lize McCourt, representing the Department, provided explanations to the proposed amendments.²²⁸

²²⁴ Ridl and Couzens n 11 above at 103/189.

²²⁵ S 24(1) of NEMA.

²²⁶ A Ramdhin n 28 above at 132.

²²⁷ The Western Cape Chapter of the International Association for Impact Assessment (South Africa) 29 May 2007 available at http://www.iaia.co.za/file_uploads/NEMADraftAmend accessed March 2, 2014.

²²⁸ Memorandum on the Legal Implications of (and certain insights regarding) the National Environmental Management Second Amendment Bill and Proposed Amendments to the National Environmental

All changes to s 24 were discussed. Their impacts were highlighted and insights given on the actual implication and the proper interpretation and application of the amended text. Section 24(4), an equivalent to s 24(7) of NEMA as was originally promulgated was discussed and insight with regards to the proposed amendment given. Subsection 24(4) provides for the minimum procedures for the investigation and assessments of impacts. The minimum requirements for environmental impact assessments were mandatory under the 1998 and 2004 Acts.

3.2.1. Insights with regard to the proposed amendment to s 24(4)

The Department stated that the proposed amendment under s 24 in subsection (4) would significantly be more permissive in relation to the investigation, assessment and communication procedures to be applied by the development proponent/EAP with regard to an application for environmental authorisation. The so-called ‘minimum requirement’ set by NEMA amendment in 2004²²⁹ were no longer peremptorily stated under the Bill and therefore the amended text allowed for the exercise of discretion with regard to the procedures for investigation, assessment and communication of the potential impact of activities that require authorisation.

DEAT went on to state that the procedures to be followed during the investigation, assessment and communication of the environmental consequences of particular activities were left to be decided upon at the discretion of a development proponent/EAP and the relevant authority responsible for a particular application for environmental authorisation.

The Department noted two possible consequences that could arise in the circumstance, namely that, a decision-maker could be required in certain cases to explain why it allowed the EAP to exercise its discretion in the investigation, assessment and communication of the potential impact of an activity with respect to an application for environmental authorization. Or that a decision-maker who decides on a particular compliance requirement in this regard to investigation, assessment and/or communication procedures may have to justify the basis on which they reached a decision to require (or not, as the case maybe) compliance with a particular standard in regard to the assessment process.

Management Act's Environment Impact Assessment Regulations of 3 July 2006. Prepared by Smith Ndlovu and Summers Attorney, Janse Rabie and Nicholas Smith 29 May 2007. Available on <http://www.iaia.co.za> accessed March 27, 2014.

²²⁹ National Environmental Management Amendment Act 8 of 2004.

The following inferences could be drawn from the Department's presentation: first, DEAT failed to provide defences available to either the authority or the EAP in a case where they were required to explain why they decided on a particular compliance standard or what could be the justification for the exercise of discretion under the circumstances. It also failed to state the circumstances under which a decision might be challenged or the body that might challenge such a decision. Nevertheless, the implication is that the Department is aware of possible review proceedings that could ensue under this part of the Act.

Even so, the point underscored by DEAT is that if both the proponent and the competent authority mutually agree on a certain standard, they have the discretion to determine essential factors for consideration. It was not mentioned in the presentation whether the EAP or the authority should have justifiable reasons in determining the compliance requirement. However, the understanding is that they should act reasonably.

3.3. Proposed Amendments to the National Environmental Management Act, 1998 (NEMA) October 2007²³⁰

3.3.1. Presentation by Joanne Yawitch, Department of Environmental Affairs and Tourism

A clause by clause presentation of the Bill amending s 24 of NEMA was also made before parliament on October 2007. One Yawitch made the presentation. The following reasons were given by the Department in support of the Bill:

- to restrict the use of tools other than the EIA;
- by making all requirements compulsory, process is very rigid and flexibility and variation to meet circumstances not possible;
- it is not possible to exempt an applicant from any aspect of a compulsory requirement

The Department proposed to split minimum requirements into compulsory and non-compulsory requirements. However, this change is not reflected in the Act as the wording in the current section is 'must ensure' under subsection 24(4)(a) and 'must include' under 24(4)(b).²³¹ The reasons why this is the case will be discussed in the succeeding paragraphs.

²³⁰ Proposed amendments to the National Environmental Management Act, 1998 (NEMA) October 2007. Available at www.pmg.org.za/2007/071010nema.ppt accessed March 29, 2014.

²³¹ See s 24(1) of NEMA.

DEAT stated that it has linked NEMA to the Promotion of Administrative Justice Act²³² in order to prevent court reviews being made prior to exhaustion of the internal appeal process.

Yawitch's explanations resonate with Lize McCourt's insights on the proposed amendments. They both stated that the amendment would streamline and refine the EIA process and that the amendment would confer discretion on environmental authorities and proponents to determine the compliance requirement. The following are the minimum requirements that the Bill proposed to reduce to discretionary requirements; description of the environment to be affected; alternatives; mitigation measures; public participation and access to information; reports on gaps in knowledge and management and monitoring of impacts.

3.4. National Environmental Management Amendment Bill [B36-2007]: PUBLIC HEARINGS 6 NOVEMBER 2007²³³

Other presentations were made in November 2007, to the general public, stakeholders and interested people who were invited to make comments on the Bill. Among those who commented on the proposed Bill was Professor Jan Glazewski from the Institute of Marine & Environmental Law at the University of Cape Town. He provided a background on EIAs in South Africa. He stated that:

The EIA procedure explicitly and systematically brings a variety of factors before decision-making official to enable him or her to make a more informed decision as regards planning and development process. These factors are in line with the internationally accepted norm of sustainable development which has been included in our Constitution, namely that everyone has, among others, the right ... to secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development (s 24(b)(iii)).²³⁴

He went on to cite the *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others*²³⁵ and quoted Ngcobo's dictum that:

²³² Act 3 of 2000.

²³³ National Environmental Management Bill [36-2007]: Public Hearings 6 November 2007 <http://www.pmg.org.za/minutes/20071105-national-enviro> accessed 1 April 2014.

²³⁴ National Environmental Management Bill (B36-2007) Submission to the Parliamentary Portfolio Committee, Tuesday 6 November 2007 <http://www.pmg.org.za/minutes/20071105-national-enviro>.

²³⁵ 2007(6) SA 4 (CC).

The Constitution recognizes the interrelationship between the environment and development; indeed it recognizes the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.²³⁶

He continued to state that NEMA, the Act which was sought to be amended, rested on the foundation stone of sustainable development. His problem lay with the proposed amendment to s 24(4) which split subsection (a)(i) into new subsections: (a) and (b) and removed 'as a minimum' as a requirement from both subsections, but stipulated a 'must' under subsection (a). While stipulating a 'must' requirement for part (a), the problem he identified was that the new subsections (b)(i) to (v) had been reduced to 'may include' and the effect was that it conferred discretion.

In his view this was untenable and removed the 'legislative heart' of the EIA process from the regulatory framework. He explained that:

it is not arguable that we do not have the government capacity to achieve these minimum requirements; on the contrary the minimum requirements provide a template which we must strive to at least achieve to ensure that the environmental needs and socio-economic needs are integrated as per Justice Ngcobo's dictum quoted above.

The Chairperson asked whether Professor Glazewski believed that the amendment should be adopted. He stated that he supported the Bill as far as the exemptions clauses were concerned because they were necessary for the process to be made faster, he proposed that the minimum requirements be reinstated.

3.4.1. Public comments and submissions

The Legal Resources Centre (LRC) is a non-profit law firm representing rural and urban communities affected by mining and industrial pollution among other things.²³⁷ LRC was also concerned about the removal of minimum requirements for EIAs. It pointed out that

²³⁶ At para 45.

²³⁷ Legal Resources Centre home page available at <http://www.lrc.org.za/about-us>

while consideration of alternatives, mitigation measures, gaps in knowledge and monitoring had become discretionary under the proposed Bill; the principles of s 2 and the objectives contained in s 23 were mandatory.

LRC submitted that the minimum requirements in NEMA which the Bill sought to remove were not home-grown but were a result of international law and were applied in countries like Nigeria, Gambia. Principle 10 of the Rio Declaration of 1992 provides for public participation, access to information and access to justice; and principle 14 provides for environmental impact assessments. LRC pointed out that the minimum requirements for an EIA came from principle 4 of the Brundtland Report 1987.²³⁸ It was argued that the Bill gave no guidance for the exercise of discretion as to which minimum requirements should still apply no assurance for public scrutiny or participation, uneven standards for impact assessment, uncertainty as to the level of monitoring and enforcements of findings and lack of protection for environment from future impacts.

LCR also submitted that the amendment infringed upon the right to administrative justice. It replaced environmental standards with discretion, the exercise of which could result in the infringement of constitutional rights to procedurally fair administrative action including: the right to be heard (public participation, access to information) under s 3(2)(b)(ii) of PAJA and the right to a process where relevant considerations have been taken into account in administrative decision making.

²³⁸ Our Common Future (Brundtland Report): Report of the World Commission on Environment and Development 1987. Principle 4- An EIA should include, at a minimum

- (a) A description of the proposed activity.
- (b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity.
- (c) A description of practical alternatives, as appropriate.
- (d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short term and long term effect.
- (e) An identification and description of measures available to mitigate adverse environmental impacts of proposed activity and alternatives, and an assessment of those measure.
- (f) An indication of gaps in knowledge and uncertainties which may be encountered in compiling the required information.
- (g) An indication of whether the environment of any other state or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives.
- (h) A brief, nontechnical summary of the information provided under the above headings.

See s 24 (4) of NEMAA 8 of 2004 and S 24(1) of NEMA 107 OF 1998.

Other comments came from Wildlife Habitat Council²³⁹ through its Executive officer Marie le Roux, who submitted that s 24 gave excessive discretionary powers and there was no guidance on how to exercise such powers. Also the minimum criteria no longer applied. The Habitat Council's position was that the criteria that 'procedures must as a minimum' lie at the heart of the EIA process, namely whether the environment will be significantly affected, whether viable alternatives needed to be considered among others.

The other point was that the requirement to consider alternatives including the option of not implementing the activity had been dispensed with under the proposed amendment. Section 24 (4)(a) of the Bill deleted the phrase 'investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto'. In its (the Habitat Council) view, such removal removed one of the pillars of the EIA process, namely the need to explore viable alternatives in a given situation. Resonating Glazewski, the Habitat Council stated that 'this is untenable, since it is at the very heart of the EIA process. It is unacceptable to say that we don't have government capacity to achieve these minimum requirements. The minimum requirements are designed to ensure that environmental needs and socio-economic needs are integrated'. The Habitat Council then pointed out that the amendment had an impact on mitigatory measures, public participation, reporting on gaps in knowledge and monitoring and managements of the impacts.

3.5. The environmental authorization process under the NEMAA 2008

It seems that the Portfolio committee considered the comments made by commentators on the draft Bill. Glazewski's concern was that the amendment split s 24 into two new subsections: (a) and (b) and removed the 'as a minimum' requirement from both. While stipulating a 'must' requirement for part (a), the problem was that the new subsections (b) ((i) to (v)) were reduced to 'may include'. According to Glazewski, subsection (b) reduced the fundamental building block of the EIA process to a discretionary requirement. He suggested that a 'must' be retained in subsection (b). This was accordingly observed and the Act has changed "may include" to "must include".²⁴⁰

²³⁹ Wildlife Habitat Council- an non-profit, non-lobbying 501(c)(3) group of corporations, conservation organisations, and individuals dedicated to restoring and enhancing wildlife habitat. Available at <http://www.wildlifehc.org/about-whc>.

²⁴⁰ See n 233 above.

Environmental authorization issued under s 24 follows a sequence of events. The environmental authorization process is commenced under the NEMA EIA Regulations.²⁴¹ The Regulations prescribe a procedure for compiling a Basic Assessment Report (BAR)²⁴² or Scoping & Environmental Impact Report (S&EIR).²⁴³ It sets, among others, the compliance standard, the procedure for compiling, and criteria to be taken into account by authorities when considering applications for environmental authorization. However, in the Act there is a new inserted subsection (4A) which was not included in the Bill at the time of the hearing. The effect of this subsection will be discussed in the following paragraphs.

The proponent or EAP, in support of their application to carry out a listed activity,²⁴⁴ and depending on the magnitude and the significance of the impact on the environment, should undertake either a basic assessment and compile a Basic Assessment Report (BAR)²⁴⁵ or an environmental impact assessment and compile Scoping and Environmental Report (S&EIR).²⁴⁶ EIA is followed where ‘there is an assumption that the potential impacts, by their magnitude, will indicate a more comprehensive approach and, it follows a more time-consuming process’.²⁴⁷ A basic assessment has to be followed where the significance of the impact on the environment is lower;²⁴⁸ or where the impacts of the activity on the environment are generally known and could generally be easily managed.²⁴⁹ The size of the project, the threshold of harm and the availability of mitigation measures may also be used as the standard for determining which of the two processes is to be followed.²⁵⁰

The Regulations also prescribe the procedure for carrying out either the BAR or the S&EIR, the content, procedure for submission and perhaps most importantly and central to the present inquiry the criteria for the consideration of an environmental authorisation application. The criteria for the consideration of the BAR and S&EIR is laid down under reg 24 and 30

²⁴¹ GN R543 of June 2010.

²⁴² NEMA EIA Regulations Part 2: regulation 21-25.

²⁴³ NEMA EIA Regulations Part 3: regulation 26-35.

²⁴⁴ S 24D (1) the Minister or MEC concerned, as the case may be, must publish in the relevant Gazette a notice containing a list of

(a) Activities or areas identified in terms of 24(2); and

See also Listing Notices GN R544, 545 and 546 in GG 33306 OF 18 June 2010.

²⁴⁵ Reg 21

²⁴⁶ Reg 26, 27 and 28.

²⁴⁷ J Ridl and E Couzens n 11 above at 90/189.

²⁴⁸ J Ridl and E Couzens n 11 at 90/189.

²⁴⁹ Government Notices no. 805 of October 2012. The companion Guideline on the implementation of the environmental impact assessment regulations 2010.

²⁵⁰ See J Ridl and E Couzens n 11 above at 90/189.

respectively. The criteria to be taken into account by competent authority are also laid down under sections 24(4) and 24O of the Act. Note, however, that s 24O is only applicable where the Minister of Minerals and Energy is the competent authority to consider the application.²⁵¹

3.5.1. Compliance requirement with respect to basic assessments reports under the Regulations

The Regulations require an EAP undertaking a BAR to include, among others things, a description of the environment that maybe affected by the proposed activity and the manner in which the...social, economic and cultural aspects of the environment may be affected by the proposed activity²⁵² and also a description of the need and desirability of the proposed activity.²⁵³

The environmental authority may either accept or reject the application if it does not substantially comply with regulation 21 or 22. Regulation 21 outlines steps to be taken after submitting the application, which includes facilitating public participation of interested and affected parties, to consider all views and comments made on the BAR. Regulation 22 refers to the information that should be included in the report, necessary for the competent authority to consider the application and reach a decision. Such information should include the description of the environment likely to be affected to be affected by the proposed activity and the manner in which the geographical, physical, biological, social and economic and cultural aspects of the may be affected by the activity.

The empowering regulation provides that, the environmental authority may reject or accept the BAR if they are of the opinion that the EAP in preparing the BAR has *substantially complied* with regulation 21 or 22 may approve the report.²⁵⁴ The regulation does not define what is meant by ‘*substantially comply*’ with reg 21 or 22. Substantial compliance is defined as conformity with the substantial or essential requirements of something²⁵⁵ (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with.²⁵⁶ Therefore it would be safe to deduce that under the regulation, environmental authorities have the discretion to set up the compliance requirement. The

²⁵¹ S 24O(1).

²⁵² Reg 22(1)(d).

²⁵³ Reg 22(1)(g).

²⁵⁴ Reg 24(3).

²⁵⁵ The Wolters Kluwer Bouvier Law Dictionary, S M Sheppard (ed) Compact edition (Wolters Kluwer Law and Business 2011) 206.

²⁵⁶ Webster New World Law Dictionary, S E Wild (ed) (Wiley Publishing, Inc 2006).

question is whether a description of socio-economic factors to be affected by the proposed activity could be calculated as an essential factor to be considered by the environmental authorities?

Also, s 24(4) also prescribes minimum requirements to be complied with. Where BAR has to applied to an application for environmental authorization, the competent authority has to consider the provisions of s 24(4)(a).²⁵⁷ In terms with this subsection applications must ensure coordination between organs of state where activity falls under the jurisdiction of more than one organ of state;²⁵⁸ that the findings flowing from an investigation, the general objectives of integrated environmental management, principles of s 2 are taken into account;²⁵⁹ that a description of the environment likely to be affected is contained in the application;²⁶⁰ investigation of the potential impacts on the environment and the assessment of the significance of those impacts;²⁶¹ and public information and public participation procedures followed.²⁶²

3.5.2. Criteria for considering an S&EIR

If a proposed activity for which environmental authorisation is sought is likely to have a significant impact on the environment, a thorough environmental process which encompasses the scoping and environmental impact assessment has to be followed. The scoping report 'is a preliminary report identifying problems to be addressed by the environmental impact assessment',²⁶³ and outlines the following; a description of the activity to be undertaken;²⁶⁴ the description of any feasible and reasonable alternatives that have been identified; a description of the environment that may be affected by the activity and which activity may be affected by the environment;²⁶⁵ a description of environmental issues and potential impacts, including cumulative impacts that have been identified;²⁶⁶ details of public participation

²⁵⁷ See s 24 4A-where environmental impact assessment has been identified as the environmental instrument to be utilized in informing an application for environmental authorisation, subsection (4)(b) is applicable.

²⁵⁸ See s 24(4)(a)(i).

²⁵⁹ S 24(4)(a)(ii).

²⁶⁰ S 24(4)(a)(iii).

²⁶¹ S 24(4)(a)(iv).

²⁶² S 24(4)(a)(v).

²⁶³ E Couzens n 192 above at 50.

²⁶⁴ Reg 28(1)(b).

²⁶⁵ The use of the word environment is not restricted to the physical environment, even the economic and social environment can be read into the word.

²⁶⁶ Reg 28(1)(g).

process conducted;²⁶⁷ a description of the need and desirability of the proposed activity must be included. Kidd²⁶⁸ equates need and desirability with socio-economic factors, therefore this amount to the description of the socio-economic aspects that may be affected. It includes a description of identified potential alternatives to the proposed activity, including advantages and disadvantages that the proposed activity or alternatives and the community that may be affected by the activity.²⁶⁹

If the environmental authority accepts the scoping report, the EAP would be advised to proceed with the tasks for environmental impact assessment, including a requirement to conduct public participation process. Other tasks are similar to those undertaken in the scoping phase. The difference is that the environmental impact report should indicate an assessment of each identified potentially significant impact; an indication of methodology used in determining the significance of potential environmental impacts. Another difference is that unlike the scoping report, the environmental impact assessment report must include a description of the environment likely to be affected by the activity and the manner in which the ... social, economic and cultural, aspects of the environment may be affected by the proposed activity²⁷⁰ and any other matter required in terms of ss 24(4)(a) and (b) of the Act.²⁷¹

The EAP must submit written environmental impact assessment reports²⁷² together with a detailed, written proof of an investigation as required by the competent authority.²⁷³ The report may either be accepted²⁷⁴ or rejected if it does not substantially comply with r 32(1)(b).²⁷⁵ The use of substantial compliance suffers from lack of a clear definition as it does where a BAR is under consideration.

²⁶⁷ Reg 28(1)(h)

- (i) the steps that were taken to notify potentially interested and affected parties of the application;
- (ii) proof that notice boards, advertisements and notices notifying potentially interested and affected parties of the application have been displayed, placed or given;
- (iii) a list of all persons or organization were identified and registered in terms of regulation 55 as interested and affected parties in relation to the application; and
- (iv) a summary of the issues raised by the interested and affected parties, the date of receipt of and the response of EAP to those issues;

²⁶⁸ M Kidd n 39 above at 94.

²⁶⁹ Reg 28(1)(j). See also s 2(4)(i) of NEMA.

²⁷⁰ Reg 32(2)(d).

²⁷¹ Reg 32(2)(s).

²⁷² Reg 34(1)(b)- at least five copies

²⁷³ Reg 32(3).

²⁷⁴ Reg 34(2)(a).

²⁷⁵ Reg 34(2)(b).

The issue is whether socio-economic factors are an essential element of an environmental impact assessment. The mandatory minimum requirements for an EIA are provided for by subsection 24(4)(b) of the Act. The inserted subsection (4A) emphasises this by explicitly stating that where environmental impact assessment has been identified as the instrument to be utilized in informing an application for environmental authorization, subsection (4)(b)²⁷⁶ is applicable. Subsection (4)(b) prescribes the following minimum requirements; the investigation of the impact on the environment including the option of not implementing the activity; mitigation measures; evaluation of impact on national estate; reporting on gaps in knowledge; arrangements and monitoring of impacts; consideration of environmental attributes and adherence to requirements prescribed in a specific environmental statute.

Recalling that under s 24(7) of NEMA, as was originally promulgated, minimum procedures for investigation, assessment and communication of impacts had to include an investigation of the potential impact of the activity and its alternative on the environment, socio-economic conditions and cultural and assessment of the significance of that potential impact²⁷⁷ would be a starting point towards the realization that investigation of the potential impact on socio-economic conditions is no longer a minimum requirement under s 24 of NEMA.

However, the inserted subsection (4A) creates uncertainty in the understanding of s 24(4) in general. First, there is a split of subsection 24(4) into two subsections (a) and (b), and the inserted subsection does not make it any clearer as to what is meant by other instruments to which subsection 24(4) (b) may not be applicable. This is more so because under the regulations there are two types of assessment to be followed, to wit, basic assessment and

²⁷⁶ S 24(4)(b)- procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment- (b) must include, with respect to every application for an environmental authorisation and where applicable

- (i) investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity;
- (ii) investigation of mitigation measures to keep adverse consequences or impacts to a minimum;
- (iii) investigation, assessment and evaluation of the impact on any listed or specified activity of any national estate referred to in section 3(2) of the National Heritage Resource Act, 1999 (Act No. 25 of 1999), excluding the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act;
- (iv) reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, uncertainties encountered in compiling the required information;
- (v) investigation and formulation of arrangements for the monitoring and management of consequences for or impacts on the environment , and the assessment of the effectiveness of such arrangements;
- (vi) consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3); and
- (vii) provision for the adherence to requirements that are prescribed in a specific environmental management Act relevant to the listed or specified activity in question.

²⁷⁷ S 24(7)(b).

environmental impact assessment. Does this mean that where basic assessment is utilized subsection 24(4A) is not applicable?

Subsection (4A) was not in the Bill at the time it was debated. It was inserted through Bill [B36D-2007].²⁷⁸ The Portfolio Committee recognized that the words ‘where applicable’ in subsection 24(4) were capable of creating confusion and an assumed discretion. Therefore subsection (4A) is inserted to prevent a situation where the discretion of the Minister introduced by subsection 24(4)(b) may negatively impact on the current rigour and effectiveness of the EIA.²⁷⁹ It was also pointed out that the requirements under subsection 24(4)(b), are all applicable to an EIA but could not be adhered to by other tools such as, cost benefit analysis as alternatives and mitigation do not apply; environmental management program - alternatives do not apply but mitigation does; life cycles assessment-alternatives do not apply. Emphasis is therefore that all the minimum requirements under subsection 24(4)(b) apply where EIA is utilized to inform an application for environmental authorisation.

3.5.3. Compliance requirement: substantial compliance

The use of the phrase ‘substantially comply’ suffers from lack of a clear definition. However, from the context in which it is used one could safely deduce that it is a directory provision which confers discretionary powers on the authority issuing environmental authorization to determine the compliance requirement. The regulation confers on the environmental authority the discretion to choose which between two or more legally valid factors should form compliance requirement.²⁸⁰ As a result the question is what in law constitutes substantial compliance. The test laid down in *Maharaj and Others v Rampersad*²⁸¹ - which has been cited with approval in a number of judgments²⁸² - is that:

The inquiry is, I suggest, is not so much whether there has been ‘exact’, ‘adequate’ or ‘substantial’ compliance with this injunction but rather whether there has been compliance therewith. This inquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what according to the requirements of the

²⁷⁸ National Environmental management Amendment Bill [B36D-2007].

²⁷⁹ National Environmental Management Amendment Bill (B36D-2007).

²⁸⁰ See Y Burns and M Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006 LexisNexis)

²⁸¹ 1964(4) AD 638.

²⁸² Example, *African Christian Democratic Party v The Electoral Commission and Others* 2006 (3) SA 305 (CC) heard on 23 February 2006 and judgment delivered on 24 February 2006.

injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether this has been achieved are of importance.

The powers conferred on the authority by the Regulations are permissive and do not impose an obligation on the authority to adhere to all the requirements prescribed by the Regulations. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*²⁸³ it was stated that ‘the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is a room for a reasonable people to hold differing opinions as to which is to be preferred’.

3.5.4. How does an EIA authority know which factors are relevant to the exercise of discretion?

Generally, legislation confers discretionary powers on administrative authorities (including environmental authorities) in order to enable them to discharge the mandate imposed on them by law effectively and efficiently. The growing consensus is that administrators are given discretionary powers because of their specific qualification, expertise and first-hand knowledge of the administrative matters.²⁸⁴ This qualification, expertise and experience suggest that they are in a better position to determine which factors are relevant to the exercise of such discretion. Burns and Beukes state that ‘in any modern democratic state the administration has the difficult task of running the state’.²⁸⁵

²⁸³ [1977] AC 1014 at 1064. The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at 512 quoted the dictum of Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*, who had (Lord Cooke) quoted, with approval from *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665. The Court in *Bato Star Fishing* adopted the test used in *Secretary of State for Education and Science* to determine the meaning of s 6(2)(h) of PAJA. O'regan J held that: in determining the proper meaning of s 6(2)(h) of PAJA in the light of the constitutional obligation upon administrative decision makers to act ‘reasonably’, the approach of Lord Cooke provides sounds guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set standard such that a decision would ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative decision to be ‘reasonable’. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.

²⁸⁴ See Y Burns and M Beukes *Administrative Law under the 1996 Constitution* (LexisNexis Butterworth 2006)162.

²⁸⁵ Ibid. at 161.

Studies have shown that between September 1997 and March 2006 more than 40 000 EIA applications were submitted in South Africa and this reflected a weakness in the ability of the EIA system to screen EIA applications effectively.²⁸⁶ Consequently, it becomes necessary for environmental authorities to possess discretionary powers in order to perform their functions efficiently and adequately.²⁸⁷

3.5.5. Mandatory requirements under the Act

Section 24(4) of NEMA lays down the procedures for the investigation, assessment and communication of the consequences or impacts of activities on the environment which under part (a) must ensure:

- i. coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;
- ii. that the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management and the principles of s 2 are taken into account in any decision;
- iii. that a description of the environment likely to be significantly affected by the proposed activity is contained in such application;
- iv. investigation of the potential impacts of the activity and assessment of the significance those potential impacts; and
- v. public information and participation procedures which provide all interested and affected parties, including all organs of state that may have jurisdiction over any aspect of the activity.

Under subsection (b) an application must include;

- i. investigation of the impacts and significance of the impacts on the environment, including the option of not implementing the activity;
- ii. mitigation measures;
- iii. evaluation of the impact of activity on any national estate listed under National Heritage Resources Act 25 of 1999;
- iv. reporting on gaps in knowledge;
- v. monitoring and management of impacts on the environment;
- vi. consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3).
- vii. provision for adherence to requirements that are prescribed in a specific environmental management Act relevant to the listed or specified activity in question.

²⁸⁶ F Retief, CNJ Welman and L Sandham n 207 above at 154.

²⁸⁷ Y Burns and M Burke Administrative Law under the 1996 Constitution (LexisNexis Butterworth 2006) 161.

