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SCHOOL OF LAW – PIETERMARITZBURG

**Critical Analysis of the Independence of Environmental
Assessment Practitioners in South Africa**

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

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ABSTRACT

Environmental Assessment Practitioners (EAPs) are at the centre of the Environmental Impact Assessment (EIA) process. Their competence and ethics, therefore, are crucial in facilitating the EIA process. This research aims to analyse the extent to which the current South African (SA) EIA regulations ensure EAP independence. The key findings from other professions that place emphasis on independence reveal that factors such as financial interest, prior relations and managerial advisory services, competency, contractual arrangements, close personal relations and government and political influence interfere with independence. In the SA context, the independence of EAPs continues to be debated even after vigorous changes in the EIA regulations.

The recent regulation of the EAP profession in SA marks a much-needed intervention. However, it does not guarantee EAP independence while they are still being appointed by the project proponent. Results from Kenya and Botswana do not expressly state in their EIA regulations that they have EAP independence. It appears that international practice places more emphasis on the views and opinions of the affected communities during the public participation process rather than EAP independence. In parallel, Intervenor Funding is adopted to provide financial assistance to the affected communities to encourage their participation during the EIA process in order for the process to be objective.

Thus, there is still potential to strengthen EAP independence in SA. In order to achieve the desired outcome of independence, the Competent Authority (CA) must appoint EAPs on behalf of the project proponents rather than allowing EAP-client relationships. Moreover, adoption of the Intervenor Fund concept, where EAPs will be compensated for their services, is a concept that SA should consider.

Keywords: Independent Environmental Assessment Practitioner, Specialist, Competent Authority, independence, Environmental Impact Assessment, Public participation.

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ACRONYMS and ABBREVIATIONS

BAR	Basic Assessment Report
CA	Competent Authority
CEAA	Canadian Environmental Assessment Act, 2012 (now repealed)
DEDTEA	Department of Economic Development Tourism and Environmental Affairs
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DEFF	Department of Environment, Forestry and Fisheries
EAA	Environmental Assessment Act, 2011 (Botswana)
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
EAPASA	Environmental Assessment Practitioners Association for South Africa
ECA	Environmental Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EIR	Environmental Impact Report
EMCA	Environmental Management Co-ordination Act, 1999 (Kenya)
I&APs	Interested and Affected Parties
FEARO	Federal Environmental Assessment Review Office
GG	Government Gazette
GNR	Government Notice Report
IAA	Impact Assessment Act, 2019 (Canada)
IAIA	International Association for Impact Assessment
IEM	Integrated Environmental Management
KZN	KwaZulu-Natal
NEMA	National Environmental Management Act 107 of 1998
NEMA	National Environmental Management Authority
NEPA	National Environmental Policy Act, 1969 (USA)
PPP	Public Participation Process
RoD	Record of Decision
SA	South Africa/South African
SEMA	Specific Environmental Management Acts
ToR	Terms of reference
UNEP	United Nations Environmental Policy
UKZN	University of KwaZulu-Natal

CHAPTER 1

INTRODUCTION AND BACKGROUND

I INTRODUCTION

Environmental impact assessment (EIA) is one of the tools generally acknowledged worldwide as a fundamental support tool for sound decision-making in pursuit of sustainable development in both the developed and developing world.¹ According to Shah *et al* this tool ‘requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves the present and future generations’.² As a result, many countries have made it mandatory to undertake EIAs through their respective environmental legislation to protect the environment and to meet international obligations.

In the South African (SA) context, EIAs were conducted voluntarily prior to the enactment of the Environmental Conservation Act (ECA) in 1989.³ SA, being a developing country and as an active participant in the global community, was put under a lot of pressure by the international community to introduce EIAs as a legal mechanism for regulating activities likely to have a significant impact on the environment.⁴ Although the ECA was passed in 1989, it was only in 1997 that the EIA regulations R1182, R1183 and R1184 were promulgated in terms of sections 21, 22 and 26 of this Act.⁵ The ECA gave rise to various implementation challenges and as a result of these challenges, the National Environmental Management Act (NEMA),⁶ the EIA regulations issued under NEMA and the subsequent amendments to these EIA Regulations⁷ were enacted. The Specific Environmental Management Acts (SEMA)s⁸

¹ N King & S O’Beirne *Improving the Contribution of EIA to Achieving Sustainable Development in South Africa: A Case for Formalised Independent Review in the EIA Process* (2014) 2.

² A Shah, K Salimullah., MH Shah, K Razaulkah & UJ Irfan. ‘Environmental Impact Assessment (EIA) of Infrastructure Development Projects in Developing Countries’ (2010) 1(4) *OIDA International Journal of Sustainable Development* 47–54 47.

³ Act 73 of 1989.

⁴ M Sowman, R Fuggle & R Preston. ‘A Review of the evolution of environmental evaluation procedures in South Africa’ (1995) 15 *Environmental Impact Assessment Review* 46–67 48.

⁵ Sections 21, 22 and 26. Section 21 provide for the identification of activities that have a potential to have a detrimental effect on the environment. Once these activities have been identified, such activities may not be undertaken without an authorisation issued in terms of Section 22. Section 26 provides regulations regarding the environmental impact assessment procedure.

⁶ Act 107 of 1998.

⁷ GN R543 GG 33306 of 18/06/2010, GN R982 GG 38282 of 04/12/2014, GN R326. GG 40772 of 07/04/2017 and GN RGG 42849 of 22/11/2019. The regulations have also been amended four times with a list of activities that cannot commence without environmental authorisation.

⁸ Specific Environmental Management Acts all fall under the auspices of the overarching National Environmental Management Act (NEMA). The list of SEMAs is:

1. National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA).
2. National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA).

such as the National Environmental Management: Waste Act, read in conjunction with Government Notice No. 921,⁹ also make provision for EIAs. All these regulations place restrictions on human activities that may have a significant impact on the environment. Thus, the EIA process is conducted for particular listed activities that may not commence without the approval of the Competent Authority (CA) in the form of an Environmental Authorisation (EA).¹⁰ The introduction of the NEMA EIA regulations also came with its own challenges; therefore, there have been a number of amendments aimed at improving the application of the EIA process.

Central to the EIA process are Environmental Assessment Practitioners (EAPs), who are the drivers of the successful implementation of EIAs. EAPs are ‘responsible for managing, planning and co-ordinating various environmental management instruments such as EIAs’.¹¹ The effective implementation of EIAs and the EA process in SA. ‘relies directly on the competence and ethics of EAPs in government, parastatals and private consulting practice’.¹² The EIA process in SA requires the project proponent or the applicant to appoint the independent EAP, at his, her or its own cost,¹³ to facilitate the EIA process and to submit the Environmental Impact Report (EIR) to the CA for a decision.¹⁴ The CA relies on the EAP to provide accurate information and makes a decision on the information provided. It is therefore critical for the EAP to remain independent from the project proponent even though they are appointed and paid for by the project proponent because it is law. The project proponent is equally responsible for ensuring that the EAP is independent.¹⁵ The question is whether an EAP can be independent when he or she is employed directly by the project proponent.

3. National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA).

4. National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA).

5. National Environmental Management: Waste Act 59 of 2008 (NEMWA).

⁹ 29 November 2013.

¹⁰ M Kidd *Environmental Law* 2nd ed (2011) 235.

¹¹ Department of Environmental Affairs Roles and Responsibilities of Role-players (2013), available at: https://www.environment.gov.za/sites/default/files/docs/chapter7_rolesandresponsibilities_roleplayers.pdf, (accessed on 08 September 2019).

¹² Environmental Assessment Practitioners Association of South Africa. History of EAPASA, available at <https://www.eapasa.org/index.php/about/history-of-eapasa>, (accessed on 14 August 2020).

¹³ Chapter 1 of the NEMA EIA regulations provides clarification that EAP or a person involved in the environmental authorisation process has no business, financial, personal or other interest, but this excludes “fair remuneration for work performed in connection with that activity, application or environmental audit”. The term ‘independent’ was not clarified under the Environmental Conservation Act 73 of 1989 (ECA) until the guideline document was published by the Department of Environmental Affairs and Tourism in 1998 wherein an independent consultant was defined as a consultant who is not in the permanent service of the applicant.

¹⁴ Regulation 12(1), 2014 EIA regulations.

¹⁵ Section (12)(3)(a) of GN R982.

II

BACKGROUND

It is evident that the EAPs are at the centre of the decision-making process which is aimed at promoting sustainable development in South Africa.¹⁶ The CA relies on the information provided by the EAP in the EIR to make a decision as to whether or not the project should proceed. The EIR is preceded by impact identification and prediction of the development project on the environment, human welfare, as well as the economy, followed by a comprehensive and transparent consultation and participation process involving a wide range of stakeholders,¹⁷ after which an EA is issued on the basis of information provided in the EIR. EAPs are therefore advisors and an extension of the CA. This is so because the officials from the CA and the EAP are in partnership. One is dependent on the other for information to be able to make a robust decision. It is thus imperative that the EAP acts impartially as they influence the decision of the CA. The EIA Regulations further stipulate that the EAP must conduct his, her or its services in an objective manner.¹⁸ Quality assurance and ethics in environmental assessment practice are recognised as prerequisites for effective governance towards sustainable development in SA.¹⁹ However, a lack of trust²⁰ between the role players in the EIA process is a concern,²¹ and the responsibility rests with the EAP and the project proponent to ensure that this trust is maintained by conducting the EIA in an ethical manner.

In an attempt to address the issue of trust from an EAP perspective in SA, a voluntary certification system for EAPs was initially provided by the Interim Certification Board, which was established in 2001.²² In February 2018, the Minister of Environmental Affairs appointed the Environmental Assessment Practitioners Association of South Africa (EAPASA)²³ as the only registration body for EAPs for a five-year period with the purpose of advancing EAP practice and the quality of environmental assessment in South Africa in the

¹⁶ King & O’Beirne note 1 3.

¹⁷ LA Sandham, AJ Van Heerden, CE Jones, FP Retief & AN Morrison-Saunders, ‘AN Does Enhanced Regulation Improve EIA Report Quality? Lessons from South Africa’ (2013) 38 *Environmental Impact Assessment Review* 155–162 156.