NEMA is an overarching framework legislation that is applicable to any activity that may significantly affect the environment. However, there are other specific environmental management statutes such as the National Water Act,²⁸⁸ the National Environmental Management: Biodiversity Act.²⁸⁹ The mandatory requirements stipulated under subsection 24(4)(b) do not absolve EAP from complying with the requirements prescribed in a specific environmental management Act relevant to the proposed activity. To illustrate this further, an EAP for a proposed filling station in Mpumalanga that affects a water course would have to seek necessary approval in terms of the National Water Act.

Some of the information that should be included in the environmental impact assessment report under the regulations overlaps with the mandatory requirements prescribed under the Act. For instance, it is a requirement under both the Act and the regulations that an environmental assessment report must include: a description of any assumption, uncertainties and gaps in knowledge; investigation of environmental issues, an assessment of the significance of each issue and an indication of the extent to which the issue could be addressed by the adoption of mitigation measures. Therefore it becomes mandatory that these factors become part of the compliance requirement under the regulation since they are mandatory requirements under subsection 24 (4) (b).

An environmental assessment report must also include details of the public participation process conducted in terms of the regulations, including a summary of comments received from, and a summary of issues raised by interested and affected parties and the response of EAP to those comments. Public participation is also a requirement in terms of subsection 24(4)(a) (v).

Public participation is one of the operating principles behind environmental justice in South Africa.²⁹⁰ According to Kidd 'it is vital that people have the opportunity to be heard in a meaningful manner before decisions are taken ... this is recognized, both explicitly and implicitly, in the NEMA principles'.²⁹¹ The idea of bypassing public participation is inconceivable. However, the standard application form²⁹² for EIA environmental authorization obtainable from the Department of Environmental Affairs contains a clause exempting applicants or EAPs from public participation requirements. Section 9.2 of the form

²⁸⁸ Act 36 of 1998.

²⁸⁹ Act 10 of 2004.

²⁹⁰ See M Kidd *Environmental Law* (Juta 2008) 242. See also M Kidd *Environmental Law* 2 ed (Juta 2011) 304.

²⁹¹ M Kidd *Environmental Law* (Juta 2008) 242. See also M Kidd *Environmental Law* 2 ed (Juta 2011) 304.

²⁹² The application form is available on www.westerncape.gov.za/...application_form accessed 19 May 2014.

is entitled ‘motivation for deviation from public participation requirements’ and it states ‘please provide detailed reasons as to why it would be appropriate to deviate from the requirements of regulation 54(2) as indicated above’.

Deviation from the requirements of reg 54(2) is not only a derogation from the regulations but it is a derogation and deviation from s 24(4)(a)(v) and the seven NEMA principles that relate ‘to public participation in environmental decision-making and related ideas such as transparency’.²⁹³ Not only could the EAP be exempted from the public participation requirements but may also indicate their intend to apply for exemption from any provisions of NEMA and/or NEMA EIA regulations by ticking the right box (yes or no) under section 10 of the application form. If the EAP has ticked the ‘yes box’ she is requested to ‘provide a description including the relevant section number of the Act and/ or EIA Regulation number for which exemption is sought’.

Under the circumstances there is no assurance that the minimum requirements of an EIA process as prescribed in NEMA and its regulations will be followed to the letter. Even where public participation is followed, there is no assurance that the views of the interested and affected parties are taken into account. Therefore, projects may proceed without sufficient public scrutiny.

The courts have in the past emphasised the right of interested parties to be heard in environmental matters by both environmental authorities and the courts. More importantly, the Constitutional Court held in *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga Province and Others*²⁹⁴

3.6. Conclusion

This chapter discussed further proposals made by the Department of Environmental Affairs to amend s 24 of NEMA in 2008 including the promulgation of the 2010 EIA Regulation and how this proposal ultimately turned out. Unfortunately for the department, many of the changes proposed in the 2008 Bill did not turn out as envisioned as they were rejected by the public as being *ultra vires* the constitution and best laid EIA practices internationally and locally. The proposal to have s 24(4) split into compulsory and non-compulsory minimum requirements for an EIA was contested. The split remains but all the requirements under

²⁹³ M Kidd *Environmental Law* 2 ed (Juta 2008) 242.

²⁹⁴ 2007 (6) SA 4 (CC).

subsection 24(4)(b) are obligatory with respect to every EIA application. However, what was not contested was the removal of the requirement in subsections 24(1) and 24(7) to investigate the potential impact of activities and its alternative on the socio-economic conditions and cultural heritage.

In accordance with s 24 all requirements listed under subsection 24(b) are obligatory. Even though the requirements of subsection 24(4) are mandatory it appears that in practice EAPs are allowed to apply for exemption from certain requirements of the EIA where appropriate and deemed necessary by the environmental authorities and the concerned EAP. Also the EIA regulations discussed above create a room for authorities and EAPs to determine factors that form the compliance requirement.

CHAPTER 4

4. Critical analysis of the judgment in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*²⁹⁵ and the opinions of different commentators.

4.1. Introduction

The above case came before the Constitutional Court as a result of what the appellants considered to be a procedural irregularity, in that during the environmental authorisation process towards approval of a proposed filling station the environmental authorities failed to consider the ‘need and desirability’ of that filling station together with its sustainability. In South Africa the performance of an EIA is a legal requirement for the construction, erection or upgrading of facilities for the storage of any substance which is dangerous or hazardous and is controlled by national legislation.²⁹⁶

Some of the typical risks associated with the construction of filling stations, such as installation of underground storage tanks, are known beforehand and could be easily mitigated and environmental damage prevented. One of the major environmental threats posed by underground gas storage is gas leakage. But depending on the sensitivity of the receiving environment, these readily identifiable and easily mitigated problems may present a more significant impact.²⁹⁷ According to Retief, Welman and Sandham:

Through the adoption of standards for the storage of particularly hydrocarbons, and other dangerous goods, the large number of EIA applications could be screened out, without allowing unique situations, such as filling stations in sensitive social and biophysical environments to be authorised without appropriate assessment.²⁹⁸

The view that filling stations pose a little threat to the environment is also shared by Retief and Kotzé²⁹⁹ who marvel their astonishment at the fact that South Africa’s environmental developments are cultivated through EIA case law in courts; ‘considering that most of the

²⁹⁵ 2007(6) SA 4 (CC).

²⁹⁶ Government Notice No.1182

²⁹⁷ F Retief, CNJ Welman and L Sandham n 207 above at 158.

²⁹⁸ F Retief, CNJ Welman and L Sandham n 207 above at 166.

²⁹⁹ F Retief and LJ Kotzé ‘The lion, the ape and the donkey: cursory observations on the misinterpretation and misrepresentation of environmental impact assessment (EIA) in the chronicles of *Fuel Retailers*’ (2008) 15 *SAJELP* 139.

historically well-established EIA systems do not bother including filling stations as an activity which would trigger an EIA'.³⁰⁰ They write that this is because impacts resulting from filling stations are not considered sufficiently significant as to warrant an EIA.³⁰¹

The integral object of the EIA process is to identify the environment to be affected, alternatives, mitigation measures so that the benefits derived from the project do not outweigh the harm suffered by the affected community,³⁰² public participation of interested and affected people, identification of gaps in knowledge and formulation of arrangements for the monitoring and management of impacts.³⁰³

4.2. The impacts of filling stations on the environment

Issues of concern that are usually associated with the construction of filling stations are the following; gas leakage,³⁰⁴ risk of fire or explosion,³⁰⁵ emission of greenhouse gases,³⁰⁶ production of waste,³⁰⁷ and in certain cases the pipelines may have to cross protected and sensitive areas.³⁰⁸ According to Retief, Welman and Sandham,³⁰⁹ the management actions and impacts and mitigation measures dealing with these impacts are generally known and standardised.

³⁰⁰ F Retief and LJ Kotzé n 298 above.

³⁰¹ F Retief and LJ Kotzé n 298 above at 140.

³⁰² E Couzens and M Dent 'Finding NEMA: the National Environmental Management Act, the De Hoop Dam, Conflict Resolution and alternative dispute resolution in environmental matters' (2006) 3 *PER/PELJ*.

³⁰³ See s 24 of NEMA; Convention on Environmental Impact Assessment in a Transboundary Context 1991; principle 4 of the United Nation Environment Program; F Retief, Welman and L sandham 'Performance of environmental impact assessment (EIA) screening in south Africa: a comparative analysis between the 1997 and 2006 EIA regimes' (2011) 93 *South African Geographical Journal* 154-171 at 154.

³⁰⁴ See *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga Province and Others* 2007(6) SA 4 (CC).

³⁰⁵ An immediate warning is given upon entering any premises where gaseous products are sold to switch off or extinguish lights.

³⁰⁶ A Ramsey and ND King 'Climate Change: Impacts, Adaptation, and Mitigation; threats and opportunities' in HA Strydom and ND King (eds) *Fuggie and Rabie's Environmental Management in South Africa* 2ed (2009) 1048 at 1050-11051 greenhouse gases are primarily carbon dioxide, methane, and nitrous oxide. C Anyadiegwu and E Anyanwu 'Environmental Impact of underground Natural Gas Storage' (2012) 4 *African Journal of Science, Technology, Innovation and Development* 197 methane emissions are discharged into the atmosphere during burn-free technological operations as a part of natural gases losses. Usually these emissions consist of carbon-dioxide with a slight content of methane. According to Ramsey and King carbon dioxide the principal cause of global warming.

³⁰⁷ Anyadiegwu and Anyanwu 'Environmental impact of underground natural gas storage' (2012) 4 *African Journal of Science, Technology, Innovation and Development* 197.

³⁰⁸ Anyadiegwu and Anyanwu n 306 above.

³⁰⁹ F Retief, Welman and L Sandham n 207 above at 158.

The generic impacts of filling stations could be minimised during the installation or operational phase. During this period, electrically driven compressors are preferred to minimise the emission of greenhouse gases.³¹⁰ According to Annyadiegwu and Anyanwu³¹¹ ‘the underground storage tanks are the safest and most secure way of storing large quantities of natural gas. The stored gas is not in contact with oxygen and cannot ignite within the underground storage tank’.

4.2.1. Causes and prevention of oil and gas leakages

Even though the impacts of filling stations on the environment are generally known and could easily be mitigated the participation of interested and affected parties is vital. The participation of interested and affected parties is one of the principles of environmental management which according to NEMA, should be promoted.³¹² The views expressed by the interested and affected parties may support the ‘need’ for the proposed filling station or why in their opinion a proposed filling station is not ‘desirable’. If the expressed views are considered they could go a long way in influencing a selection of best suitable location for implementing the activity including the option of not implementing the activity. According to Kidd ‘need relates to the need for the development in the sense of economic impact and provision of benefit to the community’.³¹³ While desirability on the other hand ‘involves the considerations of what town planners call welfare, efficiency and amenity’.³¹⁴ The need and desirability study should cover the entire socio-economic profile of the affected public.³¹⁵ Kruger, Wilgen, Weaver and Greyling observe that ‘IEM, and environmentally sustainable development, requires the rational weighing of environmental, social, and economic factors - even if some of these factors are expressed in emotional rather than rational terms’.³¹⁶

³¹⁰ Annyadiegwu and Anyanwu n 306 above.

³¹¹ Annyadiegwu and Anyanwu n 306 above.

³¹² S 2(4)(f).

³¹³ M Kidd n 39 above at 94.

³¹⁴ Ibid- he also finds that welfare consists of the objectives of promoting health, safety order, convenience and general welfare. Efficiency relates to the considerations such as efficient infrastructure and communications. Amenity has been defined as meaning much more than visually aesthetic and includes all that is seen, heard felt or smelt, in other words anything that could stimulates the senses in a pleasant manner.

³¹⁵ Department of Environment Affairs, 1992. *Checklist of Environmental Characteristics*. The socio-economic characteristics of the affected public includes but are not limited to the following; demographic aspects, economic and employment status of the affected social groups, welfare profile, health profile and the cultural profile.

³¹⁶ FJ Kruger, B van Wilgen, A Weaver and T Greyling ‘Sustainable development and the environment: lessons from the St Lucia Environmental Impact Assessment’ (1997) 93 *South African Journal of Science* 31.

4.3. Screening of applications for construction of filling stations under NEMA EIA Regulations

In South Africa an EIA is a mandatory legal requirement for any project that may significantly affect the environment in terms of NEMA.³¹⁷ The Environment Conservation Act³¹⁸ (ECA) EIA regulations,³¹⁹ which were repealed by the NEMA EIA regulations, indiscriminately required an EIA to be undertaken with regard to construction, erection and upgrading of any infrastructure used for storage of any substance which is dangerous and is controlled by national legislation.³²⁰ The 2010 EIA regime has a revised system of identifying activities and the type of assessment to be followed. For instance, construction of underground tanks for storage of petroleum is listed three times in the EIA listing notices.³²¹

First, where the construction of facilities or infrastructure for the storage and handling occurs in containers with combined capacity of 80 (eighty) but not exceeding 500 cubic metres a Basic Assessment Report (BAR) should be compiled.³²² Second, where the construction of the same infrastructure occurs in containers with a combined capacity of more than 500 cubic metres the scoping and environmental assessment (S&EIR) process should be followed.³²³ Finally, where the storage occurs in containers with a combined capacity of 30 but not exceeding 80 cubic metres in an environmentally sensitive area a BAR should be applied.³²⁴ Future litigants, interested and affected parties seeking to have decisions of environmental authorities set aside or reviewed need to be mindful of these listing notices as the adopted assessment determines the compliance requirement and the extent to which the public may be involved.

If the construction or storage of dangerous goods occurs in containers with a combined capacity of less than 80 cubic metres in a non-environmentally sensitive area there could be no need for the proponent to carry out either the BAR or S&EIR. However, concern is that identifying activities by their size could leave room for differing interpretations³²⁵ and

³¹⁷ See GN R544, 545 and 546 in GG 33306 of 18 June 2010.

³¹⁸ Act 73 of 1989.

³¹⁹ GN R1182 in GG 18261 of 5 September 1997.

³²⁰ Item 1(c)(i).

³²¹ NEMA EIA Listing Notice GN R544,545 and 546 of 18 June 2010.

³²² See GN R544 of June 2010 item 13.

³²³ See GN R545 of June 2010 item 3.

³²⁴ GN R546 of 18 June 2010 item 10.

³²⁵ See *Ridl and Couzens* n 11 at 9. *F Retief*, CNJ *Welman and L Sandham* n 207 at 158.

abuse³²⁶ by developers. It had been pointed out that where for instance ‘the size of a project in terms of cubic metres is used as a threshold, developers could potentially design their project to fall just below the threshold, raising legitimate questions such as what is the difference in significance between *80 cubic* metres and *79.9 cubic* metres project?’³²⁷ Ridl and Couzens, however, advise that where doubt exists as to which procedure is to be followed the precautionary principle ought to be applied and scoping and environmental assessment followed.³²⁸

Basically, in order to obtain an environmental authorisation for the construction of a filling station and associated structures, depending on the size of storage containers and the sensitivity of the receiving environment, the EAP could be required to prepare either a BAR or S&EIR. Either report should give a detailed account of the environment likely to be affected, highlighting every risk likely to arise including gas leakage, fire explosion, emission of greenhouse gases, waste, visual intrusion, noise and pollution; mitigation measures to be adopted in order to address any negative impacts; proof of public participation process, the views expressed by interested and affected parties and the EAP’s response to those questions. Authorisation would be granted where the competent authority is satisfied that all the procedural requirements pertaining to the law of environmental impact assessments have been complied with and has reason to believe that the proposed development would not cause any adverse harm to the environment.

³²⁶ F Retief et al n 207 at 158.

³²⁷ F Retief et al n 207 at 158.

³²⁸ Ridl and Couzens n 11 at 9/189.

4.4. The judgment in *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*

4.4.1. Facts³²⁹

On 9 January 2002 an application was made by the 9th to 12th respondents - beneficiaries of INAMA trust - in accordance with the provisions of ss 21, 22 and 26 of ECA for establishment of a filling station in Kingsview Extension 1, Whiteriver, Mpumalanga Province. The competent authority granted the authority for the installation of three underground fuel tanks each with a capacity of 21 500 litres³³⁰ for octane leaded and unleaded petrol, respectively, and the third for dieseline, the erection of a convenience store, a four post canopy, ablution facilities and a driveway onto the premises.

The application for environmental authorisation was supported by a scoping report prepared by a firm of environmental management services (Globecon) in accordance with GN reg 5 and reg 6 of the ECA EIA Regulations.³³¹ The competent authority upon receiving the scoping report could accept the report and grant authorisation if she was of the opinion that the information contained in the report was sufficient for the consideration of the application.³³² Alternatively, the competent authority could decide that the information (if insufficient) be supplemented by an environmental impact assessment which would focus on the identified alternatives and environmental issues identified in the scoping report.³³³

³²⁹The facts discussed are those from the record of the High Court Transvaal Provincial Division; *Fuel Retailers Association of South Africa (Pty) Ltd v The Director-General Environmental Management, Department of Agriculture Conservation and Environment for Mpumalanga Province and Others* case no: 35064/2002. Decided on 28/7/2002.

³³⁰ Under the 2010 EIA Regulations the threshold is that where the capacity of a gas tank is between 80-500 cubic metres a basic assessment should be applied to the application for environmental authorisation under GNR 544, and a scoping and EIR when the capacity of a tank is above 500 cubic metres. GNR 546 would apply for small stations between 30-80 cubic meters where the installation would take place in a geographical area. It is not clear from the listing notices whether the capacity of the fuel tank is applied to each tank separately, or whether it applies to the aggregate of the filling station to be installed on the identified location. See Ridl and Couzens 'Misplacing NEMA? A consideration aspects of South Africa's new EIA Regulations' (2010) 13 *PER/PELJ* 9-10. 'The guidelines are relatively straight, but the lists of activities are capable of differing interpretations, and there may be disagreement as to which procedure is to be followed. Where doubt exists, the precautionary principle should be adopted and scoping and environmental assessment route should be followed'. This point was made in reference to the 2006 EIA Regulations, but since the position was not changed by the 2010 EIA Regulation the argument becomes relevant here. If the application was made under the 2010 EIA Regime it would not be necessary for the applicant to prepare the S&EIR because the capacity fell below 30-80 cubic meters threshold.

³³¹ GN R 1183.

³³² Reg 6(3)(a).

³³³ Reg 6(3)(b).

4.4.2. Contents of the scoping report and specialist reports

The scoping report dealt with activities to be undertaken during the preparation, construction and operational phases of the development; the estimates of types of solid waste, liquid effluent and gaseous emissions expected from the project; biophysical descriptions of the site, including physical, biological characteristics; an evaluation of the impacts and concerns and recommendations. It dealt further with the issues identified during the scoping process that ought to be addressed, namely, the protection of the aquifer, the prevention of dust generation, possible noise impact during construction and operational phase; it gave details as to how those impacts would be mitigated so that the development would not have significant impact on the environment and the neighbouring areas. Annexed to the report was a Geotechnical and Hydrological report, proof of advertisement and proof of public participation.

It is apparent from the facts that the scoping report was a composite of two disparate processes, as it had identified the environmental risks and provided measures for the mitigation of the same risks. Commixing of the scoping processes with EIA process was one of the problems that plagued the effectiveness of the 1997 EIA regime,³³⁴ which is something that appears to have happened during the application process in the *Fuel Retailers Association* case. According to Ridl and Couzens ‘what happened in practice (under the ECA EIA Regulations) was that the scoping processes were commixed with the EIA process and the result was a report that exceeded the requirements of a scoping report but fell short of the full assessment required of an EIAR’.³³⁵ They wrote that the scoping report ‘is intended to be an information-gathering exercise, not an evaluation or assessment process. If the latter is required, no decision can be made at this stage and the process must proceed to an EIA’.³³⁶

The Fuel Retailers Association, through their consultant - Ecotechnik Environmental and Wetland Consultants, lodged an evaluation report challenging the contents of the scoping report submitted by the proponents of the filling station. They raised the following contentions: there was a risk of the contamination of the underground water; there was a risk

³³⁴ Ridl and Couzens n 11 above at 98/189.

³³⁵ Ridl and Couzens n 11 above at 98/189.

³³⁶ Ridl and Couzens n 11 above at 98/189.

of noise pollution, due to the fact that several sensitive receptors were located in the immediate vicinity of the proposed development; the scoping report did not disclose the type of fuel and the quantity to be stored on the premises;³³⁷ the shortcomings of the public participation process and the fact that no assessment had been performed of the visual impact of the proposed development.

Globecon commented on the issues raised in the evaluation report. The response was found in the Geotechnical and Hydrological reports annexed to the scoping report. The Fuel Retailers Association engaged another firm of engineers - de Villiers Cronje - to refute the contents of the Geotechnical and Hydrological reports made by the proponents. The report prepared by de Villiers Cronje highlighted: the Geotechnical data pertaining to structures and paved areas; hydro-geological data pertaining to future potential pollution hazards and information that lacked in the scoping report, that is, soil test data at the base of the fuel tanks, the potentially lacking data for the residual granite at depths below 3.7 metres, data on the aquifer and concluded by recommending further soil tests.

The competent authority granted authorisation for the construction of the filling station and associated structures. The approval was made subject to a number of conditions, namely, that the necessary approval be sought from the Department of Water Affairs (DWAf); the compliance with all control and mitigation measures as set out in the scoping report that had been prepared and submitted on behalf of the applicants be observed and that the applicants ought to prevent the pollution to the surface and underground water. The applicant appealed against this decision to the first respondent – the Director-General Environmental Management, Department of Agriculture Conservation for Mpumalanga Province (Director-General). The appeal was dismissed by the Director-General on the 23 September 2002. The applicant then lodged a review application before Webster J in the Transvaal Provincial Division of the High Court.

³³⁷ While quantity of the fuel stored on the premises was no a major issue under the 1997 EIA regime, it clearly is now. See GN R544, 545 and 546 in GG 33306 of 18 June 2010.

4.4.3. The High Court and the grounds of review

Eleven grounds of review were raised by the applicant in support of its application. All of them were dismissed by the High Court. They were: the exclusion of relevant considerations by the DWAF, in particular the water utilisation sections of DWAF and the presence of the underground aquifer and the effects of the possible leakage and the consequences thereof; need and desirability; the attempted delegation of responsibility to the DWAF; shortcomings in the public participation process; that alternatives were not considered; the failure to take into account the report of the applicant's engineers, Messrs de Villiers Cronje, into consideration; the decision by the 2nd and 1st respondents to reserve the right to amend and change the conditions of authorisation; an alleged piecemeal approach to need, sustainability and desirability; and the failure to call for a full environmental impact assessment.

The applicant's counsel submitted that the first and the second respondents failed to obtain the input of the water quality management and water utilisation sections of DWAF. He stated that according to the RoD 'no development may take place on the area of concern without the necessary permits/approvals and/or lease agreements/ where it is relevant, from the following institutions: Department of Water Affairs and Forestry'. It appeared from the RoD that the second respondent had forwarded the application for the filling station to DWAF for comment.

Webster J held that the second respondent had clearly applied its mind to the issue of consulting with DWAF. He held further that the contents of correspondence indicated an honest and genuine concern on the part of DWAF to ensure that the establishment of the proposed filling station posed no threat of contamination to water. The applicant argued that due to the permeability of the soil on the site in question, should leakage occur contamination of the aquifer was a likely consequence. According to the applicant the possibility of a leakage was a justified and serious concern.

However, it appears that the second respondent had entertained certain concerns regarding the contamination of the aquifer and had considered the evaluation report prepared by Ecotechnik (a consultant firm appointed by the proponents of the filling station to lodge an evaluation report dealing with certain aspects of the scoping report). This report was deferred to DWAF for comment and the latter agreed with the report.

Webster J held, in the relevant part:

A great deal of technical literature has been introduced by the parties in this application. Lacking any knowledge in the technical issues raised I find myself unable to utilize my legal knowledge in forming an informed decision on the issues covered by this literature. The only guiding knowledge is that the transportation, handling and storage of fuel can be reduced to a basic level. It is a well-known fact that there is a fuel pipeline from Durban to Gauteng. That pipe crosses literally hundreds of rivers, streams and rivulets. It traverses the greater part of our hunter land and passes through various important catchment areas. It is a well-known fact that there are rigs in the oceans. Some of these are located on the notorious treacherous water like the North Sea. The entire world is, however, either satisfied with the preventive measures that are place or considers them reasonably safe not to advocate the closure of such oil wells. All these activities rely on mitigatory measures. I can find no fault therefore in the second respondent's evaluation of the impact of the presence of the aquifer and his decision.

In support of this ground the applicant relied on the provisions of ss 2(3), 2(4)(g) and 2(4)(i) of NEMA and on the Gauteng EIA guidelines.³³⁸ The gist of these sections is that development must be socially, environmentally and economically sustainable. Also that decision must take into account the needs and values of all interested and affected parties. The first and second respondents refuted that they failed to take into account the aforesaid considerations. But they averred that need and desirability are requirements that are considered before rezoning can be approved by the Local Council in accordance with the Town Planning and Townships Ordinance³³⁹ as well as the Development Facilitation Act. This argument was supported by an affidavit of a Township planner who deposed that in accordance with the practice that obtained in Mpumalanga need and desirability were dealt with whenever applicants applied for rezoning.

The Gauteng EIA Guideline³⁴⁰ was developed by the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs in 2002 for the purposes of streamlining its approach to the management of applications in respect of the construction and upgrading of

³³⁸ EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations March 2002.

³³⁹ No 15 of 1986.

³⁴⁰ EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations March 2002. <http://www.eiatoolkit.ewt.org.za> accessed April 9, 2014.

filling stations. It is not clear from the Guideline itself or case law³⁴¹ whether this Guideline could be adopted and applied in the other eight provinces as well or whether it exclusively applies to Gauteng Province. There could be nothing barring the parties from applying it. However, the Guideline contains a disclaimer that the Gauteng Department reserves the right to deviate from the Guideline where appropriate.

The Guideline generally prohibits construction of filling stations if they are within three kilometres of an existing filling station in urban, built-up or residential areas. The proposed filling station fell outside the distance stipulation as it was 5 kilometres away from six other filling stations in the area.³⁴² This was referred to by the applicant as failure to consider the need, desirability of the filling station in accordance with ss 2(3), 2(4)(g) and 2(4) (i) of NEMA and the Gauteng EIA Guideline- Webster J held that:

The provisions in section 2(4)(g) and 2(4)(i) of NEMA apply throughout the country. In so far as they relate to local authorities that already have provision that need, sustainability and desirability are requirements for granting of authority to undertake a business or commercial activity, these provisions are redundant. There is a presumption that the legislature is aware of previous similar legislation. Further, government departments perform separate functions. A Department may not usurp the functions of another department. It is common cause that the relevant Town Planning considered the need, sustainability and desirability of the proposed site when it considered the application for rezoning. Were the applicant's version accepted, the consequence thereof would be that there is a possibility of more than one view on the same information, data and particulars.³⁴³ The Town Planning Council could reach its own conclusion. The first respondent could reach an opposing view. The licensing board when considering the application could reach a different conclusion. That clearly could never have been the intention of the legislature.

The applicant submitted that by attempting to transfer the responsibility of ensuring that no environmental pollution takes place to DWAF, the first and second respondents attempted to delegate their responsibility further. It was further submitted that, by delegating the decision on the issue of environmental pollution the applicant and other interested and affected parties

³⁴¹ See *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

³⁴² *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 16.

³⁴³ See *M Kidd* n 39 at 97.

were denied their right to public participation and to make inputs to the decision-maker prior to the decision being made.

The applicant's counsel further submitted that regulation³⁴⁴ 9(1) read together with 9(3) permitted the first and second respondent to reach a decision without seeking further comment from DWAF. This ground was also dismissed by the Court. The applicant submitted that the public participation was flawed; and, secondly, that in the same meeting the second respondent delegated its decision-making powers regarding the underground aquifer in that the first respondent did not make a decision on the aquifer but deferred all matters relating to water to DWAF for evaluation.

The applicant averred that the scoping report contained cursory reference to identified alternatives, and that the first and second respondents failed to consider alternatives to the proposed development; accepted the say-so of the thirteenth respondent regarding alternatives; and never considered the alternative not to act.³⁴⁵ According to the Court, the criticisms of the first and second respondents were unjustified. According to the Court, the action adopted by the first and second respondents was the only one that could have been adopted. A site was identified. They considered whether it was suitable or not in accordance with the local authority bye-laws, provincial legislation and relevant national legislation such as NEMA and ECA.

The applicant alleged that the respondent had failed properly to take into account what was set out by the applicant's expert engineer with specific reference to the aquifer. The Court was, however, satisfied with the respondents' findings. The court was persuaded that the first and second respondent evaluated reports through various experts, exercised their discretion in good faith and reached their decisions after having applied procedural and substantive fairness. According to Webster J the first and second respondent were not in breach of the provisions of s 6(2)(e)(ii) of the Promotion of Administrative Justice Act.³⁴⁶

The first respondents granted authorisation to the proponents and reserved the right to amend or change the authorisation. This was attacked by the applicant who averred that the

³⁴⁴ Reg 9 of the activities identified under section 21(1) ECA, GN R1183.

³⁴⁵ Reg 7(1)(b) and s 6(2)(e)(iii) of PAJA.

³⁴⁶ Act 3 of 2000.

respondent could not make a decision and later change or amend it. They argued that the respondents became *functus officio* and had renounced the right unilaterally to amend or change any condition.

The Applicant submitted that given the sensitive nature of the environmental issues, because of the presence of the aquifer, the first and second respondent erred in issuing the RoD on the scoping report only; and that they should have called for a full environmental impact assessment with specific reference to the underground aquifer.

4.4.4. The SCA judgment³⁴⁷

The Fuel Retailers Association appealed against the decision of Webster J. Before the SCA one Hlatswayo, the deputy director of the Department, testified that the applicants were realistic in their proposals and accepted that there will be an impact on the environment. Hlatswayo himself was ‘convinced that the proper surveys were done and that results of Messrs Geo 3 were well founded and scientifically based’. The applicants, he said ‘were realistic in their proposals, accepted that there will be impact on the environment but was convinced that scientifically the impact when weighed with the economic development, social acceptability, visual impact and in general from an environmental science perspective far outweighs the impact on the environment.’³⁴⁸ He was also convinced that the mitigatory steps were being taken to ensure that the environment would not be adversely affected.³⁴⁹

Hlatswayo was in charge of the Department that dealt with applications in respect of listed activities.³⁵⁰ He signed the RoD,³⁵¹ presided over the internal review and dismissed the Fuel Retailer Association’s claim to have the decision set aside.

In dealing with the grounds of review, Lewis JA decided that some of the grounds overlapped; therefore she decided to merge others and deal with others discretely where necessary.³⁵² As a result, only five grounds of review instead of eleven are documented in the

³⁴⁷ 2007 (2) SA 163 (SCA).

³⁴⁸ See F Retief and LJ Kotzé n 298 above.

³⁴⁹ At para [10].

³⁵⁰ Para [7].

³⁵¹ At para [3].

³⁵² At para [13]

judgment of the SCA. She decided to merge need, sustainability and desirability with failure to call for a full environmental impact assessment. This ground she termed ‘failure to take into account socio-economic considerations’.³⁵³

The first and second respondent accepted that such factors must be taken into account when considering an application for authorisation to carry on a listed activity. Lewis JA held that it was clear from a number of decisions³⁵⁴ that socio-economic considerations must be taken into account when making a decision under s 22 of the ECA; and that NEMA requires development to be socially, environmentally and economically sustainable.³⁵⁵

The SCA considered the facts of the *Fuel Retailers* case to be an exception since these factors (socio-economic factors) had been considered by the local authority when it rezoned the land from special to business. According to Lewis JA, it sufficed that the local authority had studied the questions of need and desirability. She agreed, in this regard, with the MEC whose views were supported by an affidavit of a town planner, one Muller, that need, desirability and sustainability were considered when the application for the rezoning of the site was made.³⁵⁶ As a result, it was not clear what additional factors should be considered by the environmental authorities in assessing need, desirability and sustainability once local authority has made its decision.

She held that:

The environment may well be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict, but there was no evidence to suggest that this was a possibility. In the circumstances I consider that Webster J in the in the Court below correctly held that MEC, in having regard to the local authority’s obligations when making the rezoning the rezoning decision, applied his mind to these factors and took them into account when making the decision to allow construction of the filling station.³⁵⁷

³⁵³ At para [14].

³⁵⁴ *MEC, Agriculture, Conservation and Environment and Land Affairs, Gauteng Sasol v Sasol Oil (Pty) Ltd* [2006] 2 All SA 17 (SCA), *BP Southern Africa (Pty) Ltd v MEC, Agriculture, Conservation and Environment and Land Affairs, Gauteng* 2004 (5) SA 124 (W), *Capital Park Motors CC and the Fuel Retailers Association of Southern Africa (Pty) Ltd v Shell SA Marketing (Pty) Ltd* unreported judgment of the Pretoria High Court, case number 3016/05 and *Turnstone Trading CC v The Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga*, unreported judgment of Pretoria High Court case number 3104/04.

³⁵⁵ Ss 2(3), 2(4) of NEMA.

³⁵⁶ Para [15].

³⁵⁷ Para [18].

The Fuel Retailers Association argued that regulation 7(1)(b)³⁵⁸ required that a plan of study for environmental impact assessment ought to include a description of the feasible alternatives identified during scoping that may be further investigated. Lewis J found that no feasible alternatives were placed before the MEC and in the circumstances there were no feasible alternatives for MEC to consider. The Fuel Retailers Association alleged that the installation of fuel storage tanks and the possibility of leaks of fuel into the natural water system are serious hazards. The SCA believed that the mitigatory measures were in place and as a result the applicant's ground was unwarranted.

The Fuel Retailers Association alleged that the MEC and the Director-General had failed to take into account a report filed by de Villiers Cronje. The report highlighted the Geotechnical data pertaining to the structures and paved areas and the hydro-geological data pertaining to future potential pollution hazards and information that was lacking in the scoping report, that is, the soil test data at the base of the fuel tanks, the permeability data for the residual granite at depths below 3.7 meters, data on the aquifer and concluded by recommending further soil tests and that the current and future value and the intended utilization of the water from the aquifer be evaluated. The SCA held that the complaints that the MEC erred in understanding the opinions of the experts would be a ground of appeal but not review.

The Fuel Retailers Association alleged that, once a decision was made, and the appeal rejected, the MEC and the Director-General ceased to have the power to amend or change their decision. The SCA found that the power to amend the conditions is reserved to cover new or unforeseen environmental circumstances. It held further that, on the authority of regulation 9(3), the relevant authority had the power to review any condition determined by and, if it deemed necessary, delete or amend such condition; or, at its discretion, determine new conditions, in a manner that is lawful, reasonable and procedurally fair. The Court dismissed this ground.

³⁵⁸ ECA EIA Regulations.

4.5. The judgment of the Constitutional Court³⁵⁹

The Fuel Retailers Association appealed against the decision of the SCA to the Constitutional Court. The appellant abandoned all the other grounds of review and pursued the failure of the MEC to consider need, desirability and sustainability of the filling station. The Constitutional Court stated that ‘need, desirability and sustainability’ was the term used by the parties when referring to ‘socio-economic considerations’. Need, desirability and sustainability did not appear in either the ECA or NEMA. It was used in schedule 7 of the Regulations promulgated under the Town-Planning and Townships Ordinance.³⁶⁰ It was one of the factors that the local authority was required to consider when approving the rezoning of the property.³⁶¹ The Constitutional Court explained that, in the light of the provisions of NEMA and the ECA, proper reference must be given to the socio-economic considerations.³⁶²

Kidd³⁶³ remarks that in the absence of a definition of need and desirability it was improbable that the Court could come to the conclusion that the obligation to consider the socio-economic impact of a proposed filling station was wider than the requirement to assess need and desirability. He writes that:

despite the fact that it is clearly an important requirement in the realm of town-planning, it is not defined in the legislation ... it would appear that the meaning of need and desirability is somewhat a secret code within the exclusive knowledge of town planners and those practitioners who interact with them, but not written down.³⁶⁴

However, a list of factors relevant to socio-economic factors is published in the IEM Guideline series documents.³⁶⁵ And this list covers some of the factors highlighted by Kidd in his comparison of need and desirability and socio-economic considerations.

³⁵⁹ 2007(6) SA 4 (CC).

³⁶⁰ Ordinance 15 of 1986.

³⁶¹ At 14; para [24].

³⁶² Ibid.

³⁶³ M Kidd n 39 above at 93.

³⁶⁴ M Kidd n 39 above at 93.

³⁶⁵ See Department of Environment Affairs, 1992. *Checklist of Environmental characteristics*.

4.5.1. The Constitutional Issue

The Constitutional Court stated that what was apparent from s 24 of the Constitution ‘was the explicit recognition of the obligation to promote justifiable economic and social development’. The Constitutional Court went on to state that:

Economic and social development is essential to the well-being of human beings. This Court recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. Development cannot, however, subsist upon a deteriorating environmental base’.³⁶⁶

Leading on from this statement, the Constitutional Court held that the Constitution contemplates the integration of environmental protection and socio-economic considerations with the ideal of sustainable development. This is apparent from s 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

4.5.2. Environmental authorizations and social and economic considerations: How, by whom and what stage?³⁶⁷

The court in *Fuel Retailers* stated that:

Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers the need and desirability from the perspective of town-planning and an environmental authority considers whether town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do so by NEMA. Nor is it required to identify the actual and potential impact of the proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.³⁶⁸

³⁶⁶ Para 61.

³⁶⁷ M Kidd n 39 above at 95.

³⁶⁸ At para [85].

Kidd's position is that there is no material difference between need and desirability and socio-economic considerations.³⁶⁹ His argument is that the Court's statement above ignores s 2(1) of NEMA which requires the principles of environmental management to be applied to all actions of organs of state that may significantly affect the environment. He writes that:

When a local authority decides on a rezoning application such as the one in *Fuel Retailers*, the decision may significantly affect the environment. What this means, then, is that the local authority in deciding on a rezoning, which involves adjudicating upon the need and desirability of that activity, must consider, assess and evaluate the social, economic and environmental impacts of that rezoning.³⁷⁰

Kidd has asked: 'If there is no difference between the two responsibilities, why is the developer required to go through two decision-making processes that essentially consider the same factors?'³⁷¹ Webster J in the High Court was of the opinion that the provisions in sections 2(4)(g) and 2(4)(i) are applicable throughout the country. In so far as they relate to local authorities that already have provision that need, sustainability and desirability are requirements for granting of authority to undertake a business or commercial activity, these provisions are redundant. Webster J's fear was that, there was a possibility of more than one view on the same information, data and particulars. The Town Planning Council could reach its own conclusion and the first respondent could reach an opposing view. The licensing board when considering the application could reach a different conclusion too. According to Webster J this could have not been the intention of the legislature.³⁷²

In line with this thinking, is the view expressed by van Reenen who observes that, in addition to their mandate to pursue environmental interests, local authorities have an explicit mandate to achieve a sustainable and equitable social and economic development.³⁷³ This view is underpinned by a number of statutory provisions. Amongst others, he cites the Local

³⁶⁹ M Kidd n 39 at 95.

³⁷⁰ M Kidd n 39 at 96.

³⁷¹ M Kidd n 39 at 97.

³⁷² *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management, Department of Agriculture Conservation and Environment for Mpumalanga Province and Others* unreported Judgment of the High Court Transvaal Provincial Division case no. 35064/2002.

³⁷³ T van Reenen 'Rudiments of a jurisprudential methodology of sustainable development: the judgment of Ngcobo J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and Others* 2007 (6) SA 4(CC)' (2008) 15 SAJELP 169.

Government: Municipal Systems Act³⁷⁴ which has as its purpose to provide an enabling legal framework for the ‘the overall social and economic upliftment of communities in harmony with their local natural environment’; and, in its Preamble, the Act is committed to developmental needs of the local government and to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to all people, and specifically the poor and disadvantaged.

The point noted by Kidd, however, is that not every rezoning will require environmental authorization in terms of NEMA; and that not every activity requiring authorization in terms of NEMA will have had to go through rezoning. He then advises that where the activity requires approval in terms of both the town planning legislation and NEMA the authorities could exercise one of the following options; first, ‘narrow down the responsibilities of either or each of the local authority or environmental authority, so that they are not required to consider duplicated issues’.³⁷⁵ Second, ‘do away with the requirement that one or other authority make a decision and make it a single-decision process.’³⁷⁶

There is, however, another school of thought pursuing a different line of argument. According to Retief and Kotzé³⁷⁷ ‘environmental authorities, as their name suggests, are not adequately equipped to consider socio-economic impacts; these considerations are best left to other authorities’. Further, that ‘it therefore seems particularly unfair for the Court to “coerce” environmental authorities into accepting responsibilities beyond their mandate by using incorrect means to an end, namely EIA’.³⁷⁸ Whereas, they agree that sustainability demands the assessment of environmental, social and economic considerations their discomfort lies in the extent to which the EIA was used to consider the above factors in isolation - that is, EIA - ‘a project-level assessment tool should be used to consider biophysical impacts only in relation to their social and economic implications’.³⁷⁹ According to Bray ‘... it seems that the inherent flaw, which admittedly eventually culminated in an

³⁷⁴ Act 32 of 2000.

³⁷⁵ M Kidd n 39 above at 97.

³⁷⁶ M Kidd n 39 above at 98.

³⁷⁷ F Retief and LJ Kotzé n 298 above at 152.

³⁷⁸ F Retief and LJ Kotzé n 298 above at 152.

³⁷⁹ F Retief and LJ Kotzé n 298 above at 152.

improper authorization, points to a breakdown in proper co-operative governance and intergovernmental relations during EIA process'.³⁸⁰

4.5.3. Environmental authorizations

Section 24 of NEMA, as it was originally promulgated, provided that in order to give effect to the general objectives laid down in s 23³⁸¹ the potential impact on the environment, socio-economic conditions; and the cultural heritage of activities that require authorization by law and which may significantly affect the environment, be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of the activity.

This section as it were made it clear that whenever an application for carrying out an activity that required permission was submitted, it ought to assess, investigate the impact on the socio-economic conditions likely to be affected. It could also be inferred from this section that at every stage, that is from the scoping phase to the EIA phase, the application had to be motivated by the consideration and assessment of these factors. The environmental authorities were then bound by this provision to ensure that applicants adhered to the minimum procedures for the investigation and assessment prescribed by s 24.³⁸²

4.5.4. Objectives of Integrated Environmental Management and Environmental Impact Assessments

The Court noted that the general objectives of IEM were furthered by s 24 which deals with the implementation procedures.³⁸³ The Court pointed out that the procedures require, among other things, that the potential impact of activities that require authorisation under s 22(1) of

³⁸⁰ F Retief and LJ Kotzé n 298 above at 158.

³⁸¹ S 23 (2) The general objective of integrated environmental management is to

- (a) Promote the integration of the principles of environmental management set out in section 2 into making of all decisions which may have a significant effect on the environment:
- (b) Identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts, maximizing benefits and promoting compliance with the principles of environmental management set out in section 2.

³⁸² S 24(7) (a)-(i).

³⁸³ Para 69.

ECA and which may significantly affect the environment be considered, assessed and investigated prior to their implementation and reported to the organ of state charged by law with authorising the implementation of the activity.³⁸⁴

4.5.5. The relevant Constitutional provision and sustainable development

The Constitutional Court found that the proper interpretation of ECA and NEMA raised a constitutional issue.³⁸⁵ Accordingly, the relevant provisions had to be interpreted within the context of s 24³⁸⁶ of the Constitution. Ngcobo J stated that:

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable economic and social development. Economic and social development is essential to the well-being of human beings. This Court has recognized that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if the development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.³⁸⁷

And that:

The Constitution recognizes the interrelationship between the environment and development; indeed it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable

³⁸⁴ Para 69.

³⁸⁵ At 20; para [40].

³⁸⁶ Section 24 provides that; 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.

³⁸⁷ At 21; para [44].

development and use of natural resources while promoting justifiable economic and social development.³⁸⁸

This aspect of the judgment and what was said subsequent thereto aroused much controversy among academic writers, for instance, Kidd's view is that environmental authorities are under an obligation to consider the impact of activities on socio-economic factors; Retief and Kotzé argue that environmental authorities are not adequately equipped to consider the impact of activities on socio-economic factors.³⁸⁹ The most dominant and long standing question raised by commentators is how the integration of socio-economic considerations and environmental factors as advised by Ngcobo J is to be achieved in practice. Sampson's argument is that service stations were not listed under the ECA as activities requiring EIA but the listed activity which requires EIA under the ECA is the construction, erection, or upgrading of storage and handling facilities for substance which is controlled by national legislation.³⁹⁰

Kidd's position is that while he regards the overall decision as correct as it supports the idea of integration of environmental and socio-economic factors in the environmental authorisation process, 'the judgment fails to accord appropriate weight to each of the three pillars of sustainable development'.³⁹¹ On the other hand du Plessis and Feris are of the opinion that integration of the 'three pillars' of sustainable development is a value driven exercise.³⁹² They claim that their view is supported by Sachs J in his dissenting judgment when he said 'economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is interrelated with environmental protection'.³⁹³

³⁸⁸ At 22; para [45].

³⁸⁹ In the first category find the following writers M Kidd 'Removing the green-tinted spectacles: the three pillars of sustainable development in South African environmental law' (2008) 15 *SAJELP* 85-102, LJ Kotzé 'The judiciary, the environmental right and the quest for sustainability in South Africa: a critical reflection' (2007) 16 *RECIEL* 298-311. In the latter category L Feris 'Sustainable development in practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 237-253, W du Plessis and L Feris 'A rebellious step in the right direction? A note on the dissenting judgment of Sachs J in the *Fuel Retailers Association of Southern Africa v Director-General; Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 15 *SAJELP* 157-168.

³⁹⁰ I Sampson n 123 at 79.

³⁹¹ M Kidd n 39 above at 89.

³⁹² W du Plessis and L Feris 'A rebellious step in the right direction? A note on the dissenting judgment of Sachs J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2007) 15 *SAJELP* 161.

³⁹³ At 43; para [103].

4.6. Opinions of different commentators

4.6.1. The so-called variation approach to integration³⁹⁴

The variation approach to integration is an applied approach to sustainable development in times of conflict, that is, when a decision-maker has to choose which between the three factors to give overriding priority.³⁹⁵ It is an approach supported by Tladi,³⁹⁶ and adopted by du Plessis and Feris. The variation approach to integration entails three variations of integration based on the value that is the preferred one in cases of conflict.³⁹⁷ Meaning, where economic growth is a preferred goal economic growth should take centre stage, and where conservation of the environment is a desired outcome, the natural environment should be placed at the forefront and this approach should apply similarly where the social needs of the humans is a preferred goal.³⁹⁸ Du Plessis and Feris argue that ‘whilst the integration is a value driven process, the preferred value requires a legitimate basis ... a decision maker’s decision should be grounded in law and there should be some justifiable base in law for the preferred value’.³⁹⁹

According to du Plessis and Feris, Sachs J’s dissent provides an alternative approach to the interpretation of sustainable development.⁴⁰⁰ Du Plessis and Feris argue that the overall aim of NEMA is, first and foremost, to ensure environmental protection and therefore NEMA chooses the environment-centred variation of sustainable development, which would require that in situations of conflict between economic, social and environmental considerations the latter must be preferred.⁴⁰¹ Therefore du Plessis and Feris agree with Sachs J’s argument that social and economic considerations are only triggered once the environment is implicated.⁴⁰²

³⁹⁴ W du Plessis and L Feris n 392 above at 161.

³⁹⁵ See n 396 below.

³⁹⁶ D Tladi *Sustainable Development in international law: An analysis of key enviro-economics instruments* (2007) 58.

³⁹⁷ W du Plessis and L Feris n 392 above at 161.

³⁹⁸ W du Plessis and L Feris n 392 above at 161. See also L A Feris ‘The role of good environmental governance in the sustainable development of South Africa’ (2010) 13 *PER/PELJ* at 86/234; one could argue that the integration is the ‘happy medium’ or compromise. This happy medium represents in actual fact a choice among the values made by decision-makers concerned.

³⁹⁹ W du Plessis and L Feris n 392 above at 161.

⁴⁰⁰ W du Plessis and L Feris n 392 above at 161.

⁴⁰¹ W du Plessis and L Feris n 392 above at 162.

⁴⁰² W du Plessis and L Feris n 392 above at 162.

Du Plessis and Feris continue in this line, incorporating Sachs J's dicta into their argument and write that;⁴⁰³

In this respect Sachs J's dissent is instructive. In essence, he provides us with the application of this variation approach to the integration element of sustainable development and takes NEMA as his legitimizing base. With regards to the application of the preamble and principles of NEMA he notes that economic sustainability is not treated as an independent factor to be evaluated as discrete in its own terms, but rather that the focus is on the inter-relationship between economic sustainability and environmental protection. Accordingly, he argues, NEMA does not envisage that social, environment and economic sustainability should proceed along separate tracks, with each being assessed separately and considered together at the end of the decision-making process.

Although the proponents⁴⁰⁴ of the so called variation approach to integration suggest that NEMA chooses the environment-centred variation of sustainable development, which would require that in situations of conflict between economic, social and environmental, environmental considerations to be preferred, they nevertheless fail to base their claim in law. They make a general reference to NEMA; they do not make any specific reference to the substantive provisions of NEMA to support their claim.

NEMA does not require decision-makers to take economic factors into account only when they become a potential threat to the environment. On the contrary, NEMA requires that development must meet these factors equitably. It provides that 'development must be socially, environmentally and economically sustainable'.⁴⁰⁵ It also enjoins environmental management to place people and their needs at the forefront of its concern, and serve their physical, psychological, development, cultural and social interests equitably.⁴⁰⁶ Therefore, according to NEMA, socio-economic factors need not be an environmental threat in order to become relevant, but NEMA is also concerned about how any proposed development undertaken pursuant to its provisions would respond to the socio-economic needs of the affected public.⁴⁰⁷ What NEMA fails to provide is how this balancing act should occur.

⁴⁰³ W du Plessis and L Feris n 392 above at 161.

⁴⁰⁴ See also D Tladi 'Fuel Retailers, sustainable development & integration: A response to Feris' (2008) 1 *Constitutional Court Review* 255.

⁴⁰⁵ S 2(3).

⁴⁰⁶ S 2(2).

⁴⁰⁷ See Department of Environment Affairs, 1992. *Checklist of Environmental Characteristics*.

4.6.2. Section 24 of the Constitution require that there should be no *a priori* grading of economic, social and environmental considerations⁴⁰⁸

Kidd has written:

At first glance, the idea of integration of environmental, economic and social factors does not appear to be one which is conceptually difficult, but neither our politicians, nor our administrative decision-makers, nor our Courts appear to be completely comfortable with it yet. In particular the idea that the three pillars are to be afforded equal emphasis has largely escaped all of these sectors.⁴⁰⁹

It is also suggested by Kotzé that s 24 of the Constitution guarantees everyone equal opportunities to realize their environmental, economic and social interests.⁴¹⁰ It would seem that this opportunity was further translated into a binding obligation on the part of those implementing NEMA, which provides that development must be socially, environmentally and economically sustainable.⁴¹¹ Environmental management is also required to serve physical, psychological, developmental, cultural and social needs equitably.⁴¹²

NEMA does not give guidance to those administering it on how this balance is to be achieved in practice. Also NEMA does not provide a list of these considerations. It is up to the environmental authorities and those applying NEMA to their actions to fill in this gap. The question is whether this equitable serving of physical, psychological, developmental, cultural is something achievable in practice.

The scoping had referred to the implications of the proposed filling station for noise, visual impacts, traffic, municipal services, safety and crime, and cultural sites together with the feasibility of the proposed filling station;⁴¹³ an evaluation of impacts and concerns and recommendations. According to the Constitutional Court it was detrimental for the scoping report to have omitted the impact of the proposed filling station on other filling stations in close proximity.

⁴⁰⁸ LJ Kotzé 'The Judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection' (2007) 16 *RECIEL* 311.

⁴⁰⁹ M Kidd n 39 above at 88-89.

⁴¹⁰ LJ Kotzé n 408 above at 311.

⁴¹¹ S 2(3).

⁴¹² S 2(3).

⁴¹³ At 10; para [9].

The Constitutional Court's finding in this regard presents two problems. First, while the list of socio-economic factors to be considered is not provided by NEMA, the list is nonetheless indeterminate. This may present hardships and uncertainty to future EAPs.⁴¹⁴ They would be subjected to the task of investigating both relevant and irrelevant factors, just to guard against contingencies such as the present even where such is not necessary. Secondly, the Constitutional Court in the matter regarded failure to include just one factor in the report as a breach of a mandatory procedure that warranted the matter to be referred back for environmental authorities to reconsider their decision. This was 'but one element of socio-economic investigation'.⁴¹⁵

4.6.3. Construction of a filling station and associated structures is a listed activity under the ECA EIA Regulations, but selling petrol is not⁴¹⁶

Claassen J in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Environment and Land Affairs*⁴¹⁷ held that:

To prove a point, one may merely ask a rhetorical question. Absent the storage and handling of petroleum products in a filling station, what is then left of the "filling" station? In my view, s 1(c)(ii) seeks to regulate the entire construction of the facility and not merely the construction of the facility and not merely the construction of storage tanks and petrol pumps on the site. It seems to me artificial to say that the Department is only entitled to look at the storage and handling facilities of petroleum products as an activity distinct and separate from the rest of the activities normally associated with filling station. In any event, if it is accepted that the Department has a say in the construction of the fuel tanks and the petrol pumps as a constituting storage and handling facilities of petroleum products, then, for environmental purposes, it will remain a concern where and for how long those fuel tanks and petrol pumps will be operating. All the concerns listed in the guideline, including the future economic life-span thereof, will still be relevant and applicable to such fuel tanks and petrol pumps even though they may be regarded as a distinct and separate from the filling station. Ultimately, from an environmental point of view, it makes little sense to draw a distinction between, on one hand, a filling station *per se* and, on the other, its facilities which store and handle hazardous products.

⁴¹⁴ Reference to consultants under the 2006 and 2010 EIA Regulations.

⁴¹⁵ W du Plessis and L Feris n 392 at 160.

⁴¹⁶ I Sampson n 123 above at 79.

⁴¹⁷ 2004(5) SA 124 (W) at 160A-E.

This passage was cited with approval by Cachalia AJA in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*.⁴¹⁸ It was contended in both cases that the MEC had acted *ultra vires* in making the Gauteng EIA Guideline.⁴¹⁹ The purpose of the Guideline⁴²⁰ was to provide an overview of the department's approach to the management of applications for the construction and upgrading of filling stations. The Guideline generally prohibited the construction of new filling station within three kilometres of an existing filling station in urban, built-up or residential areas. It was also contended that the purpose of the Guideline was not to protect the environment as stated by the MEC but to protect the already existing filling stations from competition.

This argument was raised again by Sampson who argues that

'Service stations' in themselves were not listed under the Environment Conservation Act as activities requiring EIA authorization. The listed activity that is generally triggered by the development of service stations is the construction, erection, or upgrading of storage or handling facilities for a substance which is dangerous or hazardous, and which is controlled by national legislation...if we are to assume automatically that the listed activity of installing petrol storage tanks storage tanks triggers impact assessments for all other infrastructure at the same site, then every factory, shops, or warehouse of any description, where dangerous goods are to be stored or handled, will be subject to EIAs, not only for the tanks, but for the entire site.⁴²¹

EIA is not only concerned about the sustainability of physical life of projects that may significantly affect the environment. As noted by Rogers, Jalal and Boyd, 'there is an economic life, which says, at some point, the operation and maintenance costs may overtake the value that the project is supposed to provide'.⁴²² In such eventuality the project cannot be sustained and it has to shut down. In the present case, selling of petroleum products and convenience become important considerations to be included in the EIA as they are the blood and life of the filling station.