¹⁸ Section 13(1)(d) of GN R982 states that EAPS should perform work relating to the application in an objective manner even if this results in views and findings not favourable to the application.

¹⁹ EAPASA note 12 4.

²⁰ In this instance, it is the lack of belief that the participants will provide reliable information.

²¹ T Davies *Keynote Address at the Annual National Conference of the South African Affiliate of the International Association for Impact Assessment in Port Elizabeth* (2016). The speech was about the importance of inclusive and participatory decision-making, objectivity and independence, and the ways in which EAPs can both hinder and promote the realisation of environmental justice. 3.

²² The purpose of this Board was to establish a credible certification process for persons wishing to obtain certification as suitably qualified EAPs.

²³ EAPASA was appointed in line with Section 24H of NEMA.

public interest and in the interest of the environment.²⁴ EAPASA will also implement an ethical code of conduct and practice for EAPs registered with the body and all EAPs practising in SA are required to register with this body.

III STATEMENT OF THE PURPOSE

Regulatory EIAs have been implemented for more than two decades in SA. However, there are still challenges related to the independence and objectivity of the EAPs. Boer and O’Beirne²⁵ state that the requirement for the independence of EAPs has been a pervasive theme in environmental assessment in SA for many years now. It is worth recognising that the EAP role is a fact-finding one and the same facts should be translated into the decisions that are made regarding proposed developments.

Davies²⁶ states that the SA system of EIA

‘places those who are responsible for EIAs in a very difficult position: they are required to be independent and to express their conclusions regardless of whether or not they favor the application, and yet they are commissioned and paid by the applicant, and their chance of future work depends on the product they produce for those who are paying them’.

She further concludes that as a result, it is rare to find project recommendations that will not favor the applicant. EAPs feel obligated to meet the needs of the project proponent.

IV AIM OF THE STUDY

The question of whether EAPs are meeting the legal requirements of “independence” and “objectivity” as they are the enablers of decision making is a topical issue in the environmental management sector. Tension exists between the legal requirements that an EAP must be independent from the project proponent, but at the same time the EAP is employed by, and is dependent on the project proponent for work.²⁷ Arendse also alluded to the fact that the requirement of EAP independence creates challenges in respect of large enterprises which may

²⁴ EAPASA note 12.8.

²⁵ A Boer & S O’Beirne *Independence and Decision Making: What Can We Learn from Other Countries?* (Paper presented at IAIA Conference Bela-Bela 2008) 2.

²⁶ Davies note 21.3.

²⁷ Cullinan and Associates. 2017. *Environmental Assessment Practitioners: Reform and Regulation at Last?* available at: <http://cullinans.co.za/blog/article/environmental-assessment-practitioners-reform-and-regulation-at-lastc> (accessed on 14 April 2019).

have internal human resources with environmental expertise but which were disqualified because of this requirement.²⁸

This study will analyse the extent to which the EIA regulations guarantee EAP independence and whether EAPs can be said to be independent while they are employed by the project proponent. The general objective of this research is to discuss the role and appointment of an independent EAP during the EIA process as prescribed in SA law. In the course of this analysis, the way in which EAPs are appointed in Kenya, Botswana and Canada is examined. The purpose of this is to determine whether they are required to be independent of the project proponent and how the law in these countries seeks to ensure such independence.

V RESEARCH QUESTIONS

The research question of this study is:

Does the appointment of EAP as conceptualized in SA law promote or undermine EAP independence? In order to address this question, the following are some of the sub-questions that the study aims to pose:

- a. What are the legal provisions governing the appointment of the EAP?
- b. How are the legal provisions interpreted and applied by the courts and the executive?
- c. Are there alternatives or better methods of promoting the independence of EAPs?

VI RESEARCH METHODOLOGY

This study is a desktop analysis of the independence of EAPs and their role in the decision-making process while they rely on the project proponent for work. The study will include an examination of definitions and perspectives on the independence of EAPs provided by research and legislation in order to illustrate its legal context and meaning. The research will be structured according to a review of South African environmental law, specifically NEMA. Case studies/laws will be used to demonstrate issues related to EAP independence and draw from other relevant literature to determine how EAPs are appointed in terms of other statutes. For the purposes of this study, contributions from Kenya and Botswana's EIA laws will be reviewed as part of a comparative study because both countries are developing countries within the African continent. They are both constitutional states with fundamental rights and subject

²⁸ C Arendse *An Evaluation of the Development of Environmental Legislation Governing Environmental Impact Assessments and Integrated Environmental Management in South Africa* (LLM Thesis, University of Western Cape, Cape Town, 2012).

to judicial review, just like South Africa. Both countries have also embedded EIA regulations in their environmental laws which contain a list of activities that may require an environmental assessment wherein the proponent submits an impact report to the CA for approval prior to development. Both countries have also established a need to compel EAPs to be professionally registered to be able to conduct EIAs. The research will briefly reflect on the international best practice of Canada since it has a similar background in the development of EIA practice to the three African countries and will draw lessons for implementation in the SA context.

VII SIGNIFICANCE OF THE STUDY

It is acknowledged that EAPs play a significant role during the EIA process. However, their independence has not been comprehensively investigated. Nevertheless, it is recognised that EAP independence is one of the problematic areas that affect the EIA process. The outcome of this research will present an alternative to the already existing prescribed manner of EAP appointment with the aim of improving the level of trust between the role players in the EIA process. Because there is limited literature on EAP independence in SA, this research will also add to a body of literature.

The next chapter will be divided in two sections. The first section will present the history of EIAs and how it has manifested itself and evolved in the South African context. The second section will focus on the role of the independent EAP during the EIA process and the establishment of the EAP registration authority in SA.

CHAPTER 2

OVERVIEW OF EIAs AND THE ROLE OF EAPs

I INTRODUCTION

The purpose of conducting EIAs is to ensure that the impacts on the environment are adequately considered in the decision-making process on development proposals with the aim of promoting sustainable development.¹ EIA is a policy and management tool for both planning and decision making which has the capacity to determine and manage potential impacts of proposed human activities on the environment.² This acknowledges that most developments will have an effect on the environment and in order to achieve sustainable development, these effects on the environment should be managed prior to continuing with the proposed development. It also provides for the participation of persons who may be affected by the proposed development,³ termed the public participation process (PPP).

In order to appreciate the role of the EAP during the EIA process fully, this chapter will provide a background to the EIA as a decision-making tool at an international and regional level. As we follow the history of EIAs, an overview of how the concept of an independent EAP has manifested itself in South African environmental law and how it has evolved over time will also be presented.

II HISTORY OF EIAs

According to Mounir,⁴ numerous developments in the past were undertaken without taking into account the environmental impact, and because of pollution, we now face major global environmental problems. The increase in industrialisation and urbanisation in western countries has also resulted in a great loss of natural wealth, creating concerns regarding pollution, the wellbeing of human life and natural settings.⁵ The increase in pollution raised

¹ J Glasson, R Therival & A Chadwick *Introduction to Environmental Impact Assessment* 3rd ed (2005).

² Ibid.

³ M Kidd, F Retief & R Alberts 'Integrated environmental assessment and management'. In King N, Strydom H and Retief F (eds). *Environmental Management in South Africa* 3rd ed (2018).

⁴ ZM Mounir 'Evaluation of the Quality of Environmental Impact Assessment Reports Using the Lee and Colley Package in Niger Republic' (2014) 9(1) *Modern Applied Science* 89–95.

⁵ PFA Ogola *Environmental Impact Assessment Procedures* (2007), available at: <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf> (accessed on 07 September 2019).

global awareness on the state of the environment which resulted in international communities adopting EIAs as a tool in managing environmental impacts.

EIAs were first introduced in the United States of America in 1969 under the National Environmental Policy Act (NEPA).⁶ The intention of establishing NEPA was to oblige all agencies of the Federal Government to incorporate environmental issues into their planning and decision-making processes.⁷ Section 120(2) of the Act imposed an obligation on every federal agency to prepare a detailed EIA report for actions that had a significant effect on the human environment.⁸ This then served as a formal inception of EIAs worldwide.⁹

After the inception and promulgation of NEPA, the United Nations Conference on the Human Environment in Stockholm took place in 1972,¹⁰ which resulted in the establishment of an action plan.¹¹ The main purpose of the Stockholm Action Plan was to identify environmental issues that required international action.¹²

Following the United Nations Conference on the Human Environment, the sustainable development¹³ concept came into being in 1987 when it was introduced by what is now known as the Brundtland report.¹⁴ The sustainable development concept was introduced in an attempt to resolve the conflicting needs of development and environmental protection.¹⁵ The concept then started to receive almost daily discourse in 1992 in the wake of the Rio Earth Summit¹⁶. The principle of sustainable development was endorsed at the Rio Earth summit and the Rio Declaration came up with various principles. According to principle 4:

⁶ NEPA of 1969.

⁷ PJ Aucamp *Environmental Impact Assessment: A Practical Guide for the Discerning Practitioner*. 9th ed (2009).

⁸ Ibid. 15.

⁹ M Sowman, R Fuggle & R Preston. 'A Review of the evolution of environmental evaluation procedures in South Africa' (1995) 15 *Environmental Impact Assessment Review* 46–67 45.

¹⁰ The main purpose of this conference was 'to serve as a practical means to encourage and to provide guidelines for action by governments and international organisations designed to protect and improve the human environment, and to remedy and prevent its impairment, by means of international co-operation, bearing in mind the particular importance of enabling developing countries to forestall occurrence of such problems'.

¹¹ Action Plan of the United Nations Conference on the Human Environment [1972] UN document A/CONF.48/5.

¹² C Arendse *An Evaluation of the Development of Environmental Legislation Governing Environmental Impact Assessments and Integrated Environmental Management in South Africa* (LLM Thesis, University of Western Cape, Cape Town, 2012) 10.

¹³ '...development that meets the needs of the present without compromising the ability of future generations to meet their own needs' – Brundtland report article 27 (Oslo, 20 March 1987).

¹⁴ WCED, 1987. *Report of the World Commission on Environment and Development: Our Common Future*.