⁴¹⁸ [2006] 2 All SA 17 (SCA).

⁴¹⁹ Guideline for the construction and upgrade of filling stations and associated tank installations March 2002.

⁴²⁰ Same as the one referred to in the *Fuel Retailers case*.

⁴²¹ I Sampson n 123 above at 79.

⁴²² P P Rogers, K F Jalal and J A Boyd *An introduction to sustainable development* 2008.

Even in the absence of any actual or potential threat to the environment the EIA should consider the economic sustainability of the project. Ramdhin submits that:

The judgment of Sachs J is flawed as he accepts that the environmental authorities were not entitled to rely on the findings of the Local Council but continues to accept the findings of the environmental authorities that there was no significant actual or potential threat to the environment. The learned judge also seems to ignore the fact that the economic sustainability of a development might be a relevant consideration in determining whether or not there is an actual or potential threat to the environment.⁴²³

4.6.4. Cumulative Impacts

Adding on to the nature and scope of the obligation to take into account socio-economic factors, the court in *Fuel Retailers* held that ‘a filling station may affect the sustainability of existing filling stations with consequence for the job security. Ngcobo J then advised that mindful of the possibility of job loss, the risk of contamination of underground water, soil, visual intrusion and light increased by the proliferation of filling stations in close proximity with one another, cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed. His advice was founded on the provisions of s 24(7)(b) - investigation of the potential impacts including the cumulative effects, of the activity and its alternative to the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact.⁴²⁴ Ngcobo J further stated that this exercise could be achieved by ‘naturally’ assessing the cumulative impact of the proposed development in the light of existing developments.

According to Couzens, the court’s holding above ‘may turn out to be the most significant aspect of the *Fuel Retailers* judgment; as it might be the aspect that will most need clarification by future judgments’,⁴²⁵ as the Constitutional Court missed the opportunity to give guidance to the decision-makers as to the relative weights to be given to various environmental, social, economic factors.⁴²⁶

⁴²³ A Ramdhin n 28 above at 135.

⁴²⁴ Note that s 24 has been amended, the amendment has changed the substantive provisions of s 24(7)(b). The current s 24(7) has no paragraph (a) or (b) nor does it make any reference to cumulative effects.

⁴²⁵ E Couzens n 262 above at 43.

⁴²⁶ E Couzens n 262 above at 55.

The Constitutional Court continued to hold that the objective of considering the impact of the proposed development on existing ones is not to stamp out competition but to ensure that the economic, social and environmental sustainability of all developments, both proposed and existing ones. A point which, according to Couzens ‘provides a “riposte” to the reasoning in *All the Best Trading CC t/a Parkville Motors and Others v SN Nayagar Property Development and Construction CC and Others*’.^{427/428} He also criticizes the judgment for failing to consider the above judgment together with other judgments of the High Court which might have been relevant to take into account and apply to the *Fuel Retailer’s case*.

In the view of other commentators this aspect of the judgment (assessment of cumulative impacts and the driving rationale) will not only need future clarification⁴²⁹ but is rather the most complicated and problematic aspect of the judgment.⁴³⁰ According to Retief and Kotzé, ‘... one of the driving forces behind commerce is competition. It cannot be the objective of any development to sustain existing ones because that would imply doing business without competition; which, needless to say, is impossible’.⁴³¹ The same writers are of the opinion that the court’s underlying objective for considering the impact of a proposed development on other developments in close proximity is both problematic and contradictory from an exclusively EIA perspective for the reason stated above.⁴³²

They also state that it was incorrect⁴³³ for the Court to have said that:

One of the environmental risks associated with filling stations is the impact of a proposed filling station on the feasibility of filling stations in close proximity. The assessment of such impact is necessary in order to minimize the harmful effect of the proliferation of filling stations on the environment. The requirement to consider the impact of a proposed development on socio-economic conditions, including the impact on existing developments, addresses this concern.⁴³⁴

⁴²⁷ E Couzens n 262 above at 43.

⁴²⁸ 2005(3) SA 396 (T).

⁴²⁹ See E Couzens n 262 above at 43.

⁴³⁰ See F Retief and LJ Kotzé n 298 above at 139.

⁴³¹ F Retief and LJ Kotzé n 298 above at 150.

⁴³² F Retief and LJ Kotzé n 298 above at 150.

⁴³³ F Retief and LJ Kotzé n 298 above at 150.

⁴³⁴ At para [80].

In their words, 'it boggles the mind how the environmental risks of one filling station could in any way affect the sustainability of other filling stations in close proximity'.⁴³⁵

4.7. Analysis of the Fuel Retailers case

Environmental impact assessment was developed in the US with the object of fostering greater environmental considerations into the decision-making process. It was developed to disclose the environmental consequences of activities that would significantly affect the environment to raise public awareness of the environmental consequences involved if the proposed activity was allowed. In the absence of mitigation measures if the finding of the EIA was that a particular project would cause detrimental harm on the environment, a no go option could be considered and the proposal to begin the project rejected.⁴³⁶

In chapter two, some of the reasons why it took South Africa almost two decades to introduce EIA in environmental statutes were highlighted. The government's fear was that environmental assessment would place undesirable constraints on the much needed economic growth. The greatest debate was that 'environmental assessment directs considerable attention at long-term or inter-generational ecological criteria, aesthetic considerations and educational interests',⁴³⁷ and the government's fear was that environmental assessment placed attention on considerations, which while equally important could be regarded by many as luxurious. For this reason, among others, the government proposed in 1980 to pursue the much needed economic growth while at the same time attributing the necessary attention to environmental considerations.⁴³⁸ It was also concluded in the White Paper Policy on a National Environmental Management Systems⁴³⁹ that environmental policy should avoid setting high environmental standards which would put constraints on much needed economic development.

⁴³⁵ F Retief and LJ Kotzé n 298 at 151.

⁴³⁶ G R Preston, N Robins and RF Fuggle 'Integrated environmental management' in RF Fuggle M A Rabie eds *Environmental Management in South Africa* (1992 Juta & Co Ltd) 749.

⁴³⁷ Ibid. at 748.

⁴³⁸ White Paper on a National Policy Regarding Environmental Conservation. Department of Environmental Affairs and Tourism 1980

⁴³⁹ Department of Environmental Affairs and Tourism 1993.

However, the international community began to take notice of the human activities affecting the environment and the resolution was the adoption in 1972 of the UN Declaration on the Human Environment (the 'Stockholm Declaration').⁴⁴⁰ In 1987, the World Commission of Environment and Development issued the Brundtland Report.⁴⁴¹ It was in that report that the concept of sustainable development was first endorsed at the highest level, and came to world attention.⁴⁴² The international community reconvened at Rio to reaffirm and build upon the Declaration.⁴⁴³

In Rio states present adopted Agenda 21 which enjoined member states to develop, in every situation, a policy of sustainable development.⁴⁴⁴ Agenda 21 also imposed on members an obligation to submit to the UN Commission on sustainable development a progress report of measures developed towards sustainable development. In 1997, South Africa submitted its report to the commission. Examples of policy and legislative responses included; constitutional environmental right; environmental management (NEMA) with its prime aim being cooperative governance and establishing principles for decision-making on the guiding principles of sustainable development and requirements for mandatory EIA for activities that may significantly affect the environment.⁴⁴⁵

Having agreed to the global blueprint for sustainable development adopted at the United Nations Summit Rio 1992 - Agenda 21- sustainable development became part of South Africa's environmental policy. To fulfil the commitment under Agenda 21, s 26 of NEMA enjoins the Minister responsible for international environmental instruments to report, annually to Parliament her participation in international meetings concerning international instruments,⁴⁴⁶ progress in implementing international environmental instruments to which South Africa is a party⁴⁴⁷ among other things. In particular, the section enjoins further the Minister to initiate an Annual Performance Report on Development to meet the government's commitment to Agenda 21.⁴⁴⁸ Sustainable development was imported into South African law

⁴⁴⁰ Declaration of the United Nations Conference on the Human Environment 1972.

⁴⁴¹ Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) 1987.

⁴⁴² See M Kidd n 39 above at 85-86.

⁴⁴³ Declaration of the United Nations Conference on the Human Environment 1972.

⁴⁴⁴ Report of the United Nations Conference on Environment and Development 1987.

⁴⁴⁵ See s 2 of NEMA.

⁴⁴⁶ S 26(1)(a).

⁴⁴⁷ S 26(1)(a).

⁴⁴⁸ S 26(2)(a).

as containing the concept of need, in particular the essential needs of the world's poor, to which overriding priority should be given.⁴⁴⁹

Arguably, the mischief that the legislature was trying to curb by including socio-economic factors in an environmental management statute (NEMA) was to prevent setting of overly high environmental standards that would put excessive constraints on social and economic development. According to Preston, Robins and Fuggle

... an approach to environmental evaluations in South Africa is needed which is reflective of these conditions (economic growth and development), taking account of both the limitations and requirements of this country. Of utmost importance is that the choice in environmental evaluation should differ from the stop/go approach in industrialised countries'.⁴⁵⁰

Therefore the s 2 principles are a reflection of this recognition and are a constant reminder to authorities to consider the needs of the poor when making decisions under NEMA and to 'formulate an appropriate compromise, with the emphasis on identifying options and facilitating a choice between options, rather than detailing the negative impacts of a development'.⁴⁵¹

Against this background, the role of environmental authorities could be examined. EIA was developed to 'focus on the biophysical environment or conservation'.⁴⁵² Based on the pretext, arguably, that every development is pursued in the name of economic growth, EIA became a trade-off between economic growth and environment conservation. According to Ridl and Couzens, 'prior to the provision of mandatory EIA, strategic business decisions were determined by two factors: technical feasibility and financial viability. Environmental considerations were largely excluded'.⁴⁵³ The inevitable consequence of affording greater consideration to the environment would be that environmental authorities would be forced to reject activities based on the significance of its impact on the environment and this would

⁴⁴⁹ White Paper on Environmental Management Policy. Department of Environmental Affairs and Tourism July 1997.

⁴⁵⁰ G Preston, N Robins and R F Fuggle 'Integrated environmental management' in R Fuggle and M A Rabie eds *Environmental Management in South Africa* (1992 Juta & Co Ltd) 749.

⁴⁵¹ Ibid.

⁴⁵² M Kidd and F Retief 'Environmental Assessment' in HA Strydom and ND King (eds) Fuggle and Rabie's *Environmental Management in South Africa* 2ed (Juta 2009) 971-1045 at 973.

⁴⁵³ J Ridl and E Couzens n 11 above at 4.

lead to a total ban of certain activities such as mining and construction of filling stations.⁴⁵⁴ This would place serious constraints on South Africa's economy and development.

Bearing in mind that environmental impact assessment addresses environmental issues with specific development proposals⁴⁵⁵ the rationale was that the assessment of environmental issues should not be decided in isolation as this would stand in the way of economic growth but be balanced with the social and economic gains. Not all development activities have to undergo an environmental impact assessment. EIA is triggered only when a proposed activity may significantly affect the environment is proposed.⁴⁵⁶

4.8. Conclusion

The judgment in the *Fuel Retailers* case is of paramount importance in this dissertation for the following reasons; the case was the first of its kind to be heard by the Constitutional Court; the issue before the court was whether environmental authorities were under the obligation to consider the impact of activities on socio-economic factors in EIAs. The Constitutional Court ruled that environmental authorities were under such obligation and that that obligation had not been fulfilled. It also ruled that sustainable development requires the balancing of environmental considerations on one hand with the social and economic factors on other hand.

The judgement attracted polarised and contending views from academics. This difference of opinion was centred on the issue- whether environmental authorities were under an obligation to consider the impact of activities on socio-economic factors. The long-standing question posed by commentators was how this integration of environmental considerations and socio-economic factors ought to happen in practice and what socio-economic factors were. It was incumbent upon the court to have provided answers to the above questions. This debate creates further uncertainty and at the end it is not any more clearly apparent whether the court was correct or wrong in its findings.

There are three main schools of thought on the matter. The first school supports the judgment and comments it for recognising the interrelationship between social, economic and

⁴⁵⁴ See Sachs' dissent in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC).

⁴⁵⁵ F Retief, CNJ Welman and L Sandham n 207 above 154-171.

⁴⁵⁶ S 24 of NEMA

environmental considerations. The second school of thought observes that the integration of socio-economic conditions and environmental considerations in the decision-making process is a value driven process. They observe that in the *Fuel Retailers* case above the value which ought to have been preferred over others is the environmental conservation. The third school is of the opinion that socio-economic factors are not a remit of an EIA process and it was incorrect for the court to have held environmental authorities responsible to consider socio-economic factors in EIAs.

One thing which remains is that during the same period, s 24 of NEMA, the section on which the court relied in its judgment was amended removing reference to socio-economic factors. The court noted and acknowledged this change. In the light of these changes would it be correct and fair for any reviewing court to review the actions of environmental authorities for failure to consider the impact of activities on socio-economic factors when the obligation to do the same had been removed from the minimum procedures for the investigation, assessment of the potential impacts? Would not such an action by the court lent credence to Retief and Kotzé's view that the decision of the court in *Fuel Retailers case* above 'coerced' environmental authorities to accept responsibilities beyond their mandate?⁴⁵⁷

⁴⁵⁷ F Retief and LJ Kotzé n 371 above at 152.

Chapter 5

5. The extent to which the Courts may control the exercise of discretion

5.1. Introduction

5.1.2. Section 24, PAJA and the judgment in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*⁴⁵⁸

It is fitting that this Chapter follows a discussion and analyses of the *Fuel Retailers* case, given that the case came before the courts as a result of an administrative decision to issue environmental authorisation made in terms of s 24(1) NEMA and ss 21, 22 and 26 of the ECA. Secondly, the Court in *Fuel Retailers* held that environmental authorities are under an obligation to consider the impact of activities on the socio-economic conditions.

Ngcobo J in the *Fuel Retailers* case noted ‘to underscore the importance of this of this requirement (that environmental authorities are under an obligation to consider the impact on socio-economic conditions), subsection 24(7) requires that any investigation must as a minimum investigate the potential impact, including the potential impact, cumulative effects of activity and its alternative to the environment, socio-economic conditions and cultural heritage, and the assessment of the significance of that potential impact. That was the law as it stood when the matter was heard.

5.2. Minimum procedures for the investigation, assessment and communication of potential impacts under NEMA and NEMA EIA Regulations

Mandatory minimum requirements under NEMA

The National Environmental Management Amendment Act(s)⁴⁵⁹ altered the minimum requirement for EIAs. The change removed the investigation of the potential impact, including cumulative effects of the activity on the socio-economic conditions and cultural heritage and assessment of the significance of that potential impact on the socio-economic conditions and cultural heritage. It is no longer a requirement under the Act that procedures

⁴⁵⁸ 2007 (6) SA 4 (CC).

⁴⁵⁹ See s 24(3) of the National Environmental Management Amendment Act 8 of 2004 and the National Environmental Management Act 62 of 2008.

for the investigation, assessment and communication of impacts include an investigation of the impact of activities on socio-economic conditions.

However, the following are the minimum requirements: investigation of the potential impacts of the activity and its alternatives on the environment, including the option of not implementing the activity; investigation of mitigation measures to keep adverse impacts to a minimum; assessment and investigation of the impact on any national estate; reporting on gaps in knowledge; monitoring and management of impacts; consideration of environmental attributes identified and adherence to the requirements of a specific environmental management Act relevant to the activity.⁴⁶⁰

The Promotion of Administrative Justice Act⁴⁶¹ (PAJA) sets out grounds under which any person may institute proceedings in a court or Tribunal for the judicial review of an administrative action.⁴⁶² A court or tribunal has the power judicially to review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.⁴⁶³ It is safe to deduce that if an environmental authority fails to ensure that an application supported by an environmental impact assessment report has complied with one or all of the mandatory requirements in s 24(4) of NEMA a court or tribunal has the power to review the action judicially.

The court or tribunal may grant any order that is justifiable, including an order directing the administrator to give reasons or to act in the manner the court or tribunal requires. It was pointed out by the court in *Fuel Retailers* that a decision by environmental authorities to grant authorisation under s 22 of the ECA and s 24 NEMA is administrative action within the meaning of PAJA.⁴⁶⁴ And the court found that the environmental authorities failed to comply with a mandatory material procedure and a material condition prescribed by the ECA and NEMA.⁴⁶⁵

A decision could also be reviewed if the decision-maker took into account irrelevant considerations or relevant considerations were not taken into account.⁴⁶⁶ It was contended in

⁴⁶⁰ S 24(4) of NEMA 62 of 2008. However, I have raised concerns regarding the inserted subsection 24(4A) and the split of subsection 24(4) into two subsection 24(4)(a) and 24(4)(b).

⁴⁶¹ Act 3 of 2000.

⁴⁶² S 6(1) of PAJA.

⁴⁶³ S 6(2)(b)

⁴⁶⁴ See *President of the Republic of South Africa v SARFU* 1999 (10) BCLR 1059 (CC); 2001 (1) SA 1 (CC) para 141.

⁴⁶⁵ At 28; para [38].

⁴⁶⁶ S 6(2)(e)(iii).

the *Fuel Retailers* case that in granting the environmental authorisation, the environmental authorities took into account irrelevant considerations and failed to consider relevant considerations.⁴⁶⁷

The court found that there was an overlap between the grounds and concluded that the main ground of attack was that the environmental authorities failed to consider the impact of the proposed filling station on socio-economic conditions, a matter which they were required to consider.⁴⁶⁸ The central question was therefore whether the environmental authorities failed to take into consideration matters that they were required to consider prior to granting the authorisation under s 22(1) of the ECA.

Another ground for review would arise if the action taken contravenes a law or is not authorised by the empowering provision or it is not rationally connected to the purpose for which it was taken; it does not connect to the purpose of the empowering provision; it does not connect to the information before the administrator; or the reasons given for it by the administrator.

After the consideration of all the relevant facts in the matter, Ngcobo J reached the following conclusion:

It is clear that the decision of environmental authorities is flawed and falls to be set aside as they misconstrued the obligations imposed on them by NEMA. In all circumstances, the decision by the environmental authorities to grant authorisation for the construction of the filling station under s 22(1) of the ECA cannot stand and falls to be reviewed and set aside. It follows that the Supreme Court of Appeal erred, the High Court in dismissing the application for review and the Supreme Court of Appeal in upholding the decision of the High Court.

Reference to the *Fuel Retailers* case illustrates the point that any action that does not take into account the mandatory requirements under s 24(4) of NEMA could be reviewed under PAJA.

⁴⁶⁷ At 20; para [38].

⁴⁶⁸ At 20; para [39].

5.3. Review of discretionary power

The NEMA EIA regulations contain a list of information that must be included in the environmental impact assessments reports, be these basic assessments or scoping and environmental impact assessments. Information that ought to be included in the report includes: a description of the environment that may be affected by the proposed activity and the manner in which social, economic aspects of the environment may be affected; a description of need and desirability of the proposed activity. These factors relate to the investigation of the impact of the proposed activity on the socio-economic conditions.⁴⁶⁹

However, when it comes to the consideration of applications for environmental authorisation, the regulation states that the competent authority may reject the application if it does not substantially comply with the regulation. The use of the phrase ‘substantially comply’ in the regulations suffers from lack of a clear definition. However, from the context in which it is used one could safely deduce that it is a directory provision which confers discretionary powers on the authority issuing environmental authorization to determine the compliance requirement. In short, the regulation confers on the environmental authority the discretion to choose which between two or more legally valid factors should form compliance requirement.⁴⁷⁰ As a result the question is what in law constitutes substantial compliance. The test laid down in *Maharaj and Others v Rampersad*,⁴⁷¹ which has been cited with approval in a number of judgments,⁴⁷² is that:

The inquiry is, I suggest, is not so much whether there has been ‘exact’, ‘adequate’ or ‘substantial’ compliance with this injunction but rather whether there has been compliance therewith. This inquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether this has been achieved are of importance.

⁴⁶⁹ M Kidd n 39 above at 95 ‘my position is that there is no material difference between the requirement to take into account the social and economic impacts (both positive and negative) of a proposed activity and the obligation to consider its need and desirability’.

⁴⁷⁰ See Y Burns and M Beukes *Administrative law under the 1996 Constitution* 3 ed (2006 LexisNexis)

⁴⁷¹ 1964(4) AD 638 CONFIRM

⁴⁷² *African Christian Democratic Party v The Electoral Commission and Others* 2006 (3) SA 305 (CC) heard on 23 February 2006 and judgment delivered on 24 February 2006.

The powers conferred on the authority by the regulation are permissive and do not impose an obligation on the authority to adhere to all the requirements prescribed by the regulation. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*⁴⁷³ it was stated ‘the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is a room for reasonable people to hold differing opinions as to which is to be preferred’.

There is no adequate guidance for the exercise of discretion as to which of the items listed in the regulations should be taken into account or which of the listed factors should form part of the compliance requirement. The answer to this question could be found in the statement made by DEAT when the amendments to s 24 of NEMA were proposed in 2007.⁴⁷⁴ It was said that amendments were necessary for the following reasons; improved efficiency and effectiveness of the system. Consequently s 24 was amended to remove reference to socio-economic factors. The Department also stated that the principal Act made all the minimum requirements compulsory. By making all requirements compulsory the process was very rigid and flexibility and variation to meet circumstances not possible. The importance of discretionary powers was discussed in the case of *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd Limited; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*:⁴⁷⁵

... the various functionaries concerned, with many and diverse powers, must have regard to a wide range of objectives and principles. Those objectives and principles will often be in tension and may be irreconcilable with one another. Accordingly it would be impractical if not impossible to give effect to every one of them on every occasion. Nor does the section

⁴⁷³ [1977] AC 1014 at 1064. The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at 512 quoted the dictum of Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*, who had (Lord Cooke) quoted, with approval from *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665. The Court in *Bato Star Fishing* adopted the test used in *Secretary of State for Education and Science* to determine the meaning of s 6(2)(h) of PAJA. O'regan J held that: in determining the proper meaning of s 6(2)(h) of PAJA in the light of the constitutional obligation upon administrative decision makers to act ‘reasonably’, the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set standard such that a decision would ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative decision to be ‘reasonable’. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.

⁴⁷⁴ Proposed Amendments to the National Environmental Management Act, 1998 (NEMA) July and October 2007. Presentation by Joanne Yawitch. Department of Environmental Affairs and Tourism available at www.pmg.org.za/docs/2007/.

⁴⁷⁵ 2003 (6) 407 (SCA) at para 31.

say that a functionary must have regard to each consideration in each case, nor what weight is to be accorded to it, nor how the various considerations are to be balanced against one another, nor when and how fast transformation is to take place, nor that the listed consideration are the only ones to be had regard to. These matters are left to the discretion of the Chief Director.⁴⁷⁶

However, it is possible that two or more people may hold differing opinions as to which of the information in the regulations ought to be included in either the basic assessment report or the scoping and environmental impact assessment report. Another possibility is that in the light of the precedent set in the *Fuel Retailers case* parties may challenge the exercise of such discretion where the procedures for the investigation and assessment have failed to assess the impact of activities on socio-economic conditions. According Burns and Beukes even though ‘the practice of bestowing discretionary powers on the state administration is a universally accepted one ... the exercise of such power is never free of legal control’.⁴⁷⁷

5.4. Discretionary power and the reviewing court

Burns and Beukes write that the reviewing court must objectively consider the following: the surrounding facts and circumstances giving rise to the exercise of discretion; the option exercised by the administrator (which must be adequate in the light of the existing facts and circumstances); and whether the choice exercised by the administrator serves the purpose authorised by law. The exercise of discretion conferred upon environmental authorities will be discussed in the light of these three elements below and one additional element.

5.4.1. The surrounding facts and circumstances giving rise to the exercise of the discretion

Ridl and Couzens have observed that to achieve the purpose of EIA, creating and maintaining the delicate tripartite balance between economic benefits, social upliftment and environmental integrity, a huge challenge is posed to both the EIA process and its participants. They argue that ‘just how difficult this is may not be fully understood; and criticisms of the process and role-players may be born out of ignorance’.⁴⁷⁸ DEAT in 2007

⁴⁷⁶ At para [31].

⁴⁷⁷ Y Burns and M Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006 Lexis Nexis Butterworths) 360.

⁴⁷⁸ J Ridl and E Couzens n 11 above at 4/189.

expressed a general lack of capacity to meet all mandatory requirements under NEMA.⁴⁷⁹ For this reason it sought to amend s 24 of NEMA out of the recognition that by making all the requirements compulsory, process was very rigid and flexibility and variation to meet circumstances was not possible. DEAT proposed to split minimum requirements to “musts” and “mays”.

This proposal was met with criticisms and the Department had to simply drop it. It was attacked by almost thirty individuals, organisations and academics, among those who criticised the proposed amendment were Professor Jan Glazewski, the Centre for Environmental Rights, the Wildlife and Environment Society of South Africa Lowveld Region, the Legal Resources Centre and Business Unity South Africa.⁴⁸⁰ It was submitted that the Department’s reasoning that it lacked capacity could not stand, rather that the Department should strive to meet the minimum requirements in order to ensure that the environmental needs and socio-economic needs are integrated as per Ngcobo J’s dictum.⁴⁸¹

Regardless of what the Constitutional Court said, there are serious capacity problems facing EIA administrators, such as human resource capacity to deal with applications submitted.⁴⁸² Consequently, the Department has to outsource services of consultants to assist them deal with applications.⁴⁸³ And this comes at a high cost. For instance, the total cost to the state of consultants used by the Department in 2005-2006 financial year was R20 million and 2006-2007 was R33 million.⁴⁸⁴ In a comparative study done by Retief et al it appeared that South

⁴⁷⁹ Proposed Amendments to the National Environmental Management Act, 1998 (NEMA) October 2007 available at www.pmg.org.za/docs/2007/0710nema.ppt accessed 29 March 2014.

⁴⁸⁰ National Environmental Management Amendment Bill [B36-2007]: Public hearings available at <http://www.pmg.org.za/minutes/20071105> accessed 2 April 2014.

⁴⁸¹ Ngcobo’s dictum ‘The Constitution recognizes the interrelationship between the environment and development; indeed it recognizes the need for the protection of the environment while at the same it recognizes the need for social and economic development. It contemplates the integration of environmental protection and economic development. It envisages that environmental considerations will be balanced with socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing “ecologically sustainable development and use of natural resources while promoting justifiable and economic and social development”. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.

⁴⁸² F Retief, N Coert, J Welman and L Sandham n 207 above at 161.

⁴⁸³ National Assembly (for written reply) question no.24 of 2008 <https://www.environment.gov.za/sites/default> accessed 20 May 2014.

⁴⁸⁴ Ibid. <https://www.environment.gov.za/sites/default> accessed 20 May 2014. National Assembly, Internal Question NO. 1446, internal question paper No 24 of 2008; Mr I F Julies (DA) to ask the Minister of Environmental Affairs and Tourism:

Africa was dealing with more EIA applications than countries like Russia and Kazakhstan.⁴⁸⁵ They observed that ‘considering that most of these countries, such as the Netherlands and the UK, have substantially more resources in terms of administrative capacity and skill, the strain on the South Africa EIA system is evident’.⁴⁸⁶ Under the circumstances it is understandable that there is a drive to reduce the scope of environmental impact assessment.

Arguably, this might be the reason why express reference to socio-economic condition was removed from s 24(1) the Act.⁴⁸⁷ Socio-economic conditions were also removed from the criteria that as a minimum procedure for investigation must ensure investigation of the potential impact of the activity on socio-economic conditions and cultural heritage and assessment of the significance of that potential impact.

5.4.2. The option exercised by the administrator

The legislature’s intention to amend s 24 in 2007 was to reduce the following mandatory minimum requirements into discretionary requirements; considerations of alternatives; mitigation measures, gaps in knowledge and monitoring to a discretionary requirement – this was met with great disapproval from the stakeholders. The proposal as stated earlier fell by the wayside. The members of public responded with a counterproposal that the minimum requirements be retained in the Act. It was stated that, by deleting the alternative requirement the legislature would remove one of the generally accepted pillars of EIA, namely the need to explore viable alternatives in a given situation. His submission was therefore that this removal was untenable and removed the legislative heart of the EIA process from the regulatory framework.⁴⁸⁸ The argument was that the minimum requirements which the

(1) (a) what was the total cost to the State of consultants used by his Department in the (i) 2005-06, (ii) 2006-07 and (iii) 2007-08 financial years, (b) what are the names of the consultants used; (c) for what purpose were they used and (d) what was the reason for preferring to use consultants instead of hiring persons with necessary skills;

(2) Whether any former employees of his Department have been employed as consultants in the above-mentioned financial years; if so, (a) why and (b) why did each such person leave her department?

⁴⁸⁵ Above n 463 at 161. It is evident that South Africa deals with significantly more EIA application per year compared with the selected sample countries-with no formal screening mechanism. South Africa has a formal screening mechanism.

⁴⁸⁶ F Retief, N Coert, J Welman and L Sandham n 207 above at 161.

⁴⁸⁷ M Kidd *Environmental Law* 2 ed (2008 Juta); M Kidd ‘Environmental Assessment’ in HA Strydom and ND King eds *Fuggle and Rabie’s Environmental Management in South Africa* 2 ed (2009 Juta) 971-1047 at 1027; M Kidd n 39 above at 85-102.

⁴⁸⁸ See Convention on Environmental Impact Assessment in Transboundary Context 1991 content of the environmental impact assessment documentation. All documentation must as a minimum contain; a description of the proposed activity and its purpose; a description, where appropriate, of reasonable alternatives to the proposed activity and also the no-action alternative; a description of the environment likely

legislature intended to remove were the essential thrust of the EIA process to which an overriding priority should be accorded at all times. The legislature was persuaded and the minimum requirements were retained in the amendment Act.⁴⁸⁹

Therefore the option exercised by the administrator must strive to achieve all the minimum requirements prescribed by the Act as these requirements are in line with international standards⁴⁹⁰ and practices of other states in Africa.⁴⁹¹ Beyond this criterion there is no yardstick as to which other factors should be considered. It is up to the authority considering the application to exercise such a choice. If the administrator were confronted with a choice to choose between the investigation of the impact of the activity on the environment and investigation of the impact of the activity on the socio-economic condition it is needless to say that the authority would choose environmental assessment over economic assessment.

5.4.3. Whether the choice exercised by the administrator serves the purpose authorised by law

It is important to note that, first and foremost, environmental impact assessment was developed in the US with the intent to build into the decision-making process an awareness of environmental considerations.⁴⁹² This was because ‘prior to mandatory EIA, strategic business decisions were determined by two factors: technical feasibility and financial viability. Environmental considerations were largely excluded’.⁴⁹³ The EIA has developed into a variety of formats in different countries.⁴⁹⁴ According to Ridl and Couzens:

In parallel with this shift in environmental thinking, social priorities in urgent need of attention were brought into the mix, and produced the complex matrix that underpins the

to be significantly affected by a the proposed activity and its alternative, a description of the potential environmental impact of the proposed activity and its alternative and the estimation of its significance, a description of mitigation measures to keep adverse environmental impact to a minimum, an explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data use, an identification of gaps in knowledge and uncertainties encountered in compiling the required information; where appropriate, an outline of monitoring and management programmes and any plans for post-project analysis, and a non-technical summary including a visual presentation as appropriate. See also principle 4 of the Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) 1987.

⁴⁸⁹ S 24(4) of NEMAA 62 of 2008.

⁴⁹⁰ See Convention on Environmental Impact Assessment in a Transboundary Context (1991) and the Report of the of the World Commission on Environment and Development: Our Common Future (Brundtland Report) 1987.

⁴⁹¹ Law no. 13 of 1994, Part V 23(3)(a)-(j).

⁴⁹² J H Baldwin Environment Planning and Management (1985 Westview Press) 244

⁴⁹³ J Ridl and E Couzens n 11 above at 4/189.

⁴⁹⁴ F Retief, N Coert, J Welman and L Sandham n 207 above at 154.

primary purpose of EIA: creating and maintaining the delicate and tripartite balance between economic benefits, social upliftment and environmental integrity.⁴⁹⁵

Subsection 24(7) of NEMA as was originally promulgated required, as a minimum procedures for the investigation, assessment and communication of impacts to consider the potential impact of activities on the environment, socio-economic conditions and cultural heritage. This subsection was in line with subsection 24(1) which required the potential impact on the environment, socio-economic conditions and the cultural heritage to be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising the implementation of an activity.

It is worth emphasising that this was changed by the 2004⁴⁹⁶ and 2008⁴⁹⁷ amendment Acts which removed reference to socio-economic factors from both subsections 24(1) and (7). The purpose as singled out by the empowering provision is that the potential consequences for or impacts on the environment must be considered, investigated and assessed and reported on to the competent authority except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of the Act.⁴⁹⁸

In respect of the discretion under the regulations, challenges may arise and the authority may have to demonstrate and explain its choice. In the light of the judgement in the *Fuel Retailers* case and what Ngcobo J said about the interrelationship between the environment and development; the need for the protection of the environment and the need for social and economic development; the integration of environmental protection of environmental protection and socio-economic development, it might take great effort to convince the reviewing court otherwise.

⁴⁹⁵ J Ridl and Couzens n 11 above at 4/189.

⁴⁹⁶ National Environmental Management Amendment Act 8 of 2004.

⁴⁹⁷ National Environmental Management Amendment Act 62 of 2008.

⁴⁹⁸ S 24(1) NEMAA 68 of 2008.

5.4.4. Factors relevant to the exercise of the discretion of the EIA authority

Environmental impact assessment is mandatory for projects listed under NEMA EIA Listing Notices⁴⁹⁹ which are considered as activities that may significantly affect the environment. These activities include; construction of filling stations; construction of railway roads; physical alteration of undeveloped, vacant or derelict land for residential, retail, commercial, recreational institutional use among other activities.⁵⁰⁰

Section 24 has been amended several times, (only three are recorded in this dissertation), in 2003,⁵⁰¹ 2007⁵⁰² and 2013.⁵⁰³ The amendment sought to allow for exercise of discretion with regard to the procedures for investigation, assessment and communication of the potential impact of activities that require authorisation.⁵⁰⁴ To streamline the EIA process and ensure that the minimum standard set out in s 24(4)(b) was achievable. Two possible consequences that would arise from the exercise of such discretion were noted by DEAT. First, the decision-maker could be required to explain why it allowed the EAP to exercise discretion in the investigation, assessment and communication of the potential impact. Second, the decision-maker who decides on a particular compliance requirement may have to justify the basis on which they reached a decision.⁵⁰⁵ DEAT did not provide defences available to either the EAP or the environmental authority exercising the discretion.⁵⁰⁶ In the absence of such an explanation it is hard to comprehend how difficult it would be to answer the above question-factors relevant to the exercise of the discretion of the EIA authority. One cannot even begin to speculate.

What makes this even harder is the fact that this function requires a case by case study of all the relevant factors involved in each project. The functions of environmental authorities are different from the tasks of other administrators. Issuing of a licence to begin a project under NEMA is different from the issuing of a motor vehicle licence (mechanical action) for instance. Under the latter once the formalities have been complied with (for example car has

⁴⁹⁹ NEMA EIA Listing Notices 544, 545 and 546.

⁵⁰⁰ NEMA EIA Listing Notices 544, 545 and 546.

⁵⁰¹ National Environmental Management Amendment Act 8 of 2004.

⁵⁰² National Environmental Management Amendment Act 62 of 2008.

⁵⁰³ National Environmental Management Laws Second Amendment Act 30 of 2013.

⁵⁰⁴ The Western Cape Chapter of the International Association for Impact Assessment (South Africa) 29 May 2007 available at <http://www.iaia.co.za/fileuploads/NEMADraftAMEND> accessed 2 March 2014.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

licence plates, roadworthy certificate) no discretion is involved the administrator must issue a licence.⁵⁰⁷ The environmental authorities are confronted with a difficult task of weighing up different considerations in different proposals for different activities.

Consider a scenario where two proposals are made. One developer wants to alter a vacant land for commercial use and ESKOM on the other hand wants to use the same area for construction of infrastructure for nuclear reaction in order to meet the growing demand for electricity. The two activities are different and the methods and standard of procedure would differ. The results of each report would differ from the results contained in the other. Although the Act lays down specific requirements to be fulfilled when EIA is undertaken, the regulation allows environmental authorities to make case by case judgment. The standard of assessment required for a nuclear station would differ from the standard applied to the construction of a commercial building such as a shopping complex or a mall. Therefore, there can never be a conclusive list of factors which environmental authorities would be required to consider and apply across board. Other determining factors that could influence the exercise of such discretion could be the size of the project, the threshold of harm and the availability and adequacy of mitigation measures to keep adverse impacts at minimum.

5.5. Conclusion

The preceding discussion identified two main challenges that could curtail the power of the courts to control and limit the discretionary powers conferred on environmental authorities by both the Act and the regulations. First, in accordance with the regulation environmental authority may accept any application for environmental authorisation if she is satisfied that in the assessment and investigation of the potential impact the EAP preparing the document has substantially complied with the regulations and the Act. Substantial compliance is not defined by the regulation but case law suggests that substantial compliance does not mean that there has to be exact, adequate or substantial compliance but that there should be compliance with the regulation. This leaves room for environmental authorities to choose factors that would constitute compliance requirement in any given case. Decisions are based on scientific standards and the expertise of environmental authorities.

⁵⁰⁷ Y Burns and M Beukes Administrative Law under the 1996 Constitution 3ed (2006 LexisNexis Butterworths) 160.

Secondly the Act sets mandatory minimum requirements that must be included in every EIA application and the requirement to consider the impact of activities on socio-economic factors which was formerly required by NEMA as was originally promulgated has been removed from the list. In so far as s 24 is concerned, it is not a requirement for EAPs to investigate the potential impact of activities on the socio-economic factors. However, decisions must be made after consideration of all appropriate factors.

Chapter 6

6. Conclusion and recommendations

6.1. Conclusion

NEPA reflected a fundamental change from an economic expansionist view of a world with open frontiers and unlimited resources; to the realisation that supply of resources was finite.⁵⁰⁸ As a result EIA was developed to afford greater consideration to environmental considerations which were largely excluded.⁵⁰⁹ Fundamental purpose of an EIA is to produce detailed information on environmental impact, based on expertise and scientific standards which decision-makers take into account.⁵¹⁰ This aspect has been covered sufficiently by s 24(4) (b) of NEMA which is in line with best international environmental practices⁵¹¹ and practices of developed⁵¹² and under-developed⁵¹³ world. In terms with s 24(4)(b) EAP must provide the environmental authority with the following minimum requirements with respect to every EIA application;

- investigation of the potential impact of the activity and its alternative on the environment and the assessment of the significance of the potential impact including the option of not implementing the activity;⁵¹⁴
- investigation of mitigation measures;⁵¹⁵
- the assessment of the impact of the activity on any national estate;⁵¹⁶
- reporting on gaps in knowledge, the adequacy of the predictive methods and underlying assumptions, uncertainties encountered in compiling the required information;⁵¹⁷
- investigation and formulation of arrangements for monitoring and management of impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation.⁵¹⁸

⁵⁰⁸ Integrated Environmental Management Information Series: Overview of Integrated Environmental Management Department of Environmental Affairs and Tourism 2004. Available at <http://www.deat.gov.za> accessed on 14 December 2014.

⁵⁰⁹ J Ridl and E Couzens n 122 above at 83/189.

⁵¹⁰ J H Baldwin Environmental Planning and Management (1995 Westview Press/ Boulder and London) 244.

⁵¹¹ See the Convention on Environmental Impact Assessment in a Transboundary Context 1991.

⁵¹² See NEPA.

⁵¹³ See Nigeria Environmental Impact Assessment Decree no. 86 of 1992 and Gambia's Law no.13 of 1994, part v23(3) (a)-(j).

⁵¹⁴ S 24(4)(b)(i).

⁵¹⁵ S 24(4)(b)(ii).

⁵¹⁶ S 24(4)(b)(iii).

⁵¹⁷ S 24(4)(b)(iv).

⁵¹⁸ S 24(4)(b)(v).

However, ‘in parallel with this shift in environmental thinking, social priorities in urgent need of attention were brought into the mix, and produced the complex matrix that underpins the primary purpose of EIA:..’.⁵¹⁹ This was indeed recognised by NEMA as was originally promulgated. The assessment of the impact of the activity on socio-economic factors formerly formed part of the list of the minimum requirements to be included in an EIA. This was provided for under both subsections 24(1) and 24(7) of NEMA. The reason given by DEAT in 2003 was that socio-economic conditions and cultural heritage were removed in order to align it with s 24(1) so that the minimum requirement set under s 24(4) could be achievable. The purpose or rational for that move was not given, in the absence of which we remain oblivious in our understanding whether or not environmental authorities are under an obligation to consider the impact of activities on socio-economic factors in EIAs - a crux issue which this dissertation sought to examine.

Argument is made that this obligation is still imposed by s 2 and s 23 of NEMA.⁵²⁰ Section 23 sets out the objectives of IEM. These are some of the objectives of IEM: to

- a) promote the integration of the principles of environmental management set out in s 2 into the making of all decisions that that may significantly affect the environment;
- b) to identify, predict, and evaluate the actual and the potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for the mitigation of impacts of activities, with a view to minimize negative impacts, maximising benefits and promoting compliance with the principles of environmental management set out in section 2;
- c) ensure that effects of activities on the environment receive adequate consideration before actions are taken in connection with them.

Under s 24(4A) NEMA recognises that there may be other ways of ensuring that the objectives of IEM are given effect to. The relevant section reads ‘where environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation...’. This subsection implies that

⁵¹⁹ J Ridl and E Couzens n 11 above at 83/189.

⁵²⁰ See the Judgment of the Constitutional Court in Fuel Retailers Case n 353 above. The Constitutional Court stated in footnote 76 that ‘in dealing with NEMA in this case it is important to bear in mind that this statute has since its enactment in 1998, been amended. Section 24(1) was amended in 2004 to delete the reference to delete the reference to social, economic and cultural impacts. However, in s 23(2)(b) the general objectives of integrated environmental management were not amended. This provision proclaims that one of the objectives of integrated environmental management is to “identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage”’.

there are other instruments to be utilised in informing applications for environmental authorisation such as, Environmental Management Programs (EMP), Life Cycle Assessment. Cost benefit analysis ‘estimates and totals up the equivalent money value of the benefits and cost to the community of projects to establish whether they are worthwhile’.⁵²¹ CBA is concerned with socio-economic benefits that would be derived from an activity that may significantly affect the environment. In order to give effect to the general objectives of IEM variety of tools has to be employed. EIA independently off the other tools cannot give effect to all objectives set out in s 23.

Therefore it is important to first determine whether, in a particular case EIA is the appropriate tool to address the potential impact of activities on socio-economic conditions. If not, more appropriate tools should identified and be employed. Consequently, if EIA is ruled out as the environmental instrument to be utilised under s 24 of NEMA and other tools that would address the issues involved sufficiently are identified or used in connection with EIA then it would not be the concern of the EIA and the authorising authority to consider the impact of activities on socio-economic factors.

Again the use of the word ‘promote’ in s 23 of NEMA is important. To promote means to support or actively encourage. Section 23 does not expect that the integration of socio-economic factors and environmental considerations be implemented on the ground, that is, it does not require project proponents to investigate, assess and communicate the impact of activities on socio-economic conditions but rather that decision makers should encourage the consideration of socio-economic factors involved when making decisions under s 24 of NEMA.

The Act further lays down certain end results that every EIA application must ensure. Applications must ensure; that recommendations and findings flowing from an investigation the general objectives of integrated environmental management laid down in the Act and the principles of environmental management set out in s 2 are taken into account in any decision made by an organ of state in relation to any proposed plan or project.⁵²² Subsection 24(4) has been split into two subsections, to wit subsection 24(4)(a) and subsection 24(4)(a). Subsection 24(4)(b) lays down the minimum requirements for EIAs. Subsection 24(4)(a) lays down a list other considerations to be taken account during the investigation and assessment

⁵²¹ National Environmental Management Amendment Bill [36D-2007].

⁵²² S 24(4)(a)(ii) of NEMA.

of the potential impact of activities on the environment not necessarily to be included in an EIA application. If the intention of the legislature was to include the assessment of the impact of activities on socio-economic factors in EIAs she could have expressly done so by including such a requirement under subsection 24(4)(b).

The fact that proceedings have been brought before the court to challenge the decision of environmental authorities for failure to consider the impact of activity on socio-economic conditions and the decision of the Constitutional Court to remit the matter back for consideration of socio-economic factors is not an answer to the above problem either. The judgment of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, conservation and Environment, Mpumalanga Province and Others*⁵²³ suffers from a number of drawbacks. First, the provision applicable and in force was s 24 as was originally promulgated.⁵²⁴ Another limitation is that the court did not define what socio-economic factors were or how these factors should be weighed against other considerations. It ruled that the obligation of environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility.⁵²⁵ It never provided the much needed guidance on how this integration ought to happen in practice.

In the absence of a clear legislative, judicial and policy guidance questions will also be asked about the rigour of such a requirement. Environmental authorities must strive to fulfil these principles, but they are free to decide how. Exercise of such discretion would include an option not to consider socio-economic factors where necessary and after the consideration of all appropriate issues. How would a filling station in White River impact on the environment and the economy? Or if there are three different developers: Mr. A proposes to build a 'life style estate' consisting of 18 hole golf courses, residential housing development, commercial activities and roads, five star hotel and a club house.⁵²⁶ He motivates his report by stating that the development would be to the economic advantage of the community. On the other hand a group of public spirited individuals feel that the proposed development would be ecologically harmful as the earmarked area is a wetland that is habitat to an endangered species of frog, fauna and flora.

⁵²³ 2007(6) SA 4 (CC).

⁵²⁴ See s 24 of NEMA 107 of 1998.

⁵²⁵ At para 62.

⁵²⁶ *Lagoon Bay Lifestyle Estate v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2011] 4 All SA 270 (WCC).

The second developer is the Fuel Retailers Association and wants to construct a filling station; a less scale project as compared to A's above and would not affect the wetland. There is a need for a fuel station in the area as the only available fuel station is 35km away. The information gathered through the public participation process supports the need and desirability for a filling station in the area. The third developer is the local municipality desirous to use the same area to build low cost housing for members of the local community living in shacks. The EIR shows that the wetland would be affected and possibly destroyed. If all the three proposals were presented before the environmental authorities for consideration and the environmental authority asked to decide which of the three projects ought to proceed. Perhaps the need for housing would rank high above others. The need for housing trumps the need for a filling station and five star hotel. In consideration of the report for its adequacy and comprehensiveness with regard to mitigation measures proposed by each developer it would be commendable for environmental authorities to consider how each project would respond to socio-economic needs of the affected community.

Assuming that there was no wetland and there was enough space to accommodate all the proposed activities, a different set of events would occur. Each development studied individually would have negligible or insignificant impact on the environment and each might be allowed to proceed. The completion of the life style estate could possibly attract more people to the area and this might create a need for another filling station. While each filling station may have relatively little or no adverse impact on the environment the accumulation of the effects from the two projects may have a far greater adverse effect on the environment.

6.2. Recommendations

6.2.1 Cumulative Impact Assessment

In most cases many of the impacts of developments on the environment and socio-economic resources result not from the effects of any single action, but from the combination of individually minor effects of multiple and subtly related actions over time.⁵²⁷ EAPs should be required to develop mechanisms for identifying the magnitude and significance of their contribution to those impacts.⁵²⁸ As pointed out above, construction of a single filling station may have little or no significant impact on the environment but the doubling of the similar

⁵²⁷ D Kay, C Geisler and RC Stedman Research & Policy Brief Series, Department of Development Sociology Cornell University issue no. 37 September 2010.

⁵²⁸ Ibid.

project may result in the doubling of effluent nutrient and doubling of the greenhouse gas emission.

Section 24(7) of NEMA as was originally promulgated required EAPs to investigate the potential impact of the activity including cumulative effects of the activity and its alternative on the environment, socio-economic conditions and cultural heritage and the significance of that potential impact. It is a pity that this requirement in particular had since been eroded by the amendment because some activities listed as activities that may significantly affect the environment under NEMA listing notices when studied individually relatively have low minimum impact on the environment.

By requiring all EAPs to consider cumulative effects of their activities, the Act ensured that the report did not only include direct impacts resulting from the proposed activity but also how the action could contribute to cumulative impacts. In the US an approach adopted by the Environmental Protection Agency is that in reviewing cumulative impact analysis, reviewers should focus on the specific resources and ecological components that can be affected by the incremental effects of the proposed action and other actions in the same geographic area. This could be achieved by considering:

- Whether the resource is especially vulnerable to incremental effects;
- Whether the proposed activity is one of several similar actions in the same geographic area;
- Whether other activities in the area have similar effects on the resource;
- Whether these effects have historically significant for this resource; and
- Whether other analyses in the area identified cumulative effects of concern.⁵²⁹

Even though cumulative impact assessment is necessary the complicating factor is that it broadens the scope of investigation and generates more expense to project proponents. Under South Africa's EIA system the responsibility of carrying out the EIA lies with the project proponent who is permitted to engage the services of a qualified EAP. Even though the Regulations⁵³⁰ categorically state that EAPs must be qualified,⁵³¹ objective⁵³² and independent⁵³³ using EAP carries the risk that the document will be biased in favour of

⁵²⁹ Consideration of cumulative impacts in EPA Review of NEPA documents available at <http://www.epa.gov/compliance/resources> accessed 19 December 2014.

⁵³⁰ NEMA EIA Regulations no. 543 of 18 June 1998.

⁵³¹ Reg 17(a).

⁵³² Reg 17(c).

⁵³³ Reg 17(b).

proceeding with the project. The government should determine and decide who prepares an EIA.

6.2.2. The act of implementing the activity

Preparing an EIA is not for the benefit of the project proponent but for the greater good of the public. Proponents might consider preparation of an EIA as part of conditions of the bureaucratic process one needs to fulfil in order obtaining permission to commence activity. They might lack the needed enthusiasm and interest to carry out the report. It is recommended that the government should not only oversee and issue licences but also engage fully in the process. This could be achieved by ensuring that EAPs are appointed by the government or a government agency. This could be private firms or a government agency. The government could require the proponent to bear the cost of the investigation and assessment of the potential impact on the environment and the preparation of the report.

Appendices

Since its inception in the US, EIA has been regarded as a normative approach towards the regulation and management of activities that may significantly affect the environment. This tool has been defined by a set of evolving principles; such as the principle of sustainable development; risk averse and cautious approach which takes into account the limits of the current knowledge about the consequences of decisions- and including the option of not implementing the activity.

In addition to various amendments made to s 24 of NEMA, s 24F and s 24G were also introduced. It is an offence under s 24F of NEMA to begin a listed activity without having obtained approval from the competent authority. The role of s 24G is to fix the procedural irregularity that occurs when listed activities are commenced without prior authorisations from the competent authority. The issue is whether the Act by allowing rectification of unlawful commencement of listed activities takes into account the irretrievable and irreversible damage that may be caused to the environment and socio-economic resources as a result of commencing a listed activity before or without having concluded necessary EIA studies.

The general perception is that where rectification is sought and granted activities are not subjected to the same review and assessment standards as activities to which an EIA is applied prior to commencement. Environmental authorities cannot be expected to ensure that findings arising from investigation or assessment of impacts took into account the socio-economic conditions of the affected public any more than they could be expected to consider the same factors prior to commencement of the said activity. Consequently, s 24G is being used as a leeway by developers to begin listed activities without obtaining the necessary authorisation from environmental authorities and seeking authorisation later- Kohn has called this the unscrambling of an egg. Although it is an offence to commence an activity without the necessary permits developers continue to flout law.

Even though the appendices do not answer the research questions they are nonetheless relevant. The dissertation discusses environmental impact assessments in South Africa with specific focus on the obligation of environmental authorities to consider the impact of activities on socio-economic factors. The appendices discuss the credibility of environmental impact assessment process in general to which the assessment of the impact on socio-

economic factors forms part of. They answer the following questions; whether the system of environmental impact assessment is efficient and effective; whether environmental authorities have the required capacity to discharge the mandate imposed on them by s 24 of NEMA. The appendices also capture the legislature and the judiciary's indifference towards the emerging criticisms levelled towards the inclusion of s 24G in the Act.

Environmental impact assessment is mandatory for activities that may significantly affect the environment and should be carried out before permission to begin such an activity is granted. The appendices look at the implementation and enforcement mechanisms provided for under the Act in case of breach of the mandatory requirement-which would also be relevant in the case where the investigation procedures failed to take into account the impact of activities on socio-economic conditions. It discussed a number of court decisions that dealt with the implementation and enforcement measures of EIAs.

Appendix A

Although it is an offence to commence an activity without the necessary permits developers continue to flout law.

7. Ex post facto EIAs

7.1. Introduction

The framework for environmental management in South Africa requires that the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of NEMA.⁵³⁴ The rationale behind this practice, as founded by the National Environmental Policy Act of 1969, in the US, was to disclose the environmental consequences of a proposed action or project to alert decision-makers of the environmental consequences involved.⁵³⁵ In addition to environmental consequences involved ‘social priorities in urgent need of attention were brought into the mix, and produced the complex matrix that underpins the primary purpose of the EIA: creating and maintaining the delicate tripartite balance between economic benefits, social upliftment and environmental integrity’.⁵³⁶ The main aim, as outlined by Retief, Welman and Sandham:

Is to identify and evaluate environmental impacts (both negative and positive) at an early stage, and to investigate methods to reduce or avoid the negative impacts, in order for the licensing authority to be able to make an informed decision that optimally supports the achievement of sustainable development’.⁵³⁷⁻⁵³⁸

⁵³⁴ S 24(1) National Environmental Management Amendment Act 62 of 2008.

⁵³⁵ S 102 of NEPA.

⁵³⁶ J Ridl and E Couzens n 11 above at 4.

⁵³⁷ F Retief, CNJ Welman and L Sandham n 207 above at 154.

⁵³⁸ S 2(4)(a) Sustainable development requires the consideration of all relevant factors including the following:

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimized and remedied;
- (ii) That pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimized and remedied;
- (iii) That the disturbance of landscapes and sites that constitute the nation’s cultural heritage is avoided, or where it cannot be altogether avoided, is minimized and remedied;
- (iv) That waste is avoided, or where it cannot altogether be avoided, is minimized and re-used or recycled where possible and otherwise disposed of in a responsible manner;
- (v) That the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- (vi) That the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardized;

The National Environmental Management Act (NEMA) is even more progressive in this regard, as it requires that, where there are uncertainties surrounding the impacts and mitigation measures to be applied, a risk-averse and cautious approach be applied, which takes into account the limits of current knowledge about the consequences of decisions.⁵³⁹ If, upon consideration, investigation and assessment of all relevant factors, it is found that the identified concerns could not be assessed and mitigated, the inevitable consequence would be that the proposed development should not proceed or an alternative suitable location be identified.