¹⁵ National Strategy for Sustainable Development 'Sustainable Development Planning' GoLegal available at: <https://www.golegal.co.za/sustainable-development-planning>, (accessed on 08 September 2019).

¹⁶ Rio Declaration of Environment and Development 1992.

'sustainable development could only be achieved by integrating environmental protection into the development process as environmental protection constitutes an integral part of the sustainable development process';¹⁷

The major contribution of the Rio Earth Summit was to give equal importance to the environment and development.¹⁸ The concept of sustainable development has since been adopted worldwide as a development principle.

Amongst other principles adopted at the Rio Earth summit include the principle of environmental impact assessment (principle 17) which states that EIAs as a national instrument shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

This principle places an obligation on member states to pass laws for EIAs to be implemented. There are various other declarations that followed the Rio Summit; The World Summit on Sustainable Development (WSSD) held in Johannesburg SA in 2002 built on the recommendations of the Rio Earth Summit. The WSSD declaration on sustainable development and its implementation plan have not articulated new principles or policies and are mostly regarded as a re-confirmation and restatement of the Rio principles¹⁹ that recognise the role of environmental assessment as one of the key instruments to sustainable development.²⁰

Following their introduction, EIAs have been considered one of the most successful policy interventions over the years as many countries started conducting environmental assessments.²¹ Many developing countries followed in the footsteps of United States of America by adopting EIAs. EIAs are now practised in 191 of the 193 member nations of the United Nations; and of the 191 countries, fewer than 10 do not have formal national legislation on EIAs.²² EIAs are also recognised by a number of international aid agencies and

¹⁷ Ibid, principle 4.

¹⁸ MT Laden 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22. *The South African Journal of Environmental Law and Policy*.159-190.

¹⁹ HA Strydom 'Essentialia of International Environmental Law' in ND King, HA Strydom & FP Retief (eds). *Environmental Management in South Africa* 3rd ed (2018) Juta and Co. Ltd , Cape Town 62.

²⁰ Department of Environmental Affairs and Tourism (DEAT). 2004. *Overview of Integrated Environmental Management. Integrated Environmental Management, Information Series 0*, Department of Environmental Affairs and Tourism (DEAT), Pretoria. 6.

²¹ LA Sandham, AJ Van Heerden, CE Jones, FP Retief & AN Morrison-Saunders 'Does Enhanced Regulation Improve EIA Report Quality? Lessons from South Africa' (2013) 38 *Environmental Impact Assessment Review* 155–162 156.

²² RK Morgan 'Environmental Impact Assessment: The State of the Art' (2012) 30(1) *Impact Assessment and Project Appraisal* 5–14 6.

development banks.²³ According to Saidi,²⁴ EIAs have proved to be an effective tool for integrating environmental concerns in project planning and development in both developed and developing countries.

III EMERGENCE OF EIAs

As a result of enhanced environmental awareness among the public, the number of EIAs undertaking in SA began to steadily increase in the early 1980s.²⁵ At this time, however, the EIA process was not mandatory. Instead, voluntary EIAs were conducted under the Integrated Environmental Management (IEM)²⁶ procedure published by the Council for Environment in 1989.²⁷ As Ridl and Couzens point out:

*EIAs were undertaken to satisfy investing companies in countries with more stringent environmental standards, or even in the genuine interest of wise use of natural resources.*²⁸

(a) *The EIA process under ECA*

SA was re-introduced into the world arena after the sanctions held against it during Apartheid were lifted. SA became party to and a signatory to the majority of the international conventions and ‘found that it had an important role to play in international environmental law by virtue of its position as one of the stronger African Countries’.²⁹ Kidd³⁰ implies that SA had for many years been an international outcast, and was keen to be seen as a willing participant in global affairs.

It was only in 1997 that the EIA process became mandatory in SA under sections 21, 22 and 26 of the Environment Conservation Act (ECA),³¹ which was read together with the

²³ United Nations Environmental Programme (UNEP) *Resource Training Manual* (2002) available at: <http://www.unep.org> (accessed on 28 March 2019).

²⁴ TA Saidi *Environmental Impact Assessment as a Policy Tool for Integrating Environmental Concerns in Development* AISA Policy Briefing No 19 (2010).

²⁵ Sowman et al note 9.

²⁶ Philosophy that is created to find the right balance between development and environment.

²⁷ JA Du Pisani & LA Sandham ‘Assessing the Performance of SIA in the EIA Context: A Case Study of South Africa’ (2006) 26 *Environmental Impact Assessment Review* 707–724.

²⁸ J Ridl, J & E Couzens ‘Misplacing NEMA? A Consideration of Some Problematic Aspects of South Africa’s New EIA Regulations’ (2010) 13(5) *Potchefstroom Electronic Journal* 80–121 83.

²⁹ M Kidd *International Conventions on the Environment: A South African Perspective*. Briefing to the Environmental Affairs and Tourism Portfolio Committee (2000). Meeting summary, available at <https://pmg.org.za/committee-meeting/3234/> (accessed on 07 April 2019).

³⁰ Ibid

³¹ Act 73 of 1989.

ECA regulations.³² Section 21 of the ECA provides for a list of activities that may have a detrimental impact on the environment. These activities may not commence without prior approval from the CA. The EIA regulations made under the ECA outline the EIA procedure to be followed, including the content of the EIR and the review of EIR and issuing of the Record of Decision (RoD) (now termed the Environmental Authorisation) by the CA. It also outlines the communication process and the process to be followed when appealing against a RoD.³³ The EIA regulations under the ECA further stipulate that the process needs to be undertaken by an ‘independent consultant’.³⁴ The independent competent consultant was not defined under the ECA, which was one of the many shortfalls that were identified under this set of regulations. After it was introduced, the legal framework governing EIAs came under sustained criticism. In order to identify which of these criticisms were valid and to address, the Department of Environmental Affairs commissioned a study in 2006 to assess the effectiveness and the efficiency of the EIA tool.³⁵ The findings of the study amongst others revealed that the EIA process was flawed as EAPs are paid by the applicant, there are time delays during the approval process and the effectiveness of EIAs was marginal.³⁶ Some of these criticisms were referred to by the then Minister of Environmental Affairs and Tourism (DEAT), Marthinus van Schalkwyk, that the EIA regulations

*lacked procedural clarity which led to the inconsistency in the application of the law, they are inflexible, led to time delays during the EIA and issuing of decisions, lacked guidance in the public participation process, poor quality EIA reports, bias and the system triggered far too many EIAs.*³⁷

(b) *The EIA process under NEMA*

As a result of the challenges experienced with the implementation of EIA regulations and the changing political circumstances in SA post the apartheid era, it was necessary that the EIA procedure developed for SA be compatible with, but not dependent upon, systems utilised in developed countries.³⁸ This is so because SA, being a developing country, it needs to promote

³² Regulations GNR 1182, 1183 and 1184.

³³ Saidi note 23 14.

³⁴ Section 3(1)(a) of GN R1183.

³⁵ Department of Environmental Affairs 2013. *Efficacy of SA's Environmental Impact Assessment (EIA) regime*. Portfolio Committee in the Parliamentary Hearing. Pretoria. 2.

³⁶ Ibid

³⁷ Ridl & Couzens note 28 86.

³⁸ Sowman et al note 9 12.

economic growth and social development in order to alleviate poverty. NEMA was then enacted in 1998 which supplemented the ECA.³⁹

SA also promulgated its new Constitution in 1996, which provided the basis for a new domestic environmental law regime.⁴⁰

Chapter 2 of the SA Constitution introduced environmental rights. Section 24(b)(iii) necessitated that in 2006, the EIA regulations under the NEMA⁴¹ were established to streamline the SA EIA process and to give effect to the environmental rights in the Constitution. The changes that came into effect in 2006 allowed for two types of assessment processes, namely, the Basic Assessment (BA) and an EIA comprising the scoping phase. The purpose of these two processes was to determine the need for and extent to which an EIA process would be triggered.⁴² A BA was aimed at activities with smaller scale that had the potential to result in less significant environmental impacts. A comprehensive EIA was aimed at activities with larger scale that had the potential to result in significant environmental impacts. The main objective behind the NEMA regulations was to expedite the authorisation process and to reduce the number of activities that require approval from the CA.⁴³

According to Kidd and as outlined above, during the period 1999 to 2006, the ECA EIA regulations operated in parallel with the NEMA requirements contained in Chapter 5.⁴⁴ The authorities were using the ECA for identified listed activities and were applying section 24⁴⁵ of NEMA to those activities which might have a significant impact on the environment and which were not listed activities under the ECA.

³⁹ NEMA did not entirely repeal all the provisions of ECA. Section 21, 22 and 26 of ECA were repealed and EIA requirements were reflected in Chapter 5 of NEMA.

⁴⁰ JH Coetzee Sustainable Development in the South African Environmental Law and Its Relationship with the National Development Plan (LLM thesis, North-West University, Potchefstroom, 2016). 8.

⁴¹ Regulations GNR 385, 386 and 387.

⁴² M Marais, FP Retief, LA Sandham & DP Cilliers Environmental Management Frameworks: Results and Inferences of Report Quality Performance in South Africa' (2015) 97(1) *South African Geographical Journal* 83–99.

⁴³ M Kidd Environmental Law 2nd ed (2011) 235–265.

⁴⁴ Integrated environmental management the objectives of which are “to promote the integration of the principles of environmental management... into the 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 the view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management...; ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them; [and] ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment”. DEAT note 20 18.

⁴⁵ Application for Environmental Authorisation.