According to Couzens and Dent⁵⁴⁰ the application of the risk-averse and cautious approach ‘echoes the precautionary principle of international law’. The precautionary principle was first formulated by the Commonwealth countries through an Intergovernmental Agreement on the Environment endorsed on 1 May 1992.⁵⁴¹ The parties agreed that in order to promote the policy making and program implementation- precautionary principle should be applied- where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as reason for postponing measures to prevent environmental degradation.⁵⁴² In the application of the precautionary principle public and private decisions should be guided by: (a) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and (b) an assessment of the risk-weighted consequences of various options.⁵⁴³

The precautionary approach was included in the 1992 Rio Declaration on Environment and Development. Couzens⁵⁴⁴ suggests that the use of the word ‘approach’ instead of ‘principle’ ‘reflects state’s concern not to use “principle” in case the usage leads to the concept actually becoming a principle before states are ready whole heartedly to embrace it as such’.

(vii) That a risk-averse and cautious approach is applied, which takes into account the limits of the current knowledge and the consequences of decisions and actions; and

(viii) That negative impacts on the environment and on people’s environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimized and remedied.

⁵³⁹ S 2(4)(b)(viii).

⁵⁴⁰ E Couzens and M Dent ‘Finding NEMA: The National Environmental Management Act, the De Hoop Dam and Alternative Dispute Resolution in Environmental Disputes’ (2006) 9 *PER* 18/189.

⁵⁴¹ Intergovernmental Agreement on the Environment available at <http://www.environment.gov.au/node/13008> accessed on 20 July 2014.

⁵⁴² S 3.5.1.

⁵⁴³ *Ibid.*

⁵⁴⁴ E Couzens n 262 above at 50.

7.2. Components of an EIA

EIA consists of the following generic components: screening, scoping, public participation, consideration of alternatives and mitigation measures, assessment of impact significance, authorisation and post-decision monitoring.⁵⁴⁵ The EIA components adopted by South Africa through NEMA are the following; coordination and cooperation where an activity falls under the jurisdiction of more than one organ of state; environmental management principles and IEM objectives; investigation of potential impact and assessment of significance; public information and participation; investigation of potential impact including the option of not implementing the activity; mitigation measures; assessment of impact on national estate; reporting in gaps of knowledge; monitoring; environmental attributes; adherence to the requirements of a specific environmental management Act.

The criteria mentioned above ought to be applied with respect to every application for environmental authorisation. The tasks arising out of the minimum requirements ought to be undertaken prior to the implementation of a specified or listed activity to which an environmental impact assessment is to be applied for the following obvious reasons; the extent to which the impacts could be mitigated, adoption of a risk-averse and cautious approach which would take into account the limits of current knowledge about consequences of decisions and actions⁵⁴⁶ ought to be decided upon before the activity could commence. However, South Africa has developed a peculiar system of management of impacts which arguably detracts from the purpose of the EIA process.

Another integral part of an EIA process is the participation of interested and affected parties. Public participation is recognised by a number of s 2 principles.⁵⁴⁷ Indeed, one of the lessons that could be learnt from the St Lucia EIA, the largest EIA to be undertaken on the African continent at the time, saw an unprecedented involvement of the affected communities and

⁵⁴⁵ F Retief, CN J Welman and L Sandham n 207 above at 155.

⁵⁴⁶ S 2(4)(vii).

⁵⁴⁷ S 2(4)(f) the participation of all interested and affected participation in environmental governance must be promoted, and all people must have the opportunity to develop their understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

non-governmental organisations in the EIA process.⁵⁴⁸ Although the St Lucia EIA was undertaken long before EIA became a mandatory requirement in South Africa,⁵⁴⁹ the EIA procedure took into account the principles of environmental law recognised in the developing and underdeveloped world, driven by international agreements, government statutes, policies of influential international agencies to mention but a few.⁵⁵⁰ The resulting decision, which was that mining should not proceed on the shores of St Lucia, an ecologically sensitive area, was a result of extensive public participation of both the affected communities and interested parties.⁵⁵¹

7.3. *Ex post facto* authorisations

The Environmental Management Amendment Bill of 2003 sought to amend NEMA so as to enable the system of environmental impact assessment to be regulated in terms of NEMA rather than the ECA.⁵⁵² It was recognised that in order to do so, certain improvements, such as the introduction of enforcement measures and streamlining of the environmental assessment process had to be introduced to the system of environmental impact assessments. The draft Bill was tabled before Parliament on the 28 August 2003 for consideration. The Minister of Environmental Affairs and Tourism (DEAT), Mohammed Valli Moosa had the

⁵⁴⁸ FJ Kruger, BW van Wilgen, A Weaver and T Greyling 'Sustainable Development and the environment: lessons learnt from the St Lucia Environmental Impact Assessment' (1997) 93 *South African Journal of Science* 23.

⁵⁴⁹ FJ Kruger et al n 548 above 25. The EIA was initiated by the cabinet in 1989, following the publication of an initial impact assessment by the proponent of mining option (Richards Bay Minerals, RBM), and a public outcry. Specialist reports were circulated to the leading I&As during September 199, and comments were addressed in the Specialist Reports Prior to publication. An environmental impact report was for public view on 18 March 1993, for 14 weeks. A response report was published in August 1993. The review panel held public hearings during November 1993 and released their recommendation in December 1993. The final decision by the government, in May 1996 was that no mining should be allowed.

⁵⁵⁰ FJ Kruger et al n 548 above.

⁵⁵¹ FJ Kruger et al n 548 at 28. The conclusion was reached, first, by recognition of the Greater St Lucia area as a special and unique place. The panel perceived and emphasised the intrinsic value of this larger conservation area as a whole, with its marine, beach, lake, estuary, wetlands, dune and inland ecosystems, in terms of its biodiversity and values. The second important factor, which grew in prominence as the EIA ran its course, was the sense of place associated with the Greater St Lucia area. A sense of place was found to prevail among a wide variety of commentators including representatives of the communities who lived there before. Most expressed concern that this sense of place would be violated if mining were to proceed. Because the Greater St Lucia area was so uniquely special, because the area proposed to be mined fell into this area, and despite it amounting to only 0.5% of the total area, the integrity of the larger area and the people's concept of it should not be violated. The panel viewed the economic benefits associated with mining with scepticism. First they did not consider mining and eco-tourism to go concurrently...

⁵⁵² National Environmental Management Act: Second Amendment Bill in Government Gazette No. 25289 of 1 August 2003.

following to say: ‘it has been said that we have a comprehensive and excellent set of environmental laws on the Statute Books, but there has been a concern that there is not sufficient teeth for enforcement of the legislation that we have’.⁵⁵³ The Minister continued to state that the amending Bill accordingly beefed up the enforcement of DEAT. The Bill was unanimously approved by the house and members showed great support for the implementation and enforcement measures introduced by the Bill.

Consequently, the amendment Act⁵⁵⁴ inserted s 24G- rectification of unlawful commencement or continuation of listed activity. This section was applicable where a person had commenced or continued a listed activity without prior authorisation from the competent authority. Apparently, s 24G was intended to be applicable as a provision applicable to the transition from authorisation under the ECA to environmental authorisation under NEMA, for a brief period of six months.⁵⁵⁵

The subsequent amendments to s 24 of NEMA, although their wording is different, still maintain that the potential consequences for or impacts of activities that require authorisation by law be considered, investigated and assessed prior to their implementation. The amendments⁵⁵⁶ went even further to make it an offence for anyone to undertake a listed activity without first seeking environmental authorisation from the relevant activity. Under the 2004 amendment, the offence was punishable by a payment of a fine or imprisonment.⁵⁵⁷

7.3.1. Rectification of unlawful commencement of activity

Any person who has committed an offence of continuing with a listed activity without prior authorisation may apply to the Minister, or the competent authority as the case may be to have the commencement of the unlawful activity rectified.⁵⁵⁸ The competent authority may direct the applicant to compile a report containing an assessment of the nature, extent,

⁵⁵³ Proceeding of the National Council of Provinces, Thursday 28 August 2003.

⁵⁵⁴ National Environmental Management Amendment Act No. 8 of 2004.

⁵⁵⁵ <http://www.cer.org.za/wp.content/uploads/2013/02/130212proposedamend> accessed 29 March 2014
Centre for Environmental Right’s (CER) submission to the Portfolio Committee and the Department of Environmental Affairs. CER submitted that s 24G was only ever intended to be applicable as a provision applicable to the transition from ECA to NEMA. This was not refuted by either the Portfolio committee or DEA.

⁵⁵⁶ National Environmental Management Amendment Act 8 of 2004 s 24F; and the National Environmental Management Amendment Act 62 of 2008.

⁵⁵⁷ S 24F(4).

⁵⁵⁸ S 24G(1).

duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects,⁵⁵⁹ description of mitigation measures undertaken,⁵⁶⁰ public participation process followed,⁵⁶¹ in short an environmental impact assessment report or basic assessment report as the case may be.

This section is regressive because EIAs in South Africa have been mandatory since 1997 with three regimes governing EIAs having been introduced by the end of 2010. The ECA EIA Regulations introduced the procedure for performing a mandatory EIA.⁵⁶² The ECA Regulations were published together with a list of activities which may have a substantial detrimental effect on the environment.⁵⁶³ Any person undertaking a listing activity was required under the ECA regulations to undertake a full environmental impact assessment notwithstanding the fact that ‘some relatively large developments will have little effect on the environment in which ... activity may occur’.⁵⁶⁴ For instance, an applicant seeking to have the land use changed from agricultural use to any other use was required to complete both the scoping and environmental assessment phases of the EIA.⁵⁶⁵ According to Couzens and Lewis, ‘the EIA process was not clearly spelt out and it was left largely to the environmental consultants to add content’.⁵⁶⁶

Consequently, the 1997 ECA EIA Regulations were later repealed in 2006 when the Minister of Environmental Affairs and Tourism promulgated EIA Regulations in terms of s 24 of NEMA. The 2006 NEMA EIA regulations and their associated listing notices introduced BAR. Under the 2006 EIA regulations BAR was to be applied to smaller activities, which would have little effect on the environment on which they would be implemented.⁵⁶⁷ The 2006 EIA regulations changed the terminology of persons undertaking tasks for environmental assessments from ‘consultants’ to ‘environmental assessment practitioners’ (EAPs).

⁵⁵⁹ S 24G(1)(a)

⁵⁶⁰ S 24G(1)(a)(ii).

⁵⁶¹ S 24(1)(a)(iii).

⁵⁶² GN R1183.

⁵⁶³ GN R1182 in GG 18261 of 5 September 1997.

⁵⁶⁴ T Winstanley ‘Environmental impact assessments: one year later’ (1998) 5 *SAJELP* 386.

⁵⁶⁵ GN R1182 item 2 (c).

⁵⁶⁶ J Ridl and E Couzens n 11 above at 81/189. See also Couzens Ed, Lewis Melissa. ‘South Africa’. In *International Encyclopedia of Laws: Environmental Law*, edited by Kurt Deketelaere. Alphen aan den Rijn, NL: Kluwer Law International, 2013 at 397.

⁵⁶⁷ See GN R386 of April 2006.

Following the restructuring of the institutional and administrative structure of the then Department of Environmental Affairs and Tourism (split into the Department of Water and Environmental Affairs and Tourism), a new set of regulations had to be passed to reflect the shift in the administration of environmental matters including environmental impact assessments. The restructuring necessitated the publication of the 2010 EIA Regulations and their associated listings.⁵⁶⁸ Another reason for publishing the 2010 EIA Regulations might have been to align the regulations with the 2008 National Environmental Management Amendment Act.⁵⁶⁹ In addition to the BAR the 2010 EIA Regulations introduced a third category of activities requiring basic assessment. Under this category activities which would not in the ordinary course of events require either a basic assessment or a full environmental assessment are listed as activities to which a BAR should be applied where such an activity is implemented in an environmentally sensitive area.⁵⁷⁰

Section 24G has been criticised and attacked by academics and interest groups. CER, a non-profit company and a law clinic in Cape Town, has since its inception in 2009 fought against the incorporation of s 24G into NEMA. CER has said this insertion is a thorn in the flesh of wide group of different stakeholders, from authorities to civil society organisations to innocent and aggrieved violators of NEMA and has dubbed the section “a monster”. Kohn calls s 24G ‘a legislative invitation to offenders to attempt an unscrambling of the egg: it invites those in breach ... to ask for forgiveness, instead of permission through an application for ex post facto authorisation for illegally commenced listed activity’.⁵⁷¹ The common criticism is that the section has become a potential tool in the hands of wrongdoers to buy their way out of criminal prosecution and avoid lengthy EIA processes.⁵⁷²

⁵⁶⁸ See Environmental Impact Assessment Regulations GN R543, R544, R545 and R546 in GG33306 of 18 June 2010

⁵⁶⁹ For instance, see reg 6 of the 2010 EIA Regulations. The contents of reg 6 are different from that of their predecessor. See also M Kidd *Environmental Law*

⁵⁷⁰ See GN R546 in GG33306 of June 2010. Although the 2010 EIA Regulations are in place, the EIA process remains the same as provided by the 2006 EIA Regulations.

⁵⁷¹ L Kohn ‘The anomaly that is section 24G of NEMA: An impediment to sustainable development’ (2012) 19 *SAJELP* 1-24 at 2.

⁵⁷² National Environmental Management Amendment (NEMA) Laws Bill: Public Hearings 21 August 2012 available at <http://www.pmg.gov.za> accessed 24 April 2014.

The reason among developers to apply for s24G rectification might be to evade the lengthy decision-making process inherent under the EIA. This is given credence by Couzens and Gumede, writing about the attitude of politicians towards the role of EIA for development, on one hand;⁵⁷³ and what Retief, Welman and Sandham say about the backlog of applications EIA applications awaiting authorisation on the other hand.⁵⁷⁴ Developers not willing to undergo the lengthy process preceding environmental authorisation might seek to take advantage of this section. What they would do is to start with the ground works for whatever project they intend to undertake and seek authorisation later.

7.4. Obstructionist role of EIA for development; Discussion by Couzens and Gumede ‘Losing NEMA: *Endangered Wildlife Trust v Gate Development (Pty) Ltd and Others*’

Government has attributed its failure to deliver on a number of services, for example housing, infrastructure, and water delivery to the lengthy EIA process. This is touched on by Couzens and Gumede. They cite the speeches of various Ministers, including the former State President Thabo Mbeki, regarding the apparent obstructionist role which EIA requirements might play. They refer to the statement made by the Minister of Housing, Lindiwe Sisulu, who was recorded as saying that ‘she had given the construction industry an undertaking that housing delivery would no longer be delayed by EIAs’.⁵⁷⁵

According to the same report, they write, Sisulu said:

We cannot forever be held hostage by butterfly eggs that have been laid, because environmentalists would care about those that are important for the preservation of the environment, while we sit around and wait for them to conclude the environmental studies.

According to the same article:

Other ... departments with gripes about the EIAs include public enterprises, trade and industry and water affairs and forestry. Delays in infrastructure roll-out by parastatals such as Transnet and Eskom are also being blamed on EIA processes. Several officials in the Department of Environmental Affairs and Tourism told the Mail & Guardian that calls by other government departments to scrap EIAs entirely were “an open cast”.

⁵⁷³ E Couzens and K Gumede ‘Losing NEMA: *Endangered Wildlife Trust v Gate Development (Pty) Ltd and Others*’ (2007) 13 SAJELP 131-133.

⁵⁷⁴ E Couzens and K Gumede n 573 above.

⁵⁷⁵ E Couzens and K Gumede n 573 above at 131.

They also write that in, ‘2005 worrying signals were given out by the state President, Thabo Mbeki, and the then Minister of Minerals and Energy Affairs, Phumuzile Mlambo-Ngcuka’.⁵⁷⁶ What happened according to the above writers was that ‘Earthlife Africa claimed that the area around Pelindaba nuclear power station was badly irradiated from carelessly discarded nuclear waste’. Mbeki responded, they write, by labelling such warnings

... without foundation and, in my view, totally impermissible. We cannot go on scaring people about something that does not exist. I am deeply disturbed by the reckless statements that have been made regarding the Pelindaba nuclear emissions and how these are affecting the people of Atteridgeville. These statements have been made by an NGO in order to promote its own interest, which is regrettable.

They write that Mlambo-Ngcuka reacted similarly, by threatening to enact ‘legislation making it a criminal offence to spread such allegations and give rise to such public panic’ and to ‘make individuals and organisations “speak responsibly” on sensitive matters, and to charge them with incitement if they do not’.⁵⁷⁷

While in another report, quoted by the same authors, Mbeki had been recorded as saying that

...in terms of outstanding Environmental Impact Assessment Applications, so that people can do whatever investment programmes they have in mind, the [mid-year cabinet] Lekgotla agreed that we shall have to appoint consultants and other experts/people urgently to assist in finalising the outstanding the impact assessment applications, so that we remove this backlog. We are quite convinced that once we have removed that backlog, the new regulations which came into effect this month would be sufficient to ensure that backlog does not arise again. This particular intervention, to appoint consultants and others, even on a short term basis relates in particular to provincial governments, many of which did not have the capacity to respond quickly and properly to these applications relating to environmental impact.

According to Couzens and Gumede this statement was not well received by the media. Mbeki was interpreted as saying that environmental impact assessment regulations are overly

⁵⁷⁶ E Couzens and K Gumede n 573 above at 131.

⁵⁷⁷ E Couzens and K Gumede n 573 above at 131.

restrictive of development, which was almost certainly out of context since what Mbeki meant was that once the backlog had been cleared it would not re-occur.⁵⁷⁸

The writers also note ‘that the Chief Executive of ESKOM, blamed outstanding environmental impact assessment for standing in the way of ... ESKOM’s R97-billion expansion plans’.⁵⁷⁹ They also quote the Premier of Kwazulu-Natal saying that ‘developers with projects worth billions of Rands were stalled by “a snail, or frog” and that investors took their money elsewhere’.⁵⁸⁰

7.5. The backlog of EIA applications; the views of Retief, Welman and Sandham ‘Performance of environmental impact assessment (EIA) screening in South Africa: a comparative analysis between the 1997 and 2006 regimes’

As noted above, politicians have complained about the system being slow and weak. In his statement quoted above, Mbeki promised that the system would be improved by the 2006 EIA Regulations. This optimism he shared with the Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk, who in 2006 said⁵⁸¹

There have been some who have implied that the Department of Environmental Affairs and Tourism’s re-examination of the environmental impact system is somehow indicative of a weakened commitment to the environmental impact assessment (EIA) process. Nothing could be further from the truth ... The new EIA regulations [to come into effect on 11 July 2006 for all activities except those related to mining, which are to come into effect on 1 April 2007] will be better for conservation, better for communities, better for development, and better for south Africa.

At their launch, van Schalkwyk praised the 2006 EIA Regulations in the following words;

Elements improved [by the NEMA regime] include the identification of activities to be subject to EIA ... Differentiating the process requirements based on the nature and extent of activities is an important milestone towards addressing concerns related to unnecessary costs and delays. It is estimated that these lists, and the introduction of development thresholds, will see the number of EIA applications reduced by up to 20%. This empowers

⁵⁷⁸ E Couzens and K Gumede n 573 above at 132.

⁵⁷⁹ E Couzens and K Gumede n 573 above at 132.

⁵⁸⁰ E Couzens and K Gumede n 573 above at 133.

⁵⁸¹ See Couzens and Gumede above at 132.

our environmental authorities to make an informed decision after a faster and cheaper process, and to ensure the protection of environmental quality.⁵⁸²

According to Retief et al⁵⁸³ ‘the 2006 EIA Regulations appear to have been successful in achieving the 20% application reduction target’. But according to the same writers

... no critical consideration of the appropriateness of the 20% reduction target mentioned in the Minister’s speech has been performed, nor has any empirical research been conducted to determine if the 20% has been achieved through the interventions introduced under the NEMA regime.

It remains to be seen whether the 2010 EIA Regulations will achieve the target set above considering the fact that the 2010 EIA Regulations did not make any changes of substance to the EIA process. According to Kidd ‘the basic thrust of the EIA process remains the same as under the 2006 EIA regulations. There were textual changes to many of the provisions that do not amount to changes of substance’.⁵⁸⁴ For these reasons, the criticisms made by Ridl and Couzens towards the 2006 EIA Regulations are persuasive and could be applied to the 2010 EIA Regulations. Ridl and Couzens did suggest that the 2006 EIA Regulations had not sufficiently addressed the setting of the thresholds (which is still the problem under the current EIA regulations). And as a result, they have suggested that the lists of activities were capable of differing interpretations.⁵⁸⁵ Also Retief et al observe that

... thresholds could also leave room for different interpretations and abuse. For example, where the size of a project in terms of hectares is used as a threshold, developers could potentially design their projects to fall just below the threshold, raising legitimate questions such as what is the difference in significance between a 20- and 19.9-ha development?⁵⁸⁶

However, Ridl and Couzens’ recommendation that ‘where doubt exists, the precautionary principle should be adopted and the scoping and environmental assessment route should be followed’⁵⁸⁷ could similarly be applied here. Where the setting of the threshold is a matter of screening Retief suggests that a combination of methods should be used which include, activity description lists, thresholds (in the form of environmental standards and/or

⁵⁸² See J Ridl and E Couzens n 11 above at 1.

⁵⁸³ Above n 2 at 157.

⁵⁸⁴ M Kidd ‘Environmental Law’ 2010 *Annual Survey of South African Law* 401.

⁵⁸⁵ J Ridl and E Couzens n 11 above at 9.

⁵⁸⁶ F Retief, CNJ Welman and L Sandham n 207 above at 158.

⁵⁸⁷ J Ridl and E Couzens n 11 above at 9-10.

geographical sensitivity), preliminary study and the use of discretion or (case-by case examination).⁵⁸⁸

Concerns have also been raised by interest groups that *ex post facto* applications generally lack clarity and provide little or insufficient communication to the interested and affected parties about the process around s 24G application, as would be required of an EIA and that all *post facto* applications end up with authorisation granted.⁵⁸⁹ The reluctance on the part of the courts and administrators to decline *post facto* applications, illustrated by the case of *Magaliesberg Protection Association V MEC: Department of Agriculture, Conservation, Environment and Rural Development North West Provincial Government and Others*,⁵⁹⁰ discussed below reinforces these perceptions.

7.6. The courts and s 24G: The *Magaliesberg Protection Association V MEC: Department of Agriculture, Conservation, Environment and Rural Development North West Provincial Government and Others*,⁵⁹¹

The Supreme Court of Appeal (SCA) had an opportunity to express its view on this section in the *Magaliesberg Protection Association* case,⁵⁹² argument in which was heard on 13 May 2013 and judgment delivered on 30 May 2013. This was a matter in which the decision of the MEC was challenged for granting *ex post facto* authorisation to a developer who had commenced a R30 million project on a protected area in the Northwest Province.

7.6.1. Conservation history of the Magaliesberg

In 1965, in response to increasing intrusion by developers, the then Department of Planning and the Environment recommended the establishment of a nature reserve encompassing the Magaliesberg. On 12 August 1977 an area comprising approximately 30 000 hectares in the Magaliesberg was declared a natural area in terms of the Physical Planning Act 88 of 1967.

⁵⁸⁸ F Retief, CNJ Welman and L Sandham n 207 above at 158.

⁵⁸⁹ Concerns about and suggestions for the amendment of s 24F and 24G of the National Environmental Management Act, 1998 (Act 108 of 1998) available at <http://cer.org.za/hot-topics/section-24g> accessed 24 March 2014.

⁵⁹⁰ [2013] All SA 416 (SCA).

⁵⁹¹ [2013] All SA 416 (SCA).

⁵⁹² Ibid.

The immediate effect was that no one could, in the absence of a permit, use the land for any purpose other than what it was being used for before the proclamation. In October 1986, in terms with the Environment Conservation Act 100 of 1982, the Minister of Environment Affairs⁵⁹³ issued directions which prohibited the building of structures and subdivision of land within the area without the consent of the Administrator of the Transvaal.⁵⁹⁴

On 4 May 1994 the Administrator published two notices in terms of the Environment Conservation Act 73 of 1989. The first declared the area ‘a protected natural environment’; and the second identified a number of activities that could not be undertaken in the area except by virtue of a written approval from the Administrator or the Chief Director: Nature and Conservation within the Department of Environmental Affairs.⁵⁹⁵ When the National Environmental Management: Protected Areas Act 57 of 2003 came into effect on 1 November 2004 the status of Magaliesberg was preserved as a protected environment in terms of s 28 (7).⁵⁹⁶

7.6.2. Facts

In July 2008, the members of the appellant association – the Magaliesberg Protection Association (MPA) - while flying in an aeroplane across the Magaliesberg Protected Environment, noticed a huge development nearing completion.⁵⁹⁷ The development was in the form of a country lodge comprising 47 en-suite units; a conference block; a reception and office block; as well as a restaurant and a massage parlour.

The MPA is a voluntary association established in 1975 with the sole objective to foster and encourage the conservation of the Magaliesberg Mountain Range. It has also made contribution to the enactment of presently applicable environmental legislation. MPA also intends to persuade UNESCO⁵⁹⁸ to elevate the status of the Greater Magaliesberg Region to a

⁵⁹³ The title of the Minister of Environment Affairs under the 1982 Act.

⁵⁹⁴ Para [20]. See also s 10 of the Environment Conservation Act 100 of 1982.

⁵⁹⁵ Para [21].

⁵⁹⁶ Para [22]. S 28(7) provides ‘An area which was a protected environment immediately before this section took effect must for purposes of this section be regarded as having been declared as such in terms of this section.

⁵⁹⁷ Para [4].

⁵⁹⁸ United Nations Educational, Scientific and Cultural Organization.

Biosphere reserve.⁵⁹⁹ Alarmed that a massive development was taking place within an ecologically sensitive place the MPA members contacted officials in the Chief Director's office, who in turn informed them that they had recently become aware of the development and were investigating the matter, with a view to taking action against the developer as necessary statutory environmental authorisation had not been obtained.⁶⁰⁰

The MPA, in a letter dated November 2008 complained to the MEC's predecessor. The thrust of the complaint was that the development threatened the environment and the initiative to have the Greater Magaliesberg Region declared a Biosphere. They were also concerned that, if the development were to remain extant it would open floodgates to a spate of developments in the area.⁶⁰¹ The MPA later was informed that an EAP appointed by the developer was requesting comments from I&APs regarding an application for *ex post facto* authorisation.⁶⁰² The application for environmental authorisation had been submitted in July 2008. The MPA insisted that the only way forward was that the development be demolished and the environment rehabilitated.⁶⁰³

Apparently, the Rustenburg Local Municipality had also approved the building plans.⁶⁰⁴ The MPA was also advised by Khasane that the application for *ex post facto* authorisation had been approved.⁶⁰⁵ MPA lodged an appeal against this decision and contended that; the public participation process was flawed;⁶⁰⁶ the information contained in the report was inadequate and insufficient;⁶⁰⁷ mitigation measures were not site specific but generic in nature;⁶⁰⁸ the area in which the development took place was a protected area⁶⁰⁹ and that authorisation was contrary to the integrity and strategic plans for the area and there were several inaccuracies and contradictions, as a result the information in the report was unreliable and misleading.⁶¹⁰

⁵⁹⁹ Para [4]. Biosphere reserves are areas of terrestrial and coastal ecosystems promoting solutions to reconcile the conservation of biodiversity with sustainable use. Biosphere reserves originated from the biosphere conference organized by UNESCO in 1968. Available at <http://www.unesco.org.uk> accessed on 16 April 2014.

⁶⁰⁰ Para [5].

⁶⁰¹ Para [6].

⁶⁰² Para [7].

⁶⁰³ Para [8].

⁶⁰⁴ At 419 para [9].

⁶⁰⁵ At 419 para [10].

⁶⁰⁶ At 419 para [10].

⁶⁰⁷ At 419 para [10].

⁶⁰⁸ At 419 para [10].

⁶⁰⁹ At 419 para [10].

⁶¹⁰ At 420 para [10].