NEMA also requires the EIA process to be managed by an independent EAP on behalf of the applicant or the proponent and for a Specialist to be appointed, if the assessment requires the expertise of a Specialist.⁴⁶ This means that Specialists are an extension of the EAP. Similarly, the EIA process was managed by independent consultants under the ECA. Kidd further states that both pieces of legislation fail to specify the accreditation process that needs to be followed by EAPs. However, under the 2006 NEMA regulations, there are provisions for the appointment of an EAP registration authority.⁴⁷

The 2006 EIA regulations were amended in 2010 by three listing notices⁴⁸ identifying activities for which an EIA is required. Listing notice 1 requires a BA, Listing notice 2 requires Scoping and EIA and Listing notice 3, comprising listed activities taking place at specific geographical locations, requires a BA process. According to Kidd, there were no significant changes between the two pieces of legislation; the EIA process remained the same as under the 2006 EIA regulations and was merely refined by the 2010 regulations. Although it is beyond the scope of this study to examine all of the changes introduced by the 2010 regulation, it is important to note that Interested and Affected Parties (I&APs) were given the authority to notify the CA of the fact that an EAP had failed to meet the requirements for an EAP.⁴⁹ I&APs are

*individuals, communities or groups, other than the proponent or the authorities, whose interests may be positively or negatively affected by a proposal or activity and/or who are concerned with a proposal or activity and its consequences. These may include local communities, landowners, residents, investors, business associations, trade unions, customers, consumers and environmental interest groups.*⁵⁰

The role of the EAP will be discussed in the next section.

Further improvements were made to the 2010 regulations in 2014. The significant change during the 2014 EIA regulations was the agreement reached between the Department of Environmental Affairs (DEA) and the Department of Mineral Resources (DMR) to manage the impacts on the environment associated with mining activities.⁵¹ The significant

⁴⁶ Section 12(1) and (2) of EIA regulations, which came into effect on 03 July 2006.

⁴⁷ Section 24H.

⁴⁸ GNR 544, GNR 545 and GNR 546.

⁴⁹ Regulation 17.

⁵⁰ Department of Environmental Affairs 2014. Environmental Impact Assessment and Management Strategy for South Africa (Draft) 6.

⁵¹ SC Cele *Exploring Post-authorisation Follow-up and EIA Effectiveness in South Africa: Case Studies from KwaZulu-Natal* (MSc thesis, University of KwaZulu-Natal, 2016).

change in relation to this study is that an EAP is no longer required to compile an EA amendment application where no EIA or part thereof was required for such amendment.⁵² Amendment applications to an EA can be performed by the applicant. Moreover, the public participation process was clearly defined. Other amendments to the EIA regulations post-2014 took place in 2017 and 2019 respectively. The 2017 and 2019 EIA amendments were not considered for this study as they are not relevant to the issue under consideration.

IV DEFINING THE ROLE OF THE ENVIRONMENTAL ASSESSMENT PRACTITIONER DURING THE EIA

There are various role players that are involved during the EIA process: the project proponent; the EAP; the CA; and the I&APs. Each of these individuals or groups has a critical role to play in contributing to the successful implementation of the EIA. The EAP is at the centre of the EIA process as the regulations require the project proponent to appoint an independent EAP who has the expertise to manage the process and submit an EIR with a signed statement of independence for the CA to approve or reject the proposed development from proceeding. This submission must be preceded by an impact identification and prediction of development on the environment and human welfare, as well as the economy, followed by a comprehensive and transparent public participation process⁵³ involving a wide range of stakeholders; after which an EA will be issued on the basis of information provided in the EIR. The PPP is a critical component during the EIA process because the CA is able to make an informed decision without solely relying on scientific information collected by the EAP. Moreover, I&APs are often affected by the decision taken by the CA and the applicant's development. This observation is supported by Ridl wherein he states 'the fundamental purpose of an EIA is to ensure that the public interest is best served in any development proposal'.⁵⁴ As such, the EAP

⁵² Warburton Attorneys *A Summary for EAPs on the Recent Changes to the NEMA 2014 EIA Regulations and Listing Notices* (2017) available at: <https://www.polity.org.za/article/a-summary-for-eaps-on-the-recent-changes-to-the-nema-2014-eia-regulations-and-listing-notice>, accessed on 08 September 2019.

⁵³ Public participation process wherein persons who may be affected by the proposed development are afforded the opportunity to comment on the reports prepared by the EAP. This process is usually announced through publications in newspapers and other relevant media of communication depending on the environment in which the proposed development will take place.

⁵⁴ J Ridl *Environmental law. Continuing legal education seminars. (2013)1-17. See also Sand's definition of EIA – highlights public participation as a central purpose of EIA from Kidd (2011) 235.*

must ensure that all I&APs participate fairly in the environmental assessment process and contribute towards the outcome of the EIA process.⁵⁵

Other responsibilities of the EAP as outlined in the DEAT guideline document include the following:

- *Determine the level of assessment applicable to the proposed activity.*
- *Prepare and submit the application to the relevant CA.*
- *Conduct at least a basic public participation process including:*
 - *Arranging the necessary public participation activities including notifying all Interested and Affected Parties of the proposed project via notice boards, advertisements and written notice as prescribed in the Regulations;*
 - *Providing all I&APs with sufficient information to enable them to participate;*
 - *Keeping a register of all I&APs, their associated details and any inputs they have made;*
 - *Preparing the minutes of any meetings held which accurately records the views of the participants, together with any responses to those representations, comments and views;*
 - *Ensuring that the I&APs are afforded sufficient time to participate and comment;*
 - *Considering all objectives and representations received from I&APs;*
 - *Notifying I&APs of the CAs decision, associated reasons for the decision, and that an appeal may be lodged against the decision.*
- *Compile the relevant and integrate environmental specialist reports.*
- *Submit the required documentation to the CA.*
- *Upon request from the CA, amend the reports or provide additional information.*

The EAP is not allowed to promote the interests of the developer even though it is paying the EAP for his, her or its services.⁵⁶ This can be achieved only if the EAP remains independent of the developer. Section 13(1)(a) and (b) of the EIA regulations specifies that an EAP must be independent and objective:

‘independent’, in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means:

- (a) *that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or*

⁵⁵ Department of Environmental Affairs *Roles and Responsibilities of Role-players* (2013), available at: https://www.environment.gov.za/sites/default/files/docs/chapter7_rolesandresponsibilities_roleplayers.pdf, (accessed on 08 September 2019).

⁵⁶ Sowman et al note 9 15.

(b) *that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;*

excluding—

- (i) *normal remuneration for a specialist permanently employed by the EAP; or*
- (ii) *fair remuneration for work performed in connection with that activity, application or environmental audit.*⁵⁷

The regulations further places the responsibility on ‘the proponent or the applicant to take all reasonable steps to verify whether the EAP complies with Section 13(1)(a)’.⁵⁸ The duty of ensuring independence does not reside with the EAP only however it is the duty of both the EAP and the project proponent to ensure that the EAP is independent before they undertake the EIA. Therefore, the EAP can breach independence in two ways, namely, if they have a business, financial, personal or other interest in the activity or application, or if they compromise their objectivity. According to Boer and O’Beirne,⁵⁹ the issue of independence of EAPs was questioned by I&APs during the public consultations on the EIA process and has since been a subject of contention at the International Association of Impact Assessment SA. This view will be explored in detail in the following chapter.

V CERTIFICATION OF EAPs

In order to address the issue of independence, a voluntary certification system for EAPs was provided by the Interim Certification Board from 2001. NEMA, however, makes provision for the Minister to appoint a Registration Authority. The regulations⁶⁰ were published in 2014⁶¹ and came into effect in July 2016. The Registration Authority provides for the appointment of a registration authority; minimum requirements of the registration authority; and the registration of EAPs. The Environmental Assessment Practitioners Association of SA (EAPASA) was nominated and appointed in February 2018 as the Registration Authority⁶² for all EAPs and all EAPs were given a period of 24 months in which to register with it. A draft Government Notice⁶³ was promulgated in January 2020 proposing to change the 24-month period to a 48 month period. If this change is accepted by members of the public and other

⁵⁷ Section 1 of GN R982.

⁵⁸ Section 12(3)(a) of GNR 982

⁵⁹ A Boer & S O’Beirne *Independence and Decision Making: What Can We Learn from Other Countries?* (Paper presented at IAIA Conference Bela-Bela 2008) 2.

⁶⁰ Section 24H.

⁶¹ GN R1142.

⁶² GN R629.

⁶³ GN 40 in GG 42967 of 24 January 2020.

interested persons and parties, it means that the period for the registration of EAPs will expire in 2022 instead of 2020. The primary role of EAPASA is to register candidate EAPs, to develop, administer and enforce a code of conduct, and to develop procedures for disciplinary action, for sanctions and for the termination of the registration of an EAP.⁶⁴ Thus, EAPASA will serve as a regulator holding EAP professionals accountable for any negligence, as happens with other professional societies such as the Legal Practice Council.⁶⁵ EAPASA will keep a register of all registered professional EAPs as contemplated in the regulations. By law, all future EIAs must be facilitated by EAPASA-registered EAPs.

To register as a professional EAP, the EAP must have ‘an advanced certificate in Environmental Assessment Practice or equivalent, with three years’ appropriate professional experience and at least three environmental assessments or reviews’.⁶⁶ It is evident that the process for registration is vague as there is no clarification on what is ‘equivalent to a certificate in Environmental Assessment Practice. Moreover, the regulations specify that an application for registration must be considered and decided upon within 60 days from receipt of the application. There are no clear provisions for EAPs whose applications do not meet the requirements and what happens after the lapsing of the 24-month period that has been allocated for registration.

Despite the shortcomings in the EAP registration and accreditation process, it is a positive initiative in addressing EAP independence.

VI CONCLUSION

This chapter has laid the foundation as to how EIAs were brought about in SA to meet the requirements of sustainable development. The regulations that govern this process have gone through various changes during the past two decades in order to address some of the implementation challenges that were brought about by these regulations. The improvements in the regulations brought clarity on the concept of EAP independence and also saw the introduction of the registration board for EAPs which became law in 2018 and which is reinforcing the independence of EAPs. It remains to be seen how this process of registration

⁶⁴ SM Makhudu & RC Hill ‘Enhancing impact assessment professionalism in South Africa’ (Paper presented at the 38th Annual International Association of Impact Assessment (2018) held in Durban, South Africa.

⁶⁵ Established in terms of Section 4 of the Legal Practice Act, 28 of 2014.

⁶⁶ Regulation 15.

will unfold as there are some gaps owing to the ambiguity on some sections of the registration process.

The next chapter will commence with the factors affecting independence and includes an outline of the importance of EAP independence. The chapter will conclude by presenting cases that question EAP independence. The aim is to advocate why EAP independence is vital during the EIA process.