The appeal was dismissed by the MEC who was satisfied that the public participation was in line with the procedure prescribed by the regulations; the information and mitigation measures were adequate; that legislation did not prohibit development in MPE *in toto* but that permission must be granted for the development to take place and rectification was sought and allowed and was of the opinion that there was no bias or irrelevant considerations were taken into account when the decision was made. In conclusion the MEC stated:

After assessing all the information placed before me, I am of the opinion that the objectives of integrated environmental management, the principles set out in section 2 of the NEMA as well as the ideal of sustainable development have been adequately addressed by the Respondents. I am furthermore convinced that, provided the proposed mitigation and management of impacts as contained in the Environmental Management Plan are adhered to, this development will be well managed in the spirit of eco-tourism in the area.⁶¹¹

The MPA lodged a review application and sought an interim interdict to prevent the construction pending the finalisation of a review application. In addition, it sought an order for demolition and rehabilitation of the environment. The MPA was of the opinion that allowing the development to remain extant would serve as a symbol against conservation and it would open the floodgates to extensive intrusion upon the environment.

Another concern was that prospective developers would build first and seek authorisation thereafter, presenting the municipal and other regulatory bodies with a *fait accompli*. Both the application for review and an interdict order were dismissed with costs by the High Court and hence the appeal before the SCA. The SCA held that:

A fundamental problem facing the MPA is that it bore the onus of proof in satisfying the court below that it was entitled to an order for demolition, which it acknowledged was a far-reaching remedy. As far as the *Corpus Juris Civilis* it was recognised that he who seeks a remedy must prove the grounds therefore.⁶¹²

In support of its application for review the MPA had submitted before the SCA that the MEC's decision ought to have been set aside because he displayed bias towards it. This ground was based on the minutes of a meeting between the MEC and the director of Kgaswane.

⁶¹¹ At 420 para [12].

⁶¹² At 430 para [51].

It is a R30 million investment focusing on tourism.

He cannot be part of a decision where eco-tourism project of R30 million is just destroyed as this will be equivalent to murder. Mr Ntemane's father probably died without having millions of money, such that Mr Ntemane therefore had to borrow money to commence with this tourism development. I cannot destroy him. I also noted that if this development is to be destroyed, there will be irreparable damage to the environment and the environment will then never be the same. It also noted that all competitors in the MPE are white and there have been constant interference from them. Mr Ntemane went to the MPA to inquire what they would require but nothing came of it.

The MEC indicated that the MPA should not come with the approach of no development in the MPE as from the level of government there must be attempts to negotiate in the right spirit to bring people together. He has his own suspicions on why this matter is so extremely opposed, but he will raise his concerns when he meet with the MPA in future. It was indicated that when people negotiate in bad spirit. It was indicated that when people negotiate in bad spirit it will not take anybody anywhere- and this is a pity.

The route which Mr Ntemane wanted to take was to talk to the MPA about this. Part of the site visit was to assess the surroundings and the attitudes of parties regarding this matter. When he came from the site visit his conclusion was that the spirit of the MPA is to destroy relationships and people and not to build. This will not work. Government cannot take decisions based on race or gender. This forms part of the Freedom Charter which states that SA Belongs to all who live in it-black and white. The ultimate strategic objective is therefore that people should be united, non-racial, non-sexist to be a prosperous.

7.6.3. The judgment of the Supreme Court of Appeal

The MPA contended that the minutes demonstrated that the MEC was biased and in the alternative that, as a result of these utterances the MPA had a reasonable apprehension that the MEC was impartial. According to the MPA, the suggestion by the MEC was that the MPA was a racist when, in fact, it was motivated solely to protect the MPE. It was submitted that the MEC's attitude as displayed in the minutes is different to that displayed towards other recalcitrant developers.⁶¹³ On this issue, Navsa J's view was that:

The minutes by themselves do not prove actual, or reasonably perceived, bias. The words are, at worst, unfortunate. The observation that Mr Ntemane would be destroyed by a demolition order is not irrelevant nor is it unlikely that a majority of hotel or guesthouse

⁶¹³ At 433 para [59].

owners in the area, who would be his competitors, are from advantaged backgrounds. As stated above, the MEC provided substantiated reasons for his decision. More importantly the MPA failed to present evidence to justify the remedy sought by it.

The court had also found that MPA has failed to show, at the most basic level, that it was entitled to the relief sought. Equally importantly, in considering the remedy of demolition, the image of working equipment, bulldozers, earth moving machines and the like, with concomitant pollution and the potential further harm on the environment cannot be ignored. Without further devastating effects of acceding to such remedy may be, it becomes even more problematic. This was an issue not addressed at all by the MPA.⁶¹⁴

7.7. Implications of the judgment

7.7.1. Principles of NEMA

NEMA is a prominent statute; therefore, the presumption is that its provisions should be known especially by those who apply it to their actions. The third respondent in the matter had alleged that he was not informed by the Rustenburg Municipality that he was required to seek further authorisation in terms of NEMA, an excuse which seemingly was accepted by the MEC, the High Court and the SCA.

In granting the ex post facto authorisation, the MEC had concluded that the objectives of integrated environmental management, the principles of s 2 as well as sustainable development had been adequately addressed by the respondents. NEMA has several principles some of which were relevant to this matter, such as the principles which ‘relate to public participation in environmental decision-making and related ideas such as transparency’⁶¹⁵ to mention a few. The MPA contended that the decision was based on a flawed public participation process in that “it” the MPA as a key interested and affected party was not notified during the rectification process. It is not clear from the MEC’s statement which of the NEMA principles were considered. Couzens and Dent, commenting on the impact assessment and decision-making process in the matter of the proposed De Hoop dam,

⁶¹⁴ At para [52].

⁶¹⁵ M Kidd *Environmental Law* 2 ed (2008 Juta) 242.

suggested that ‘preferable would have been evidence that the decision-maker had indeed given consideration to all relevant NEMA principles and applied them to the particular matter; before concluding on reasonable grounds that the principles could be upheld’.⁶¹⁶ The same reasoning could be applied in this matter. The principles of NEMA are intended to be applied where there is an apprehension that the action of an organ of the state “may” significantly affect the environment. “May”, in this case, connotes that the action of the organ of the state precedes the authorisation to undertake the activity that may affect the environment.⁶¹⁷

One of the principles of NEMA which was ignored in the present case was the one which requires that ‘the participation of all interested and affected parties in environmental governance must be promoted...’.⁶¹⁸ The MPA, as an interested party in the matter, was not given the chance to present its view by the MEC. This is a contravention of the above principle. The other principles of NEMA also require ‘decisions to take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge including traditional and ordinary knowledge’.⁶¹⁹

The ideal of sustainable development (which the MEC believed was adequately addressed) requires, amongst other things, that the disturbance of landscapes and sites that constitute the nation’s cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied’.⁶²⁰ In the present matter it would have been appropriate for the decision-maker to have considered the option of preserving the MPE as a protected area with a view of preserving it to become a biosphere, untainted by unauthorised developments. NEMA also requires that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions’.⁶²¹ Couzens and Dent write that ‘application of a risk-averse and cautious approach echoes the precautionary principle of international law ... that where the scientific consequences of a development are

⁶¹⁶ E Couzens and M Dent n 539 above at 16.

⁶¹⁷ S 2(1).

⁶¹⁸ S 2(4)(f).

⁶¹⁹ S 2(4)(g).

⁶²⁰ S 2(4)(a)(ii).

⁶²¹ S 2(4)(a)(vii).

uncertain, the development ought not to proceed'.⁶²² This principle cannot be observed where an activity proceeds before the magnitude of its impact on the environment is unknown.

7.7.2. Apprehension of bias

Despite the record of allegations contained in the minutes of the meeting between Ntemane and MEC, Navsa JA held that:

In my view, the minutes by themselves do not prove actual, or reasonably perceived, bias. The words are at worst, unfortunate. The observation that Mr Ntemane would be destroyed by a demolition order is not irrelevant nor is it likely that the majority of hotel or guesthouse owners in the area, who would be his competitors, are from advantaged backgrounds. As stated above, the MEC provided substantiated reasons for his decisions. More importantly, the MPA failed to present evidence to justify the remedy sought by it.⁶²³

Instead of attacking the appellant association for being a 'racist association' because its members happened to be white, the MEC ought to have weighed the grounds for demolition of the lodge against the reasons for letting it remain. The reason for reaching either decision ought to have been premised in law, not on the background of the third respondent. He could have achieved this by paying due regard to the environmental concerns raised by MPA on one hand; and, on the other, the mitigatory measures and recommendations made on behalf of the third respondent, taking into account the provisions of NEMA to substantiate each view, this time referring directly to the relevant provisions of NEMA.

As a measure to deter prospective developers from proceeding with projects before authorisation from the competent authority as argued by the MPA, both the MEC and Courts ought to have sought a more justifiable and valid reason instead of condoning the respondent's actions because the latter had pleaded ignorance. The third respondent ought to have given reasons why the lodge should not be demolished as opposed to the MPA's call that the environment be preserved for its intrinsic value.

⁶²² E Couzens and M Dent n 539 above at 18.

⁶²³ At para [60].

7.8. National Environmental Management Amendment (NEMA) Laws Bill [B13-2013]

In 2011 further amendments⁶²⁴ to s 24 of NEMA were proposed.⁶²⁵ A notice was published in a Gazette soliciting comments and input from the public.⁶²⁶ On the 26 September, CER addressed a letter to the Director-General, Department of Environmental Affairs stating its views on the proposed amendment. In that letter, CER referred the Department to a letter which it had earlier addressed to the Department of Environmental Affairs legal office regarding s 24G. The reference letter read:

Dear Linda,

Thank you for this opportunity to provide inputs into a proposed amendment of section 24G of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA). It appears that the application of the rectification mechanism in s.24G has had unfortunate and unintended consequences for environmental management, and it has been a thorn in the flesh of civil society organisations for some years.

To the letter were attached a number of comments and suggestions CER had received from its stakeholder network on s 24G. The following were identified in the letter as recurring and consistent themes from the comments and suggestions;

1. Insufficient provision within the s 24G to cater for different responses to different levels of fault. Intentional and repeat offenders are let off easily, while innocent offenders are prejudiced by the criminal stigma that attaches to s 24G in the context of strict liability under s 24F.
2. Administrative and criminal fines that are way too low to constitute a proper disincentive for non-compliance. There also seems to be a tendency for fines to be reduced on appeal. There is also a general concern about lack of transparency in the calculation of fines, giving rise to concerns about corruption.
3. The cynical abuse of s 24G whereby companies simply budget for administrative fine and then proceed with contraventions of s 24F (and do not stop when caught out). There also seems to be a trend to rely on the emergency defence in s 24F(3) to criminal liability, followed by a s 25G application.

⁶²⁴ See the National Environmental Management Amendment Act 8 of 2004 and the National Environmental Management Amendment Act 62 of 2008.

⁶²⁵ National Environmental Management Laws second Amendment Bill [B13-2012] available at <http://www.jutalaw.co.za/media/filestore> accessed 17 April 2014.

⁶²⁶ National Environmental Management Laws Amendment Bill 2011 GG No. 586 of 26 August 2011.

4. The phenomenon of repeat offenders, and the need for a register of offenders, particularly to capture violators who commit s 24F offences in different provinces.
5. A perception that s 24G applications always end in authorisations granted.
6. A perception that authorities are less keen to prosecute contraventions of s 24F where s 24G applications are submitted, effectively creating an escape route from criminal prosecution for violators.
7. A lack of clarity and insufficient communication to interested and affected parties about the process around s 24G application, as would be required in an EIA.

7.8.1. National Environmental Management Amendment Laws Bill; Public Hearings 21 August 2012

The proposed changes were presented to the public for comment.⁶²⁷ The presentations preceded a Bill tabled before parliament in July 2013. The three institutions, BUSA, CER and LRC were present. CER noted its general support for the Bill but made it clear that they had a number of issues, in particular with s 24G. CER's view was that s 24G created perverse incentives and did not promote criminal prosecution sufficiently.

One Fourie, on behalf of CER and other organisations, submitted that CER was generally supportive of the Bill and was appreciative of consultations that the Department had held with CER. However, their disquiet lay with the proposed ss 24F and 24G. CER made a detailed submission supported by a Master's dissertation: *A critical Analysis of the Application of s 24G of NEMA: The Gauteng Province Explained*.⁶²⁸ CER, labelling s 24G a "monster", submitted that in its present form it could become a potential tool for wrongdoers to buy their way out of criminal prosecution and to avoid the lengthy EIA process.

⁶²⁷ National Environmental Management Amendment (NEMA) Laws Bill: Public Hearings available on Parliamentary Monitoring Group |Parliament of South Africa monitored (<http://www.pmg.org.za>) accessed on 25 March 2014.

⁶²⁸ A Dissertation submitted by Lea September in fulfillment of the requirements for the degree of Master in Environmental Management at the Potchefstroom campus of the North-West University, January 2012 available at <http://dspace.nwu.ac.za/handle/10394/8448> accessed 25 March 2014.

Recent events add credence to the submission made by CER. *Times Live*, on 3 November 2013⁶²⁹ revealed that Idwala Coal, a mining company, had for three years mined coal without a water licence, destroyed a wetland and diverted a public road and a river. Idwala had admitted in documents to doing the following; destroyed part of the wetland so that “there exists the possibility that protected species were destroyed”- illegal under the Biodiversity Act⁶³⁰; diverted a public road around the mine without permission, even though the road falls under the Mpumalanga provincial government; released contaminated water and pollutants without a licence required by the Department of Water Affairs and mined in a tributary of the Rietspruit River and diverted the river without permission. This was corroborated by environmentalists in Mpumalanga, who stated that farmers living near the mine were affected by the illegal mining activity.

It appears from the article that DWAF warned the company in November 2011 that it would shut down the mine for its unlawful use of water. The mining stopped briefly, then resumed, ‘rising questions about why authorities have not acted for two years’. It was only on or about November 2013 that Idwala send an application to DWAF applying for rectification in terms of s 24G of NEMA.

The chairperson of the public hearing, one De Lange, stated that while he understood the concerns of CER, s 24G could not simply be deleted and asked CER to provide practical examples of what was happening under s 24G. Fourie pointed out that many examples were seen in the mining sector, such as in Eastern Mpumalanga, where mines opened and built without authorisation. Developers then sought permits after damage to the environment had already been done, and some had used this as a motivation for authorisation permits.

In the Memorandum on the objects of the National Environmental Management Laws second Amendment Bill 2013,⁶³¹ the Department admitted to noticing a growing trend in the abuse of the s 24G environmental authorisation process. The Department stated that most people tend to commence with a listed activity without environmental authorisation and later apply

⁶²⁹ B Jordan ‘State ignores illegal Zuma-Gupta mining’ *Times Live* 03 November 2013 available at <http://www.timeslive.co.za/politics/2013/11/03> accessed 25 March 2014.

⁶³⁰ National Environmental Management: Biodiversity Act 10 of 2004.

⁶³¹ Memorandum on the objects of the National Environmental Management Laws second amendment Bill, 2013. Bill available at <http://www.google.co.za> db3sqepoi5n3s.cloudfront.netfile/doc/130212memo.doc cached.

for s 24G environmental authorisation. The Department noted that the challenges posed serious dangers to the credibility of environmental impact assessment process but the section could however not simply be deleted.

7.9. National Environmental Laws second Amendment Bill: Department of Environmental Affairs briefing

7.9.1. National Council of Provinces and Environmental Affairs 30 July 2013

The same Bill was also tabled before the National Council of Provinces and Environmental Affairs by the Department of Environmental Affairs and Portfolio Committee. The Western Cape Provincial Government, Erasmus Attorney, ACMP, CER, Rand Water, Afriforum and BUSA were in attendance.

CER submitted that s 24G was only ever intended to be applicable as a provision applicable to the transition from authorisations under the ECA to the environmental authorisations under NEMA, for a brief six month period; but that the section had ‘morphed into a monster’ with a range of unintended consequences that undermined the environmental management regulatory regime of which it forms part. In its proposal it referred the DEA and the Portfolio Committee to the submissions it made on 12 May 2011 (the letter), a Master’s dissertation by Lea September and proposed that s 24G either be amended urgently to attempt to remedy some of the incentives and consequences, or must be scrapped in its entirety.

The Department conceded that it had already identified various challenges with s 24G and based on the on instruction from Mintech, commenced comprehensive process to review s 24G and recommend various options for amendment.

The Bill changed the heading of s 24G from ‘rectification of unlawful commencement of activity’ to ‘consequences of unlawful commencement of unlawful activity’.⁶³² The consequences, as the Bill suggests, are the following; a person who has commenced a listed activity without authorisation is liable to a fine not exceeding R5 million.⁶³³ In addition to the payment of a fine the environmental management inspector or the South African Police

⁶³² See s 9 of the Bill.

⁶³³ See the proposed s 24G(4).

Service (SAPS) have the power to investigate the transgression under the Act or any other environmental management Act⁶³⁴ and the National Prosecuting Authority is given power under the Act to institute criminal proceeding.⁶³⁵

The National Environmental Management Laws second amendment had been passed as law on the 23rd January 2014 and published in *Government Gazette* 37170 as the Environmental Management Act 30 of 2014.

7.10. Conclusion

The effectiveness of the measures introduced by the Act are not in themselves capable of solving the challenges facing the Department, but depend on the willingness and cooperation on the part of both the SAPS and NPA in investigating and prosecuting the offences. These measures too, may suffer from the challenges surrounding the enforcement of environmental law through criminal sanctions in general.⁶³⁶ A potential challenge pointed out at the hearing was that the NPA is reluctant to prosecute the s 24G offences especially when fines had already been issued. CER had also pointed out that certain companies simply budgeted for fines. Most importantly the EIA was designed to identify adverse environmental impacts arising from activities well in advance of implementation.⁶³⁷ Arguably, the inserted s 24G detracts from this objective. In certain cases it might be difficult to apply the s 2 principles after the fact. For instance, it would not be of any help to seek the opinion of interested and affected parties once an activity has commenced or completed when their input as the people whose socio-economic condition would be affected, should be sought when the activity is proposed.

⁶³⁴ See the proposed s 24G(6)(a).

⁶³⁵ See the proposed s 24G(6)(b).

⁶³⁶ See Chapter 6.

⁶³⁷ *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

APPENDIX B

8. Implementation and enforcement of environmental law statutes in South Africa - (Environmental Impact Assessments)

8.1. Introduction

The success of every system is measured by its ability to handle and solve problems arising from regulation. NEMA has provided an array of tools to address environmental problems. It has both criminal and administrative measures to deal specifically with non-compliance with the EIA requirements. According to Rabie et al,⁶³⁸ ‘the establishment of legal provisions which are potentially effective to address environmental problems is indispensable. However, it is their satisfactory application that is decisive for ultimate success’. Nevertheless, implementation and enforcement of environmental law is an onerous and complex task - this we know from the feedback available from the Department of Environmental Affairs.⁶³⁹ There is a cynical view among interest groups that s 24G is an incentive for non-compliance with environmental impact assessment procedures under NEMA. Be it perception or fact, there is a real problem facing the implementation and enforcement of environmental law, in particular the law regulating environmental impact assessments.

The ECA,⁶⁴⁰ the first statute to introduce EIAs, generally provided for criminal sanctions where any person has contravened certain provisions identified by the Act. This did not necessarily cover failure to undertake an EIA where one was required. However, the Minister had general regulatory powers to call upon any person contravening the provisions of the Act to cease any such activity.⁶⁴¹ The Minister had the power to declare any person who had contravened the Act guilty of an offence punishable by payment of a fine or a term of imprisonment.⁶⁴² When the National Environmental Management Act (NEMA) of 1998 came into effect in 1999, it repealed the greater portion of the ECA, with the exception of ss 21, 22 and 26; and the ECA EIA Regulations remained in force until 2006 when NEMA EIA Regulations were promulgated. In addition to criminal sanctions, NEMA introduced administrative fines where individuals failed to undertake an EIA where one was required. A

⁶³⁸ M A Rabie, C Loots, R Lyster and M G Erasmus ‘Implementation of environmental law’ in RF Fuggle and MA Rabie (eds) *Environmental Management in South Africa* (Juta & Co 1992)120.

⁶³⁹ <https://www.environment.gov.za/sites/default/files> accessed 15 November 2013.

⁶⁴⁰ Act 73 of 1989.

⁶⁴¹ S 28(d).

⁶⁴² S 28(e).

peculiarity of NEMA is that EIA becomes a remedy for not complying with legislation that required an EIA to be compiled in the first place; that is, the violator agrees to undertake an EIA in order to return to compliance.

8.2. Environment Conservation Act

The ECA,⁶⁴³ in terms of which the ECA EIA⁶⁴⁴ Regulations were promulgated, prohibited any person from undertaking an activity which would probably have a detrimental effect on the environment,⁶⁴⁵ except by virtue of a written authorization by the Minister or by a competent authority designated by the former. The ECA devolved the administration of regulations promulgated pursuant to its provisions to provincial administration and local authorities.⁶⁴⁶ Any authority with the power to administer the regulations in terms of the Act had the power to call any person contravening the provisions of the Act to take certain steps or to cease certain activities within a specified period.⁶⁴⁷ It was an offence punishable by an imposition of a fine or a term of imprisonment or both such fine and imprisonment. In terms of the ECA, the computed fine ought not to exceed three times the commercial value of anything in respect of which the offence was committed.⁶⁴⁸ And where the offender continued to contravene the provisions of the Act a further fine would be imposed for as long as the violation persisted.⁶⁴⁹

The Act conferred power on the Minister, competent authority, local authority or government institution to direct any person to cease performing an activity which could seriously damage, endanger or detrimentally affect the environment.⁶⁵⁰ The Minister or any competent authority had the power to direct any person who undertook an activity with a detrimental impact on the environment to perform any activity or function at his own cost directed at rehabilitating the damage caused to the environment to the satisfaction of the Minister or any designated

⁶⁴³ Environment Conservation Act 73 of 1989.

⁶⁴⁴ Regulations regarding activities identified under section 21(1) of Act 73 of 1989 published under GN R1183.

⁶⁴⁵ S 21(2) included some of the activities that might be identified by the Minister in terms of subsection (1)

⁶⁴⁶ S 28(a).

⁶⁴⁷ S 28(d).

⁶⁴⁸ S 28(e).

⁶⁴⁹ Ibid.

⁶⁵⁰ S 31A (1)(a).

authority.⁶⁵¹ Any person who contravened this section would be found guilty of an offence in terms of s 29.

8.3. Enforcement and implementation of NEMA

8.3.1. *Locus Standi in Judicio*

NEMA extends *locus standi* to any person, or any group of public spirited individuals, to seek relief for any breach of its provisions in their own interest or in the interest of any person who for practical reasons is unable to institute such proceedings.⁶⁵² The interested group or individual may institute proceeding in the interest of protecting the environment.⁶⁵³ The right of the interested and affected parties to be heard where decisions that may significantly affect them are made had been recognised before NEMA came into effect. In *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*⁶⁵⁴ the first respondent association on its behalf and on behalf of other people living along the Vaal River,⁶⁵⁵ objected to the application made by the second appellant to mine coal on its farms that formed the front of the Vaal River.⁶⁵⁶ The respondents raised five grounds,⁶⁵⁷ most environmental in nature, in opposition to the proposed mining

The Appellant raised a point *in limine* that SAVE was an illegal association because it had more than 20 members but was not registered as a company in terms of s 30(1) of the Companies Act 61 of 1973.⁶⁵⁸ Olivier J held against Sasol Mining's objection in the following words;

The prohibition contained in s 30(1) should be kept within its proper bounds. The underlying purpose of the prohibition in our country, as in England, is to prevent mischief arising from overtrading undertaking being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting.⁶⁵⁹

⁶⁵¹ S 31A(2).

⁶⁵² S 32(1)(a)-(d).

⁶⁵³ S 32(1)(e).

⁶⁵⁴ 1999(2) SCA 709.

⁶⁵⁵ At 714C-D; para [4]

⁶⁵⁶ At 713J; para [2].

⁶⁵⁷ At 714-715G; para [6].

⁶⁵⁸ At 715G-H; para [7].

⁶⁵⁹ At 716A-B; para[8].

In other words, the Court accepted that Save the Vaal Environment had the right to institute proceeding before the Court, seeking the relief it claimed.

8.3.2. Private prosecution

NEMA also empowers individuals to bring private prosecutions in their own name in environmental matters where the Attorney General has declined to prosecute in respect of any breach or threatened breach by any institution, except where the breach is caused by the organ of state.⁶⁶⁰ According to Milton,⁶⁶¹ NEMA has moved away from the conventional requirements for a private prosecution, which could not allow private prosecution unless the person bringing such a prosecution had a ‘substantial and peculiar interest ... arising out of the injury suffered’.⁶⁶² He also observes that s 33(2) of NEMA moves away from the requirement to seek a ‘nolle prosequere’ certificate from the Attorney General, when the latter had no intention to prosecute the offence himself.⁶⁶³

8.3.3. Criminal proceedings

Generally, criminal proceedings could only be brought in terms of NEMA if the accused person had contravened any provision listed in Schedule 3. Schedule 3 Part (a) outlines the provisions of national legislation that could be contravened under s 34, and in terms of which criminal proceedings could be instituted against the accused person. Among others, criminal proceedings could be instituted where a person has contravened s 29(2)(a)⁶⁶⁴ and (4) of the

⁶⁶⁰ S 33(1)(b).

⁶⁶¹ J Milton ‘Sharpening the dog’s teeth: of NEMA and criminal proceedings’ (1999) 6 *SAJELP* 53.

⁶⁶² S 7(1)(a) of the Criminal Procedure Act 51 of 1977.

⁶⁶³ *Ibid.* at 54.

⁶⁶⁴ S 29(2)(a) provides - any person (a) - referred to in section 16(3) who contravenes any provision of a direction issued under section 16(2) or fails to comply therewith.

S 16(3) provides - every owner of, and every holder of a real right in, land situated within a protected natural environment in respect of which directions have been issued in terms of subsection (2) or amended in terms of subsection (2A), and the successors in title of such owner and the holder of the real right, shall be subject to the provision of such directions.

S 16(2) provides- the competent authority may by notice in the official Gazette concerned issue directions in respect of any land or water in a protected environment in order to achieve the general policy and objects of this Act; provided that-

(a) A copy of the directions applicable to the area shall be with handed or forwarded by post to the last known address of every owner of land, every holder of every holder of every of real right of land in question; and

ECA. Part (b) of schedule 3, is applicable where provisions of other environmental specific statutes other than NEMA are contravened. NEMA has since been amended and it currently provides for a number of incidents that may attract criminal sanctions.

8.4. Offences under NEMA

The Director-General or a provincial head may issue a directive⁶⁶⁵ to any person who has caused or causes significant pollution or degradation of the environment⁶⁶⁶ if such person fails to take appropriate measures to prevent such pollution or degradation from occurring or recurring.⁶⁶⁷ Any person undertaking such remediation measures must ensure among others that the principles of s 2 are taken into account.⁶⁶⁸ Should a person fail to comply, or inadequately comply with a directive the competent authority may take appropriate measures to remedy the situation or apply to a competent court for appropriate relief.⁶⁶⁹ It is an offence, punishable by payment of a fine or a term of imprisonment, or both fine and imprisonment, to refuse to comply with a directive where one has been issued in terms of the Act.⁶⁷⁰ The directive has retrospective effect; it applies to incidents of pollution or degradation that occurred before the commencement of NEMA.⁶⁷¹ It also applies to incidents of pollution or degradation that are likely to arise in the future resulting from the existing activity.⁶⁷²

It is also an offence under the Act to fail to comply with a compliance notice⁶⁷³ issued by environmental management inspectors, with this being punishable by payment of a fine or a term of imprisonment or to both payment of a fine and term of imprisonment.⁶⁷⁴

(b) The directions shall only be issued with the concurrence of each Minister charged with the administration of any law which in the opinion of the competent authority relates to a matter affecting the environment.

S 16(4) provides-the competent authority shall in writing direct the registrar of deeds of the deeds registry in which the title deed of land referred to in in subsection (3) is registered, to make an entry of the directions in question in his register and to endorse the office copy of the title deed accordingly.

16(2A) provides- the competent authority may, subject to the provisions of any other law pertaining to land, and subject to the proviso to subsection (2), amend or repeal any direction issued under the said subsection.

⁶⁶⁵ S 28(4).

⁶⁶⁶ S 28(1).

⁶⁶⁷ Ibid.

⁶⁶⁸ S 28(5).

⁶⁶⁹ S 28(7).

⁶⁷⁰ S 28(15).

⁶⁷¹ S 28(1A)(a).

⁶⁷² S 28(1A)(c)

⁶⁷³ S 31N (1).

⁶⁷⁴ S 31N (3).

Environmental management inspectors are persons who have been designated as such by the Minister,⁶⁷⁵ who must be regarded as being peace officers, and who may exercise all the powers assigned to a peace officers, or to a police official who is not a commissioned officer.⁶⁷⁶ They have the following mandate under NEMA; to monitor and enforce compliance with NEMA and other environmental management statutes;⁶⁷⁷ to investigate any act or omission in which there is reasonable suspicion that it might constitute, inter alia, an offence and a breach of a term or condition of a permit or other instrument issued in terms of the law.⁶⁷⁸

The Act also makes it an offence for any person to interfere with an environmental management inspector in the execution of that inspector's official duties;⁶⁷⁹ pretend to be an environmental management inspector;⁶⁸⁰ furnish false or misleading information when complying with a request of an environmental management inspector.⁶⁸¹ The punishment upon conviction is a payment of a fine or a period of imprisonment for a period not exceeding one year or both a fine and such imprisonment.⁶⁸²

8.5. Implementation and enforcement of section 24 of NEMA

Chapter 5 of NEMA - integrated environmental management - lays down the general objectives of integrated environmental management. One of the general objectives is to

Identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts, maximizing benefits and promoting compliance with the principles of environmental management set out in section 2.⁶⁸³

⁶⁷⁵ S 31D.

⁶⁷⁶ 31H(5).

⁶⁷⁷ 31G(1)(a).

⁶⁷⁸ 31G (1)(b).

⁶⁷⁹ S 34A (1)(a).

⁶⁸⁰ S 34A (1)(b).

⁶⁸¹ S 34A (1)(c).

⁶⁸² S 34A (2).

⁶⁸³ S 23(2)(b).

Section 24, as was originally enacted, under the heading “implementation” provided that in order to give effect to the objectives of integrated environmental management, the potential impact on the environment,⁶⁸⁴ socio-economic conditions⁶⁸⁵ and the cultural heritage:⁶⁸⁶

Of activities that require authorisation by permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing for the implementation of the activity.⁶⁸⁷

To implement something means ‘to carry out; put into action; perform (to implement a plan).’⁶⁸⁸ Therefore, the expectation under s 24 was that the three factors listed be implemented on the ground, not ‘merely encouraged or considered by administrators when engaging in decision-making’.⁶⁸⁹ However, reference to “implementation” has since been substituted with “environmental authorisation” by the amendment Act.⁶⁹⁰ Environmental authorisation under the Act is defined as authorisation by a competent authority of a listed activity or specified activity.⁶⁹¹ When accorded its dictionary meaning, to authorise means ‘to empower another with the legal power to perform an action’.⁶⁹² The Act has further removed reference to socio-economic conditions and cultural heritage. Primarily the fact that socio-economic conditions and cultural heritage have been removed by the amendment suggests that implementation of a development that is socially and economically sustainable is not required on the ground, that is, when a decision is made under s 24 to issue environmental authorisation.

A further amendment to s 24 was proposed by Bill [B13A-2012].⁶⁹³ The Bill proposed to substitute the heading “environmental authorisations” with “integrated environmental management”. This heading is also the heading of chapter 5, and s 24 is part of the same

⁶⁸⁴ S 24(1)(a).

⁶⁸⁵ S 24(2)(b).

⁶⁸⁶ S 24(1)(c).

⁶⁸⁷ Ibid.

⁶⁸⁸ <http://www.thefreedictionary.com/implement> accessed 24 April 2014.

⁶⁸⁹ G Dwyer and M Taylor ‘Moving from consideration to application: The uptake of ecologically sustainable development in environmental decision-making in New South Wales’ (2013) 30 *Environmental and Planning Law Journal* 185-219 at 192.

⁶⁹⁰ See the National Environmental Management Amendment Act 8 of 2004 and the National Environmental Management Amendment Act 62 of 2008.

⁶⁹¹ See s 1 of NEMA.

⁶⁹² <http://legal-dictionary.thefreedictionary.com/authorize> accessed 23 April 2014. See also

⁶⁹³ National Environmental Management Laws Second Amendment Bill [B13A-2012] came out on the 19th June 2013.

chapter. Perhaps, the Bill recognises the possibility that more than one authority may have to issue authorisation pertaining to a single activity.

Section 24 of NEMA, as was originally promulgated, was more explicit and consistent with the general objectives of integrated environmental management and the national environmental management principles of the Act. Section 24(1) required the potential impact of activities on the environment, socio-economic conditions and cultural heritage to be considered, investigated and assessed prior to their implementation. Section 24(1) has been amended two times, but the current s 24 still 'requires the potential impact or consequences for activities on the environment of listed activities to be considered, investigated, assessed and reported on to the competent authority charged by its provisions with granting relevant authority'. The aim of undertaking the aforementioned exercise is to give effect to the general objectives of integrated environmental management laid down in s 23 and the national environmental management principles. The Constitutional Court and Kidd have emphasised that the obligation on the environmental authorities is still imposed by sections 2 and 23.

The Minister, or the MEC, concerned is enjoined by s 24D of NEMA to publish in the *Gazette* a notice containing a list of activities or areas identified in terms of s 24(1) and competent authorities in terms of s 24C. The overall administration and regulation of activities identified by the Minister or the competent authority is provided by the NEMA EIA Regulations.

Once the activities have been identified and published in the *Gazette* it becomes an offence under s 24F to commence such an activity without prior authorisation by the competent authority. This offence is punishable by a payment of a fine or imprisonment or to both a fine and imprisonment under NEMAA, 2004.⁶⁹⁴ It remains an offence under the Act to commence a listed activity without prior environmental authorisation. A person convicted of such an offence is liable to a fine not exceeding R5 million or to a term of imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.⁶⁹⁵

⁶⁹⁴ Act 62 of 2004. Section 24F(2) and (4).

⁶⁹⁵ S 24F(4).

8.6. Consequences of unlawful commencement of an activity

8.6.1. Use of criminal sanctions to enforce environmental impact assessment

Ordinarily, an application for environmental authorization as required by NEMA would be accompanied by either scoping and an environmental impact assessment report or a basic assessment report. The purpose of the report is to motivate the application and persuade the competent authority to grant environmental authorization based on the findings of the report. The report follows an investigation, consideration and assessment of all factors which might be affected by the proposed activity where a scoping and environmental impact assessment is applied to an application for environmental authorisation; this includes the potential impact on the social, economic and environmental factors.⁶⁹⁶ The list of factors relevant to the investigation was more explicit under the 1998 Act, but was changed by the 2004 and ultimately 2009 amendments.⁶⁹⁷

The empirical data generated by the Department of Environmental Affairs for the financial year 2012/2013 reveals that the unlawful commencement of environmental impact assessment listed activities continues to be the most common type of non-compliance.⁶⁹⁸ Based on the statistics, this high number of acts of non-compliance suggests a number of possibilities, namely either that developers are blatantly disregarding the law or that the general public has no access to environmental information.⁶⁹⁹ Where non-compliance is deliberate, Kidd suggests that criminal sanctions should be used.⁷⁰⁰ The question arises,

⁶⁹⁶ S 24(1) of NEMA provided- in order to give effect to the general objectives of integrated environmental management laid down in this chapter, the potential on-

- (a) The environment;
- (b) Socio-economic condition; and
- (c) Cultural heritage ,

Of activities that require authorization or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing, permitting or otherwise allowing the implementation of an activity.

⁶⁹⁷ See appendix 1

⁶⁹⁸ National Environmental Compliance and Enforcement Report 2012/2013.

⁶⁹⁹ See M Kidd 'Criminal measures' in A Paterson and L J Kotzé (eds) *Environmental Compliance in South Africa: Legal Perspectives* (2009) 242-243. He lists some of the weaknesses of using criminal sanctions to enforce environmental law he mentions lack of public awareness that leads to a high number of criminal cases.

⁷⁰⁰ M Kidd 'Criminal measures' in A Paterson and L J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 240, 244. See also Y Burns and M Kidd 'Administrative law and implementation of environmental law' in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2011) 244. See also M Kidd *Environmental law* 2 ed (2011 Juta) 269.

however, whether the use of criminal sanctions is the best way to ensure compliance with and adherence to the law and procedures pertaining to environmental impact assessments?

While the value of criminal sanctions for enforcing and implementing environmental law in general is recognised in South Africa and other parts of the world, it was not until recently that it was specifically legislated for in South Africa that failure to undertake an EIA for a listed or specified activity is a criminal offence.⁷⁰¹ Kidd identifies several inherent weaknesses of using criminal law to enforce environmental law, such as the burden of time and cost of prosecution; the reactive nature of criminal law (the harm has already been done when prosecution is instituted); the problem of proof (more stringent than in civil cases); procedural safeguards (the rights to a fair trial or ‘due process’ rights); the burden on enforcement agencies of preparing cases for prosecution (especially where likely punishment is not severe); attendance of enforcement officials in court; and reluctance by officials to punish offenders for conduct seen as morally neutral. And the following contingent weaknesses: inadequate policing; lack of public awareness (insufficiently developed ‘environmental ethos’); lack of expertise of court officials and inadequate penalties (not necessarily as provided for in the legislation, but with regard to the actual penalty imposed by the judicial officer).

Apart from the weaknesses of the criminal justice system; there is a cynical view among interest groups that NEMA encourages (s24G) non-compliance with its own provisions. To illustrate this point further, CER has stated that the main reason why developers do not comply with s 24(1) of MEMA is because of the perception that s 24G applications always end up in authorisation granted, administrative and criminal fines that are way too low to constitute a proper disincentive for non-compliance and the perception that companies simply budget for administrative fines and proceed with contraventions of s 24F (and do not stop when caught out).

⁷⁰¹ The Environment Conservation Act did not make it an offence not to undertake an EIA where required. Failure to undertake an EIA was not a criminal offence under NEMA until the 2004 NEMA amendment.

8.6.2. Criminal Sanctions and Environmental Impact Assessments

In certain cases, as alleged by CER, developers continue with listed activities and do not stop when caught. For instance the accused in *State v Charles Gerald Hume*⁷⁰² had been served with four compliance notices issued in terms of s 31L(1) and (4) by environmental management inspectors (EMIs). The instruction contained in the notice directed the accused immediately to cease clearing the vegetation within a critically and endangered ecosystem. In blatant disregard of the compliance notice, the accused continued to clear the vegetation.

He was therefore charged with contravening s 24F of NEMA in that he had commenced with a listed activity (in terms of the National Environmental Management: Biodiversity Act⁷⁰³ without obtaining authorisation from the competent authority. The court took into account the fact that he had paid a s 24G fine and had applied for the rectification of his unlawful commencement of the listed activity and had paid a fine of R275,00.000 as an administrative fine in terms of s 24G(2)(a) as a mitigating factor.

On the count of contravening ss 24(2), 24D and 24F of NEMA the accused was sentenced to eighteen months imprisonment suspended for a period of five years on condition that the accused was not convicted of contravening the same sections during the period of suspension. On the counts of contravening s 31N and 31L of NEMA the accused was fined R30,000 or six months imprisonment of which R10,000 or two months were suspended for a period of five years on the condition that the accused is not convicted with the same offence committed during the period of suspension.

It can be argued that the courts are not stringent enough in punishing perpetrators of environmental crimes. In the matter above, the court suspended the whole punishment on Count one because it accepted that the accused had already paid the administrative fine and applied for rectification for the unlawful commencement of the listed activity. The relationship between s 24F and s 24G could not be severed in practice. However, s 24G hinders the effectiveness of s 24F, giving credence to Paschke and Glazewski's observation that 'the activity already undertaken may in effect be legitimised as an incidental result of the

⁷⁰² In the Magistrate Court for the District of Kirkwood Case no. A513/09 18th October 2010.

⁷⁰³ Act 10 of 2004.

authorisation granted thereby rendering the s 24F criminal provision in respect of the activity in question'.⁷⁰⁴

The sentence also reinforces the CER's views that: the administrative and criminal fines are way too low to constitute proper disincentive for non-compliance; that companies budget for administrative fines and proceed with contraventions of s 24F, this view is also endorsed by Kohn who observes that 'it has become more cost-effective to break the law than comply with it';⁷⁰⁵ that s 24G applications always end up in authorisation and that the section has become a potential tool in the hands of developers, who tend to proceed with a listed activity and undertake to seek rectification at a later stage - Idwala coal being a case in point. *Prima facie*, NEMA makes it an offence to commence a listed activity without prior authorisation, but retreats from that position by allowing for rectification of such actions. It seems that the s 24F offences will continue to be a problem. The sentence of the court above does not alleviate this problem because it took into account the fact that the accused had already applied for s 24G rectification as mitigating factor. Even for continuously violating the compliance notices, the accused was fined only R30,000, R10,000 of which was suspended. This punishment was lenient.

The National Environmental Management Laws Second Amendment Act⁷⁰⁶ has delinked ss 24F and 24G in that the payment of fine or application for *post facto* authorisation shall not stop the EMIs and SAPS from investigating transgressions of s 24F. The Memorandum on the objects of the Bill that preceded the Amendment Act gave the following explanation regarding ss 24G and 24F. Contravention of s 24F is a strict liability offence, but authorities or persons instituting proceedings are subjected to the standard of proof in criminal proceedings where the accused is charged with other offences incidental to unlawful commencement of listed activities such as corruption or fraud. In *S v Stefan Frylinck and Mpofo Environmental Solutions*⁷⁰⁷ the accused were charged with fraud in contravention of the provision of s 103 of the Criminal Procedure Act⁷⁰⁸ and contravention of reg 81 of the NEMA EIA regulations of 2006. The state had alleged that the accused, Stefan Frylinck an

⁷⁰⁴ R Paschke and J Glazewski 'Ex post facto authorisation in South African environmental assessment: A critical review' (2006) 9 *PELJ* 120 at 145.

⁷⁰⁵ L Kohn n 570 above at 9.

⁷⁰⁶ Act 30 of 2013.

⁷⁰⁷ The Regional Division of North Gauteng, Pretoria Case number 14/1740/2010 judgment delivered on 6 April 2011 available at <http://cer.org.za/wp-content/uploads/2011> accessed 18 July 2011.

⁷⁰⁸ Act 57 of 1977

environmental consultant who worked for the second accused, a close corporation (legal entity) had provided incorrect and misleading information in their BAR by failing to disclose the existence of a wetland on the property on which a listed activity were to be carried out. The state had argued that by his misrepresentation, namely that there was no wetland on the site. The accused would stand to benefit. He would not incur the expenses of consulting a wetland specialist and he would evade long assessment periods.

The court found that the state had proven the existence of a wetland. On the charge of fraud the state was held to the standard of proof in criminal proceedings,⁷⁰⁹ and the court found that it had failed to prove beyond reasonable doubt that the accused had fraudulently misrepresented to the DEA that the site did not contain a wetland. The court found that the argument that Stefan Frylinck would gain from the report's recommendation was not entirely convincing. It found that the nexus between bypassing wetland delineation and financial gain was too remote and the argument without substance. The Court held further that, the argument that the accused wanted to bypass the wetland delineation for financial gain or urgency to commence construction was flawed. The Court found that the conduct of the accused suggested at most non-conformity with prescribed norms as well as negligent approach to the framework of his study and as such the court found it difficult to believe that the accused acted with knowledge of its falsity or with intent to deceive. The accused was given the benefit of doubt and acquitted of fraud but found guilty of contravening reg 81(1)(a) of the EIA Regulations.

8.7. The law

In criminal cases the state bears the onus to prove beyond reasonable doubt that the accused committed the offence he is charged with. This onus never shifts in a criminal trial. All the accused needs to do is to create doubt in the state's case and persuade the court that their version of evidence is reasonably possibly true.⁷¹⁰ The court stated the elements of fraud, as explained by Snyman, to be: 'fraud is the unlawful and intentional making of a representation which causes actual prejudice or which is potentially prejudicial to another'.⁷¹¹

⁷⁰⁹ *R v Difford* 1937 AD 370.

⁷¹⁰ WA Joubert *The Law of South Africa* 2ed 5 part 2 (2004 Lexis Nexis Butterworth 2004) 255-256.

⁷¹¹ CR Snyman *Criminal law* 5 ed (2008 LexisNexis) 531.

The court held that, in as much as Frylinck's methods to come to the final conclusion might be flawed, that was no excuse to draw further inferences of fraudulent misrepresentation. As a result, the nexus between failure to do a wetland delineation and economic gain was too remote and that the State's case lacked substance. The Court found that what the accused's conduct suggested was non-conformity with prescribed norms as well as a negligent approach to the framework of his study. The Court held further that the accused was very cooperative and responded to all queries raised by the DEA or GDACE. The accused was found guilty on count one and acquitted on count two.

It is not apparent from the facts whether the Court made enquiries into whether the state's argument that Frylinck wanted to bypass the wetland delineation for financial gain or urgency to commence construction were likely to be true. There is likelihood that the accused could have bypassed wetland delineation so that he could commence his project urgently. As a result he would also stand to gain. Faure and Svatikova advise that where a court sits as an environmental court, enforcement through criminal law should be preferred when the harm to the society or *environment*⁷¹² or benefit to the offender resulting from the activity is significant.⁷¹³ This is a persuasive observation. It is also alluded to by Kohn who observes that it has become 'more cost-effective to break the law than to comply with it'.⁷¹⁴

Another challenge presented by use of criminal sanctions in enforcing EIA is that the Act creates a ceiling in terms of the punishment or fine to be paid by the offender.⁷¹⁵ This may lead to a situation where great offences are punished with low penalties,⁷¹⁶ and *vice versa*. NEMA EIA Listing notices identify activities either by their size in metres, capacity or sensitivity of the receiving environment. For instance, construction of filling stations and associated structures is listed three times in the 2010 listing notices.⁷¹⁷ If we apply the monetary standard without paying any regard to the threshold set by the listing notices it would mean that a person engaging in the construction of a filling station to the capacity of 80 cubic metres on one hand and the person constructing a filling station to the capacity of

⁷¹² Own emphasis.

⁷¹³ M G Faure and K Svatikova 'Criminal or administrative law to protect the environment: evidence from Western Europe' (2012) 24 *Journal of Environmental Law* 258.

⁷¹⁴ L Kohn n 570 above at 9.

⁷¹⁵ See s 24G and 24F of the National Environmental Management Laws Second amendment Act 30 of 2013.

⁷¹⁶ M Kidd 'Criminal law' in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009 Juta) 245.

⁷¹⁷ See Listing Notices GN R 544, 545 and 546.

600 cubic metres would likely be liable to a similar fine as per s 24F of NEMA and this is absolutely upon the discretion of the court to impose the fine it deems appropriate. Again, depending on the size of the project and the benefit to be derived therefrom, R5 million might be a modest price to pay for great violations. Criminal measures are not stringent enough to deter prospective developers from commencing their projects before necessary licences and permits are sought.

There is absolutely nothing wrong with using both criminal sanctions together with administrative fines in attempt to enforce environmental law. In fact, it is accepted that the complementary use of the two systems might lead to additional deterrence.⁷¹⁸ In coming to their punishment the courts could use the following factors to influence the outcome: the threshold of harm, the type of activity,⁷¹⁹ benefit derived by the offender from the unlawful commencement of the activity. These factors could be more useful than the factors ordinarily used as extenuating or mitigating factors in criminal cases.

At this point one could ask whether prosecution is the best option for advancing or protecting the environment under the EIA regime. Those in favour of measures other than prosecution for enforcing environmental law criticise criminal measures for being costly, legal systems that only have criminal enforcement systems and no or limited possibilities to enforce via administrative law may be less effective. The assumption is that given the high costs of the criminal procedure, public prosecutors allocate their scarce resources to the most important cases.⁷²⁰ According to Kidd, ‘officials are reluctant to punish offenders for conduct seen as morally neutral’.⁷²¹

One of the lessons that could be learnt from the US is that when it first introduced criminal sanctions to enforce the environmental law it became very proactive. It came to the attention of the US Congress that ‘the absence of a focused criminal enforcement program resulted in

⁷¹⁸ See M Faure and K Svatikova ‘Criminal or administrative law to protect the environment: evidence from Western Europe’ (2012) 24 *Journal of Environmental Law* 256. See also M Kidd ‘Criminal measures’ in A Paterson and L Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009 Juta). See also T Winstanley ‘Administrative measures’ in A Paterson and LJ Kotzé (eds) *Environmental compliance and Enforcement in South Africa: Legal Perspectives* (2009 Juta) 225.

⁷¹⁹ See NEMA Listing Notices GN R 544, 545 and 546.

⁷²⁰ M Kidd ‘Criminal law’ in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta 2009) 240.

⁷²¹ Ibid at 243.

the development of criminal cases largely by happenstance'.⁷²² The idea of using criminal sanctions loomed large in the mind of US Congress until the early 1980s, when the Land and Natural Resources Division of the Department of Justice established an Environmental Section. The Division listed criminal enforcement as its number one priority.⁷²³

To implement this plan, the first office of Criminal Enforcement was created in 1981. Its mandate was to implement the Agency's commitment. In 1982, the first criminal investigators were hired at EPA. Most of them came from the metropolitan police departments or other federal agencies, but the challenge was that the officers did not have environmental backgrounds. The Land and Resources Division of the Department of Justice 'set up its Environmental Enforcement Section, a special unit whose sole responsibility was investigation and enforcement of environmental crimes'.⁷²⁴

The US preferred jail sentences, over payment of fines or civil fines, for their deterrent nature.⁷²⁵ This also led to the idea that punishment should be imposed on employees of corporations directly, not on corporations themselves.⁷²⁶ It was believed that corporations do not commit crimes, but individuals do.⁷²⁷ It has also alleged by CER that companies budget for administrative fines and continue with listed activities and that 'corporations in many cases may not feel a sting of fines as smartly as would individuals, since in the case of significant operations even sizeable fines may be viewed as "a cost of doing business"'.⁷²⁸ Drawing from the experiences of the US, the need to act more proactively is made much greater under the EIA, regard being had to the technicality of the field, the objectives of the integrated environmental management and the principles of s 2 that decision-makers are required to take into account and apply to their actions.

⁷²² R McMurry and S Ramsey 'Environmental Crime: The use of criminal sanctions in enforcing environmental laws' (1986) 19 *Loyola of Los Angeles Law Review* 1137.

⁷²³ Ibid at 1139.

⁷²⁴ R McMurry and S Ramsey 'Environmental crime: the use of criminal sanctions in environmental laws' (1986) 19 *Loyola of Los Angeles Law Review* 1141.

⁷²⁵ R McMurry and S Ramsey n 724 above at 1140.

⁷²⁶ See M Kidd 'Criminal measures' in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009 Juta) 240.

⁷²⁷ See CD Stone *Should trees have standing? Law, Morality and the Environment* 3ed (2010 Oxford University Press).

⁷²⁸ R McMurry and S Ramsey 'Environmental crime: the use of criminal sanctions in environmental laws' (1986) 19 *Loyola of Los Angeles Law Review* 1133-1170 at 1142.

8.8. Administrative Measures; Section 24G

As an alternative to prosecution, NEMA provides for the imposition of administrative fines where there has been a default in conducting the EIA. What happens under NEMA is that once a person has committed an offence under s 24F, such a person may apply for rectification of the unlawful commencement of the activity.⁷²⁹ Upon the receipt of the application the competent authority may direct the offender to compile an EIAR.⁷³⁰ The Minister or the competent authority may elect to direct the person to cease the activity in whole or in part and rehabilitate the environment⁷³¹ or issue an environmental authorisation to such a person.⁷³²

According to the overall national compliance statistics there was a dramatic decrease in the value of section 24G administrative fines from R5,385 215 in the year 2011/2012 to R176 272 33 a total of 64% decrease⁷³³ in the year 2012/2013 throughout the nation. But this does not prove that prospective developers are complying with s 24 of NEMA. This could be attributed to various factors, for instance this could be due to the fact that the Department is charging lower fines as compared to the previous financial year, or certain fines due were not paid at the close of the year. For instance, the statistics under table 2.6, give a total of 36 fines issued by the Gauteng: Department of Agriculture, Conservation and Environment but only 28 of those fines were paid. Again from the data provided we do not know the number of violations that were undetected.⁷³⁴

⁷²⁹ S 24G.

⁷³⁰ S 24G(1)(a).

⁷³¹ S 24G(2)(a).

⁷³² S 24G(2)(b)

⁷³³ National Environmental Compliance & Enforcement Report (NECER) 2012/2013, Department of Environmental Affairs.

⁷³⁴ Ibid.

8.9. The data on the unlawful commencement of listed activities

Province	Institution	Number of incidents reported	Total of fines issued
Western Cape	Department of Environmental Affairs and Development Planning	149	3
KwaZulu-Natal	Department of Agriculture & Environmental Affairs	81	3
Gauteng	Department of Agriculture and Rural Development	150	28
Limpopo	Department of Economic Development, Environment and Tourism	281 ⁷³⁵	2
Eastern Cape	Department of Economic Development and Environment Affairs	84 ⁷³⁶	0
Free State	Department of Economic Development, Tourism and Environmental Affairs	0	1
Mpumalanga	Department of Economic Development Environment and Tourism	14	0
Northern Cape	Department of Environmental Affairs and Nature Conservation	0	6
North West	Department of Economic Development, Environment, Conservation and Tourism	0	Unknown

Source: NECER

The total number of fines issued by the various departments for the financial year 2012/2013 does not tally with the number of incidents of non-compliance reported to each department. From this, one can safely deduce that there is still a high rate of non-compliance despite the fact that the value of administrative fines has decreased dramatically.

⁷³⁵ Illegal cutting and collection of wood.

⁷³⁶ Operating a motor vehicle in a coastal area without a permit.

Another issue is that, despite this high number of non-compliance, the percentage of EMIs assigned to inspect non-compliance with EIA is 6%.⁷³⁷ The Department at this stage is more concerned that only 16% of the total EMIs hired are females. While this is an important consideration under NEMA, which requires that the vital role of women in environmental management should be recognised and their full participation must be promoted,⁷³⁸ there are more pressing issues.

In 2011 the Department of Environmental of Affairs embarked on the task of amending NEMA, in particular s 24G was identified as one of the areas that needed reform. The Department acknowledged that it has observed the trends of companies budgeting for s 24G administrative fines and then commence with an activity without environmental authorisation. The amendment was therefore intended to increase the s 24G administrative fine from one million to five million Rands.⁷³⁹

The increase in the amount of potential fines is not enough to address the cynical view that s 24G is a potential tool for abuse in the hands of wrongdoers - be it perception or fact. What it means is that companies would have to adjust their budget for administrative fine. Therefore compliance with s 24 in general will remain a problem. It has also been stated that where companies have made an allowance for administrative fines in their budget they do not stop when caught out.

Nonetheless, the Bill was passed as law in *Government Gazette* No. 37170 as the National Environmental Management Laws second Amendment Act 30 of 2013. Section 24G (4) thereof provides that on application by a person who has commenced with a listed activity without an environmental authorisation in contravention of s 24F must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority .

⁷³⁷ NESCR.

⁷³⁸ S 2(4)(q).

⁷³⁹ Explanatory Summary of the National Environmental Management Laws Amendment Bill, 2011. Memorandum on the Objects of the National Environmental Management Laws Amendment Bill, 2011. Clause 8: Amendment of s 24G. Department of Environmental Affairs Government Gazette No. 34891.

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