CHAPTER 3

THE QUESTION OF EAP INDEPENDENCE

I INTRODUCTION

In the preceding chapter, the concept of EIA and how it was introduced and improved in the SAn context was unpacked. The concept of EAP independence was also introduced to describe the EAP role during the EIA process.

As a point of departure, this chapter will discuss the importance of EAP independence and some of the challenges associated with the lack thereof. Examples will be provided where applicable. Factors from other professions that interfere with independence will be discussed. The study will introduce case studies and appeal decisions taken by the SA judicial system, the Minister of Environmental Affairs and Tourism (DEAT) (now the Department of Environment, Forestry and Fisheries Affairs (DEFF)) and the KwaZulu-Natal Ministry of Economic Development, Tourism and Environmental Affairs (DEDTEA) in relation to EAP independence. The first case that this chapter will examine is *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others*.¹ The pronouncements made by the presiding judge on this case marked the interpretation of EAP independence in its entirety in relation to the ECA EIA regulations. This cleared up any speculation as to whether EAP independence applies to Specialists who make input to the Scoping and EIA report under the ECA EIA regulations. This section of the analysis will focus mainly on three grounds of review related to the work of the EAP as it is the focus of this study.

The second section relates to the recent appeal case in a matter between uMgenyane Conservancy and DEDTEA.² Of significant note in this appeal is that all three Specialists appointed during the Basic Assessment process were deemed not independent although the NEMA EIA regulations of 2014 clearly state that the Specialist must be independent. This gives much-needed evidence that the issue of EAP independence continues to be relevant even more than two decades after EIAs were implemented in SA. The above cases give an insight into how critical it is for the EAPs to remain impartial and independent

¹ 2011 (3) SA 55 (WCC), Hereafter *Sea Front for All*.

² DC22/0039/2017.

during the EIA process, where ordinary people are empowered through the public participation process.

II IMPORTANCE OF EAP INDEPENDENCE

The SA EIA regime has been improved extensively during the past decades. However, there are still concerns related to the independence and objectivity of the EAPs. This notion is advocated by the DEA where it states that independence and objectivity have been ‘identified as a major issue by stakeholders impacting the quality of professional work and thus the efficiency and effectiveness of environmental assessment in SA’.³ While the introduction of the EAPASA is aimed at bridging this gap, it still does not guarantee EAP independence. Some of these threats are outlined in Chapter 4.

According to Wessels and Morrison-Saunders

*one of the principles of EIA set by the International Association for Impact Assessment (IAIA) is that the process should be carried out with professionalism, rigour, fairness, objectivity, impartiality and balance and be subject to independent checks and verification.*⁴

This implies that the person who facilitates the process needs to be ethical.

In the SA context, the general requirements for EAPs and Specialists as stipulated in regulation 13(1) (a) requires an EAP to be ‘independent’. Independence has already been clarified in the preceding chapter. Whereas regulation 13(1)(d) requires that an EAP ‘perform the work relating to the application in an objective manner’.⁵ It is further noted that the same concepts of ‘objectivity’ is included in the definition of ‘independence’. The inclusion of both concepts as key requirements for EAP signifies their importance which is in line with international standards.

In the second chapter of this research, it was demonstrated that the EIA process is managed and co-ordinated by the independent EAP on behalf of the project proponent for the CA to make a decision as required by NEMA. Wessels and Morrison-Saunders point out that without independence, the aims, functions and purpose of the environmental right

³ Department of Environmental Affairs (DEA). 2011. Environmental Impact Assessment and management strategy: Subtheme 5: Quality Assurance and independence of Environmental Assessment Practitioners. 4.

⁴ JA Wessels & AN Morrison-Saunders ‘Defining the Role of the Independent Environmental Control Officer in Compliance Monitoring and Enforcement’ (2011) *South African Journal of Environmental Law and Policy* 18–27 27.

⁵ Presenting information based on facts without being influenced by personal feelings.

enshrined in the Constitution and all other environmental legislation become compromised.⁶ In Canadian practice, independence is also required from the CA.⁷ However, the requirement for the CA to be independent is not explicitly specified in the SA system. According to EAPASA, the officials working in government who have the function of reviewing EIAs are required to be registered with EAPASA as well as EAPs who undertake EIAs.⁸

III FACTORS AFFECTING EAP INDEPENDENCE

(a) *Direct or indirect financial interest*

According to Wessels, great emphasis has been placed on the independence of EAPs as a result of trust issues often raised during the PPP.⁹ This is also evidenced from the requirement that EAPs must declare their independence and submit it with the BA or EIR. He further states that the study he conducted based on the independence of other professions such as the legal, financial or business, systems audit and EIA follow up profession revealed that there are various factors that affect independence, such as the direct¹⁰ or indirect¹¹ financial interest. An indirect financial interest was noted in the EIA conducted in terms of the ECA with regard to the N2 Wild Coast Toll road between Durban and East London.¹² A positive EA was granted to the South African National Roads Agency Limited (SANRAL) in 2003 and I&APs lodged an appeal based on various issues, including the lack of EAP independence. The Minister of Environmental Affairs and Tourism (the Minister) appointed an independent review committee

⁶ Ibid.

⁷ Ibid.

⁸ See Constitution of EAPASA for definition of EAP: “EAP” means an “Environmental Assessment Practitioner, namely an individual who holds primary responsibility for the planning, management, co-ordination or review of environmental impact assessments and associated EMPs, either in the role of assessor or in the role of a reviewer of existing assessments”.

⁹ J Wessels ‘Factors that Influence the Independence of EIA Follow-up Verifiers: A Developing Country Perspective’ (2013) 31(3) *Impact Assessment and Project Appraisal* 169–179 169.

¹⁰ Such as owning shares in the company. The EIA regulations further provide details that the EAP should not be in the permanent employ of the proponent. However, Rule 17 of the Rule Book of the EAP Board of South Africa states: ‘Where an EAP is employed by an Organisation that is either the proponent of development or stands to benefit directly from development proposed by an outside party, and undertakes environmental assessment work for that Organisation, his/her environmental assessment work must be subject to review by an independent EAP’. In the SA context EIA follow up profession refers to Environmental Control Officers who are appointed voluntarily or mandatory as a condition of the EA. Their role is to conduct continuous monitoring during the construction phase of the project to ensure compliance to project specifications. A Systems Auditor conducts audits on a management system to verify that processes are documented and implemented against a specified set of requirements.

¹¹ Having a financial interest with any entity associated with the client.

¹² Anon ‘Approval for Wild Coast toll set aside’ *IOL* 10 December 2004, available at <https://www.iol.co.za/travel/south-africa/approval-for-wild-coast-n2-toll-road-set-aside-229183>, (accessed on 24 October 2019).

comprised of Specialists who found that the EAP and the developers shared common directorship, management and shareholdings.¹³ Ridl and Couzens state:

*Reg 3(2) of the ECA EIA Regulations provides that if the requirement for the independence of the consultant under Reg 3(1) is not complied with, the application is regarded to have been withdrawn.*¹⁴

In compliance with this legal requirement, the Minister overturned the decision on the N2 Wild Coast Toll Road based on the lack of EAP independence. A new EIA was then coordinated by a different EAP.

*(b) Prior relations and Managerial Advisory Service*¹⁵

Other factors that affect independence are prior relationships and/or a managerial advisory service wherein an EAP would have any link with the proponent, whether in the present or in the past. In the case of an Australian EAP which was contracted to obtain the prospecting rights for an Australian-based mining company, Mineral Commodities Ltd and its SA Mineral Sands Resources subsidiary on the northern bank of the Olifants River estuary, a favourable EA was granted.¹⁶ The I&APs lodged an appeal on the grounds of the EAP's independence and objectivity. It appeared that the EAP's CV on its LinkedIn profile showed strong links with the proponent.¹⁷ The I&APs noted from the EAP's CV that he had been a consultant to Mineral Commodities Ltd between 2013 and 2015, which suggested that the EAP had been on the payroll of the proponent in the past. Upon the I&APs questioning of the EAPs independence, the EAP did not renew his/her membership with the IAIA.¹⁸ During the time of the research, the Minister had not made a pronouncement on this matter. However, one can conclude that the EAP did not meet the independence requirements of NEMA as this relationship had not been declared.

¹³ Ibid

¹⁴ J Ridl, J & E Couzens 'Misplacing NEMA? A Consideration of Some Problematic Aspects of South Africa's New EIA Regulations' (2010) 13(5) *Potchefstroom Electronic Journal* 80–121 101.

¹⁵ Managerial Advisory Service refers to consulting services performed by a Specialist organization for its clients. These services are intended to provide advice regarding the operations of clients.

¹⁶ Environmental Consultants SA available at: <https://www.groundup.org.za/article/independence-environmental-consultant>, (accessed on 24 October 2019).

¹⁷ Ibid.

¹⁸ The IAIA is made up of researchers, practitioners, various professions and specialists and users of various types of impact assessment from all parts of the world. The IAIA has a code of conduct that each member has to abide by hence it is common cause that the Australian EAP did not renew his membership.

(c) *Competency*

Competency and skill are other factors that are very crucial in ensuring independence. Wessels states that a competent professional is less prone to influence than an individual who is not competent.¹⁹ He further supports this statement by quoting section 7.2 of the Quality systems ISO²⁰ which states that ‘a personal attribute of an auditor’ is ‘being self-reliant, [that is] acts and functions independently while interacting effectively with others’.²¹ This implies that a proponent can invite a prospective competent professional EAP to watch a game and the EAP will still not compromise his/her integrity on professional work-related matters.

In SA, previously, the EAP profession was not regulated. Any person from an Engineer to a Social scientist and Scientists conducted EIAs.²² Thus, the industry was engulfed with issues of trust, impartiality, capacity and other issues. It was only recently, in 2018, that it became mandatory for EAPs to be registered with EAPASA.²³ EAPs are now expected to hold a certain level of competency before they are accredited.

(d) *Contractual arrangements*

Contractual agreements can be used to guarantee independence.²⁴ In the EIA on the N2 Wild Coast Toll Highway between Gonubie Interchange and the N2 Isipingo Interchange in the Eastern Cape and KwaZulu-Natal in 2011,²⁵ an appeal to the positive EA was lodged by I&APs based on EAP independence, among other reasons. This ground of appeal emanated from the terms of reference (ToR) that were prepared by the proponent, SANRAL, during the bidding process, in which the proponent as part of the evaluation criteria required the EAPs to motivate and provide a proposal as to why the existing road should not be considered as an option or an alternative. Though this motivation did not form part of the service level agreement entered into with CCA,²⁶ its content, however, played a big role as a deciding factor on who should be awarded the contract. Upon the Minister’s review of the grounds of appeal, she acknowledged that the relevant clause from the ToR which states ‘due consideration of alternative options and a strong motivation for excluding the R61 and current N2 as alternative options’ is somewhat

¹⁹ Wessels note 9 175.

²⁰ ISO19011: 2002.

²¹ Wessels note 9 175.

²² Ibid

²³ Section 5 of Chapter 2.

²⁴ Wessels note 9 174.

²⁵ Department of Environmental Affairs ref 12/12/20/701.

²⁶ The EAP appointed to undertake the EIA process.

ambiguous and subject to interpretation.²⁷ The Minister dismissed this ground of appeal on the basis that the contract entered into between the EAP and SANRAL emphasised the importance of independence and the ToR did not preclude the EAP from considering options.

The review in the above matter is interesting because it was the Minister who indicated that the ToR were ambiguous and subject to interpretation. In my view, it is evident that the proponent had had prior knowledge of alternatives that must be considered. This is revealed through the inclusion of the statement ‘and a strong motivation for excluding the R61 and current N2 as alternative options’ in the ToR.²⁸ In terms of the NEMA EIA regulations, it is the duty of the EAP to assess all alternatives including the ‘No go’ options. The proponent in this instance interfered with the EAP independence and the Minister’s decision in this regard was not well reasoned.

(e) *Other factors affecting EAP independence*

Other factors that have a potential to interfere with independence include close personal relationships and family relations where one becomes familiar with the circumstances.²⁹ Government and political influence, especially on projects that are driven by the State, often results in intimidation resulting in a situation where the EAP is unable to report freely for fear of being replaced or not recommended for future work.

The next section provides an analysis of two cases where the lack of independence of Specialists (who are an extension of the EAP) was raised.

IV THE SEA FRONT FOR ALL CASE³⁰

(a) *Background*

The facts of the case concern the review of the positive RoD³¹ that was granted in 2007 by the Western Cape Member of the Executive Council (MEC).³² The applicant, On Track Development (Pty) Ltd (On Track Development), proposed the redevelopment of the Sea Point Pavilion site in Cape Town, zoned as public open space. The development would incorporate

²⁷ Section 4.3.2.5 of the appeal decision.

²⁸ Ibid.

²⁹ Wessels note 9 176.

³⁰ *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC).

³¹ Record of Decision.

³² Environmental and Development Planning.

a hotel and a retail centre that would extend onto the beach,³³ which triggered the need for an EIA in terms of section 21 of the ECA. As such, the proposed development could not commence without an EA. On Track Development appointed Chand as the environmental consultants to manage the EIA process on their behalf. Chand appointed Commlife and Diamond Properties as Economic Specialists to provide the economic assessment to the Scoping study. A favourable RoD was issued in 2002 by the CA, based on the EIR provided by the EAP. The RoD was taken on internal appeal to the MEC in 2004 and the MEC upheld the appeal in 2007.

The appellants represented by *Sea Front for All*³⁴ and another interested party who owns residential property adjacent to the proposed development presented several grounds of review of the RoD but the one relevant to the present study was:

(2) 'The MEC relied on a Specialist report co-authored by a party, Commlife and Diamond Properties,³⁵ which had an undisclosed financial interest in the approval sought'.

The judge reasoned that the constitutional and statutory provision applicable to the issues raised above is section 24 of the Constitution as well as sections 21,³⁶ 22³⁷ and 35(3)³⁸ and (4)³⁹ of the ECA. He further stated that the decision being challenged was not the original RoD but the RoD issued in 2007.⁴⁰

Of particular relevance to this study is the second ground of review as it relates directly to the role of the EAP. On Track Development appointed Chand as the independent environmental consultant to perform the scoping study and they submitted the Scoping report to the CA for a decision. In this regard, the EAP was complying with section 21(1) of the ECA, which spells out clearly that the developer must appoint an independent consultant to undertake the EIA, after which the EIA or Scoping report is submitted to the CA for a decision on whether

³³ Paragraph 1.

³⁴ 'A voluntary association and juristic person, established by a constitution. It was established, inter alia, to protect and maintain for the benefit of present and future generations the public open space which exists on the coastline on the seaside of Beach Road, Sea Point, stretching from Mouille Point to Saunders Rocks'.

³⁵ Hereafter Commlife.

³⁶ List of Identified activities which have a potential to have a detrimental effect on the environment.

³⁷ The identified activities under section 21 may not commence without an environmental authorisation preceded by the environmental impact report.

³⁸ Any person who feels aggrieved at a decision of any authority of first instance (as defined), may appeal against such decision to the Minister or competent authority concerned.

³⁹ The Minister after considering the appeal may confirm, set aside or vary the decision or may make such order as he may deem fit.

⁴⁰ Paragraph 28.

the development should proceed or not. As already outlined in the preceding chapter, the content of the Scoping or EIA report requires the assessment of social, economic and environmental impacts of the proposed development, including a public participation process which must inform the decision of the CA. Chand appointed Commlife to prepare the economic report as property specialist to be part of the submission to the Department of Environmental Affairs and Development Planning. In other words, Commlife were also consultants in this instance as they co-authored the Scoping report on which the competent authority based their decision.

(b) *Analysis*

It was brought before the court that Commlife had a financial interest in the outcome of the decision as they had been promised that they would be the sole letting agent of the R60 million redevelopment of the Sea Point Pavilion,⁴¹ as evidenced from the correspondence between the State Attorney, Chand and On Track's attorneys.⁴² Furthermore, this financial interest was not declared during the application process. On this point, the judge articulated that:

*Commlife would or could have had an expectation or contemplation that it might derive a financial benefit from the proposed development, seems, in the prevailing circumstances, to be reasonably justifiable. The fact of the matter is that the appointment of Commlife as the sole letting agent was mooted and there is no evidence tendered by On Track or Commlife, to dispel the reasonable inference that Commlife would or could, in the circumstances, probably have had an expectation or contemplation that it might derive a substantial financial benefit from the proposed development. This would or could have provided Commlife with the incentive to cast the proposed development in a favourable light in its specialist report.*⁴³

The logic adopted by the judge in this regard is that while Commlife was not appointed as environmental consultants but as Specialists to the Scoping process, they too needed to meet the requirements of independence as set by the regulations, as they influenced the Scoping report. Consequently, it is evident that Commlife was in breach of this requirement, as pronounced by the court.⁴⁴

⁴¹ Paragraph 52.

⁴² Paragraph 53.

⁴³ Paragraph 57.

⁴⁴ Paragraph 64.

It is evident from this reasoning that the independent EAP function extends to the Specialist and that there is no distinction between the EAP and the Specialist in so far as independence is concerned. Independence applies to both the EAP and the Specialist.

V THE *uMGHENYANE CONSERVANCY CASE*

(a) *Background*

In the uMgenyane Conservancy case, the uMgenyane Conservancy appealed against a favourable EA that had been granted to Gwen Stream Estate (Pty) Ltd⁴⁵ by DEDTEA for the construction of 81 units of residential estate, clubhouse facilities and the associated service infrastructure. The proposed development is situated at the Hilton College⁴⁶ estate on a location known as the ‘old dairy site’. The primary activity that takes place on the site is education. However, certain areas have been utilised for agricultural purposes and for recreation and conservation.

There is an existing Integrated Development Plan⁴⁷ that was developed for the Hilton estate and was adopted in 2007. Thereafter, it was called a Strategic Environmental Assessment⁴⁸ IDP for Hilton estate that informs the public of all the development that is taking place at the Hilton estate. Various phases of housing development have already taken place in this estate, some of which have required environmental authorisation to proceed.

Terratest (Pty) Ltd was appointed as the EAP to conduct the BA process for the proposed housing development. Various Specialists were also appointed to make input to the BAR, such as the Biodiversity and Wetland study. Specialists were appointed because of the sensitive nature of the estate and the presence of endangered grass and faunal species. A PPP, being an essential part of the BA or EIA process, was initiated after the draft BAR had been prepared for the public to engage with the report and comment. Thereafter the final BAR was submitted to the DEDTEA for consideration. The DEDTEA was not satisfied with some of the recommendations related to biodiversity issues and consulted with Ezemvelo KZN Wildlife

⁴⁵ A subsidiary of the Hilton College Endowment foundation which is a trust that functions in support of Hilton College. Hereafter Gwen Estate (see page ii of the Final BAR).

⁴⁶ Hilton College is a private boarding school for boys situated in a 1 721-hectare estate. Four hundred and seventy seven hectares of the Hilton College estate was proclaimed as a Nature Reserve under the Ezemvelo KwaZulu-Natal Wildlife’s Biodiversity Stewardship programme. It is known as the Hilton College Nature Reserve. The College is owned by the Hiltonian Society which is a non-profit company (see page ii of the Final BAR).

⁴⁷ Hereafter IDP. An IDP is a tool meant to address the inequalities of the apartheid era by formulating a plan for social, spatial, environmental and economic development in local municipalities in South Africa.

⁴⁸ Aims to incorporate environmental and sustainability considerations into strategic decision-making processes, such as the formulation of policies, plans and programmes.

Trust⁴⁹ prior to issuing the decision in order to assess the viability of offsetting the biodiversity impacts associated with the housing development.⁵⁰ An EA was granted in favour of the applicant with specific conditions to be met by the applicant.

The uMgwenyane Conservancy submitted an appeal against the granting of the EA based on seven grounds. For the purposes of this study the focus will be on the first two grounds of appeal, namely: (1) a lack of independence regarding the three Specialists' and (2) the information on the Final BAR is inadequate and biased.

(b) *Analysis*

The uMgwenyane Conservancy submitted that the three Specialists are members of the Hiltonian Society and their membership 'may be a circumstance that may compromise the objectivity in performing the Specialist work that they performed'.⁵¹ In the applicant's defence, the holder of the authorisation stated that the Specialists had no interest in the development and are part of thousands of former pupils who are members of the Hiltonian Society.

In a similar approach to that taken in the *Sea Front for All* case, in coming to a decision in relation to the first ground of appeal, the MEC examined regulation 12(2)⁵² of the NEMA EIA regulations and the obligations of the applicant in terms of appointing the Specialists.⁵³ Accordingly, the MEC noted that by virtue of being members of the Hiltonian Society, they are part of the Hilton family that stands to benefit from the proposed development. The MEC stated:

The Hilton College comprises: the Applicant, the Hilton College Endowment foundation, the Hiltonian Society, and members of the Hilton Society. At the Heart of that is the Hilton College. Furthermore, members of the Hilton Society are entitled to vote in elections for Governors of the Society, to receive the annual financial statements and to attend annual general meetings ... Through membership of the Hiltonian Society, old Hiltonians are able

⁴⁹ Ezemvelo is mandated to direct the management of nature conservation within the KZN province, protected areas, and the development and promotion of ecotourism facilities within the protected areas; and ensure the proper efficient and effective management of the conservation service.

⁵⁰ Recommendations from Ezemvelo KZN Wildlife were incorporated in section 4.6 of the EA wherein the applicant is required to appoint a Specialist to develop a Biodiversity Offset implementation plan. Offsetting is a term used to describe to manage residual impacts after all the mitigations have been implemented.

⁵¹ Paragraph 5.1 of the appeal decision.

⁵² An applicant may appoint a Specialist if the level of application is of a nature requiring the appointment of a Specialist.

⁵³ Regulation 13(1)(a) states that an EAP and a Specialist appointed in terms of regulation 12(1) or 12(2) must be independent.

*to share in the ownership of their school and to participate in its fortunes through the unique relationship offered by membership of the Hiltonian society.*⁵⁴

On the face of the above, it is very clear that both the EAP and the Specialist must be independent, and this was not the case in the uMgwenyane Conservancy matter. In this regard the MEC decided that the Specialists' membership to the Hiltonian Society disqualified them from complying with the requirements of independence as contemplated in the NEMA EIA regulations.⁵⁵ This case reveals that EAPs still cannot divorce themselves from matters that compromises their independence while the regulatory framework is very explicit in this regard. If the issuance of the EA was not challenged it would have been implemented. The role of the I&APs is very significant as they brought up information that would have not been easily accessible to the CA. The decision by the MEC must be applauded in this instance.

When considering the second ground of appeal, the MEC pronounced that the failure of the Biodiversity and Wetland Specialist to provide alternatives even after the BA had revealed that there would be a loss of the Midlands Mistbelt Grassland⁵⁶ was a flaw. In this regard, the MEC supported the appeal.

The two cases discussed above, *Sea Front for All* and the uMgwenyane Conservancy matter, reveal that the concept of an 'independent EAP' is still a topical issue. One can assume that the Specialists in the two cases were in support of the proposed developments as they would benefit from them. According to the mining activist, Mariette Lieferrink, Environmental Specialists are afraid of retribution from applicants and industries if they do not come to conclusions in their clients' favour.⁵⁷ There are cases of 'blacklisting' by certain applicants of Specialists who have co-operated with environmental activists.⁵⁸ Overall, as the above discussion indicates, the issue of EAP independence is a potential (and in some cases, actual) bone of contention.

The next chapter will provide a brief overview of the EIA process and EAP independence in the African continent, specifically from Kenya and Botswana. The international experience of Canada will be explored.

⁵⁴ Paragraphs 6.8 and 6.9.

⁵⁵ Paragraph 6.12.

⁵⁶ Classified as Priority Area 1 and regarded as being irreplaceable in terms of the Provincial Conservation Plan.

⁵⁷ S Bega Insight: Striving for Balance. Saturday Star (19 May 2018) 13.

⁵⁸ Ibid.

Thereafter a comparative analysis between the regional and international systems will be assessed highlighting the main differences and areas that are desirable to bring about changes to the SA EIA regulatory framework.

CHAPTER 4

COMPARISON WITH OTHER JURISDICTIONS

I INTRODUCTION

Chapter 3 focused on the issues associated with EIA implementation process specifically those that question the independence of EAPs through the judicial system and the review of the decision-making process in the SA context. It is evident that the findings of the case studies presented in the previous chapter emphasise the importance of EAP independence while conducting the EIA.

Against this background, this chapter will provide a brief overview of the EIA process beyond the SA borders. Given that the EIA system is developing in the African continent, Kenya and Botswana's EIA requirements will be reviewed in order to identify their strengths, with a view to improving the EAP role in the SA system. Despite the fact that both countries are from developing states and are within the African continent, they share common backgrounds to EIAs such as the legal provisions requiring the EIA process to be performed for a specific list of activities that may require an environmental assessment for approval prior to development. These requirements are embedded in their environmental framework legislation. They are both constitutional states with fundamental rights and subject to judicial review, just like SA. Both countries have also established a need to compel EAPs to be professionally registered to be able to conduct EIAs. The comparative analysis will be restricted to the environmental regulations that govern each country and the EAP independence in order to draw inspiration on how the SA system could be developed further.

Furthermore, lessons from international best practice in Canada will be explored. Although EIA is a legislative requirement in all three countries, there are variations from each country

given that the environmental situations, cultures, political systems and administrative capacities are so different, it is not possible that the same system would be optimal everywhere.¹

¹ J Stærdahl, H Schroll, Z Zakaria, M Abdullar, N Dewar & N Panich 'Environmental Impact Assessment in Malaysia, South Africa, Thailand, Denmark' (2004) 3(1) *The Journal of Transdisciplinary Environmental Studies* 2.

SA EIA regulations are viewed as having more refined procedures², however there is still room for improvement given the approaches being implemented in Kenya, Botswana and Canada in relation to EAP independence.³

II METHODOLOGY

Kenya and Botswana were selected for this study because they are both constitutional states. Both countries have entrenched fundamental rights⁴ in their constitutions (in Botswana there is no explicit reference to environmental rights; however, there is reference to environmental protection as a human right)⁵ and their EIA systems are subject to judicial review, just as they are in SA.

The methodology for the analysis is founded on the legal basis for EIA and the arrangements for its implementation and practice. This comparison is not intended to provide a comprehensive overview of the Kenyan and Botswana's EIA systems as this is beyond the scope of this research. A summary of the methodology implemented is shown in Table 4.1 below.

Table 4.1: Description of the methodology for comparison (Adapted from Betey and Godfred, 2013)⁶

Legal basis for EIA	Administration of EIA	EIA Practice
Enabling legislation for EIA	Administrative body for EIA	EAP independence
	CA	EIA funding

III THE ANALYSIS

A summary of the review of environmental laws and EIA implementation for both Kenya and Botswana are provided in Table 4.2.

² MG Faure & W Du Plessis *The Balancing of Interests in Environmental Law in Africa* (2011) 602.

³ MW Boyco *Political Opportunity and Public Participation: EIA in Northern Canada and South Africa* (MS thesis, University of Guelph Library, 2010).

⁴ Chapters 4, 5 and 10 of Kenya's Constitution 2010.

⁵ Faure & Du Plessis note 2 595.

⁶ CB Betey & E Godfred *Environmental Impact Assessment and Sustainable Development in Africa: A Critical Review* (2013) 3(2) *Environment and Natural Resources Research* 39.

Table 4.2: EIA system for Kenya and Botswana (Adapted from Betey and Godfred, 2013)

Legal basis for EIA		
	Kenya	Botswana
Enabling legislation for EIA	Environmental Management Co-ordination Act of 1999 and the Environmental Impact Assessment and Audit Regulations (2003).	Environmental Assessment Act 10 of 2011 and the Environmental Assessment Regulations, 2012
Administration of EIA		
Administrative body for EIA	National Environmental Management Authority is the Administrator of EIA as stipulated in section 9 of EMCA.	Department of Environmental Affairs is the Administrator of EIAs as stipulated under section 2 of EAA.
CA	Section 5 of EMCA, National Environmental Council is the CA.	Section 2 of the EAA states that the Department of Environmental Affairs is the CA.
EIA Practice		
EAP Independence	Section 58(5) of EMCA requires EAPs to be registered with CA.	Section 37(1) of EAA requires EAPs to be registered and certified with the Environmental Assessment Practitioners Board and procedures for registration of EAPs are contained in section 24 of EAA. See also EIA Regulations, Schedule 4, Form B.
Funding of the EIA	Section 58(2) of EMCA requires the project proponent to fund the EIA process.	Project proponent funds the EIA process as stipulated under section 9(1) of EAA.

(a) *The legal basis for EIAs*

Since strong environmental legislation and well-functioning institutions are important prerequisites to EIA effectiveness,⁷ analysis of the EIA regulations in Kenya and Botswana reveals that both countries have legal provisions requiring EIA. They have a legal environmental framework enabling EIA and regulations detailing the EIA process. Kenya's current environmental regulatory regime originates from the Environmental Management and Co-ordination Act (EMCA).⁸ Before the passage of EMCA, Kenya lacked comprehensive environmental regulation legislation.⁹ In a similar way to the situation in SA, at the initiation of EIA process, there was no clarity on the application of EIA regulations and most organisations relied on EAPs or their own interpretation prior to the issue of guideline documents.

In Botswana, EIAs are regulated in terms of the Environmental Assessment Act (EAA).¹⁰ All regulations examined have a list of categories of projects subject to EIA. The EIA process begins with the initiation of the project by the applicant; prediction of impacts associated with the development; suggestion of mitigation measures; the involvement of the public; issuance of the decision by the CA; and provisions for appealing against the decisions of the CA.

(b) *Administration of EIAs*

As outlined in Table 4.2, the EIA regulations in the respective countries specify institutional arrangements, roles of various agencies and authorities in the EIA process. Centralised decision making in these countries seems to be the model. The Kenyan National Environmental Management Authority¹¹ and the Environmental Management Council are the main administrative bodies for EIAs in Kenya. They are also responsible for assessing whether the EIR is acceptable or not. However, in Botswana, decisions are made by the Department of Environmental Affairs at a national level.

⁷ Ibid. 38.

⁸ EMCA of 1999.

⁹ B Barczewski. How Well Do Environmental Regulations Work in Kenya? A Case Study of the Thika Highway Improvement Project (LLM thesis, Centre for Sustainable Urban Development, Columbia University, 2013) 5.

¹⁰ Act 10 of 2011.

¹¹ Kenyan NEMA.

(c) *EAP independence*

According to the Kenyan EMCA, the project proponent is required to appoint a NEMA-licensed Lead Expert¹² to conduct the EIA on behalf of the proponent. The EIA process is funded by the project proponent. According to Barczewski, the EAP and project proponent relationship has the potential to create a situation in which the EAP can be pressurised by the economic relationship to return an EIA report that is biased.¹³ The EMCA does not explicitly require the EAP to be independent. However, the Act requires the EIA process to be performed by an expert who is registered with the CA.¹⁴ According to the EMCA, the EAP may be de-registered for contravening the code of practice issued by the Authority.¹⁵

Moreover, the regulations specify that

*the CA shall maintain a register of all EAPs duly authorised to conduct and prepare environmental impact assessment studies and the register is a public document that can be perused by any member of the public.*¹⁶

In essence the applicant has access to a register of licensed EAPs to undertake the EIA. By law, the project proponent can appoint an EAP only from the competent authorities register. Any person who wants to conduct EIAs in Kenya needs to apply to the NEMA for registration. There are various categories of registration such as Lead Expert or Associate Expert and the registration category is determined by the number of years' experience in the field together with academic and/or professional qualifications.

In Botswana, the EAP is also appointed by the project proponent at their own cost.¹⁷ The EAA provides that the Environmental Assessment Practitioner Board¹⁸ shall register and certify EAPs.¹⁹ This means that no person can practise as an EAP without being registered by the Board. Similarly, the Act does not expressly state that the EAPs must be independent; however, their independence is implied through registration with the Environmental Assessment Practitioner Board. The Act further prohibits EAPs from engaging

¹² Hereafter, EAP.

¹³ Barczewski note 9 6.

¹⁴ Section 58(5) of EMCA.

¹⁵ Section 14(5) of the EIA regulations.

¹⁶ Ibid, Section 58.

¹⁷ Section 9(1).

¹⁸ Environmental Assessment Practitioners Board is responsible for establishing criteria in terms of education, professional experience, competency and continued professional development requirements and procedures for registration of EAPs.

¹⁹ Section 24 of EAA.

in projects that may give rise to conflict of interest.²⁰ EAPs who contravene the provision of this section commit an offence and are liable to a fine or imprisonment for a term not exceeding three months.

IV INTERNATIONAL GOOD PRACTICE

One of the international best practice principles of EIA is that the process should be credible, meaning that it ‘should be carried out with professionalism, rigour, fairness, objectivity, impartial and balance, be subject to independent checks and verification’.²¹ Another system that provides a different approach is that of Canada. Canada is one of the countries that continues to gain vast experience in EIA. EIAs in Canada were regulated under the Canadian Environmental Assessment Act,²² which has since been repealed by the Impact Assessment Act, 2019 (IAA). These revisions to the EIA regime have resulted in moving towards a more flexible system with greater public involvement and robust arrangements and practices. Canada adopted the Intervenor Funding (IF) as a means of providing financial assistance to individuals or groups to allow them to participate in the Environmental Assessment process.²³ The need for IF stemmed from the inequalities arising from the differences in availability of resources to those involved in the EA process.²⁴

In the scoping phase, public groups may need independent technical advice on the characteristics of the project knowledge which otherwise would be the preserve of the developer.²⁵ Only with this knowledge is the public able to identify key issues and ensure that the scoping process identifies all contentious aspects.²⁶ The IF programme is funded by proponents but they play no part in the allocation of funds, which remains a governmental responsibility.²⁷ The resources are administered by the Canadian Environmental Assessment Agency²⁸ to provide limited financial assistance to individuals, incorporated not-for-profit

²⁰ Section 64.

²¹ JA Wessels & AN Morrison-Saunders ‘Defining the Role of the Independent Environmental Control Officer in Compliance Monitoring and Enforcement’ (2011) *South African Journal of Environmental Law and Policy* 18–27 27.

²² CEAA of 2012.

²³ S Lynn S & P Wathern *Intervener Funding in the Environmental Assessment Process in Canada* (1991) 6(3) Project Appraisal 169–173.

²⁴ Ibid. 170.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid 171.

²⁸ Federal body accountable to the Minister of the Environment. The mission of the Agency is to integrate Canada's environmental goals better with its economic, social and cultural values and manages the environmental assessment process for most major projects.

organisations and aboriginal groups to help prepare for and participate in key stages of environmental assessments undertaken by the Agency or by the review panel.²⁹ The government or government department associated with the development proposal is responsible for assuring the availability of funds, and for overseeing their allocation, through the establishment of a funding committee.³⁰ This money has enabled many intervenors to prepare their presentations and to travel to the public hearings to present them.³¹ The representation of the affected communities by another EAP allows the process to be more robust and any decision issued by the CA is a true reflection of the issues that have transpired during the EIA process.

In terms of EAP independence, the Canadian Environmental Certification Approvals Board³² was established to oversee the development and administration of a voluntary certification programme for environmental professionals in Canada.³³ However, the Environmental Careers Organisation Canada acts as the certifying body for Environmental Professionals.

V LESSONS LEARNT FROM OTHER JURISDICTIONS

In Kenya, it is evident that all EAPs will have an equal opportunity to be appointed by the proponent since they all have equal publicity. The register of EAPs is kept by the CA and the CA ensures that all EAPs are qualified to undertake the EIA study, whereas in SA, the process of EAP accreditation became law only in 2018 and the register of EAPs is kept by the registration authority. The register of EAPs being kept by the CA is a significant difference between the SA and the Kenyan system because the CA in Kenya has a view of EAPs that are already occupied with EIAs and the converse is true in SA.

While the formal EIA process is relatively new in Botswana, the Act makes provision for EAPs not to engage in projects that may result in the conflict of interest. This provision promotes independence and objectivity and ensures that all EAPs disclose information to the applicant prior to committing to provide the service. If EAPs are found to

²⁹ Fasken 'Something Old, Something New: Canada's Proposed Impact Act (22 March 2018.) *Environmental Bulletin*.

³⁰ Lynn & Wathern note 24 171.

³¹ Ibid. 172.

³² Hereafter, CECAB. CECAB comprises of environmental stakeholders from across Canada that ensures impartiality by overseeing the administration, evaluation and ratification processes for the certification and re-certification of EAPs.

³³ Department of Environmental Affairs (DEA). 2011. *Environmental Impact Assessment and Management Strategy: Subtheme 5: Quality Assurance and independence of Environmental Assessment Practitioners*. 21.

be contravening the provisions relating to conflict of interest, they are liable to a fine and imprisonment. EAPs are required to be registered with the Board and the Board maintains the register same as in SA. The Act is silent on EAP independence; however, independence is implied through registration. Therefore, SA remains the only country as part of this study that has EAP independence as a regulatory requirement. However, it is argued that this independence is compromised by the regulations where the project proponent appoints and pays the EAP directly.³⁴ Various experts have revealed how being in the direct employ of the developer places EAPs in compromising situation. Jenkins as cited by Bega laments that if the EAPs constantly delivers negative findings against the proposed development, their reports are rejected and are often blacklisted and not considered for future EAP contracts.³⁵ Fourie remarks that some EAPs end up taking Specialists reports and water them down or fraudulently misrepresent the findings of scientific experts and present only the favourable results in their assessment to ensure they remain viable in the industry out of fear of being blacklisted.³⁶ This signifies that the EAPs are at the mercy of the project proponents. They can only secure contracts if they support the project proponent's development.

Moreover it still remains to be seen if EAP independence will be undermined or promoted now that SA has appointed a regulator for EAPs. Risks such as undue dependence on the project proponent as a result of prolonged relationship over a period of years and receipt of substantial income from the same proponent need to be considered. EAPASA is silent on the frequency of the appointment of one EAP by the same applicant over a period of time. Intimidation or pressure from the proponents are some of the threats that may outweigh the need for EAPs to be independent and compel the EAPs to disregard the Code of Conduct of the regulator. Currently EAPASA is under tremendous pressure to register EAPs because the industry was unregulated in the past. Therefore, EAPASAs mandate must focus on EAP capacity building.

The one distinct advantage of the EAPs being appointed by the applicant is their understanding of the project and the associated designs. The EAP is able interrogate and challenge the designs and come up with viable alternatives.

A marked distinction between the SA and Canadian EIA systems is the funding programme. In Canada, this programme promotes greater involvement of indigenous peoples

³⁴ Ibid. 38.

³⁵ S Bega 'Striving for balance' Saturday star 19 May 2018 13.

³⁶ Ibid 13.

and the public in the impact assessment process. However, in SA, there is no legislated requirement for any project proponent to provide funding for Indigenous communities. In Canada, the rights of Indigenous peoples are protected under the Constitution (Constitution Act, 1982, section 35). The Supreme Court of Canada applied the ruling that constitutional protection includes a 'duty to consult'. The duty to consult means that when the Crown (whether the federal or provincial government) has knowledge that an indigenous community has an existing or asserted right and the Crown contemplates conduct that could adversely impact that right, the Crown has a duty to consult with the community.

In Canada, project approval is considered Crown conduct. Consultation is a two-way dialogue. Communities are expected to provide information in respect of the nature of the right and the Crown is expected to provide information in respect of potential impacts on the right. In practice, the procedural aspects of the duty to consult are often delegated to project proponents. This is rarely a formal delegation. But project proponents will generally be responsible for sharing information with the potentially impacted communities, taking their information in respect of impacts and working to mitigate or avoid impacts. This system recognises that the project proponents are in the best position to make changes to their project proposals in response to concerns.

Public consultation and participation are considered to be the cornerstone of any EIA process.³⁷ However, the economic development initiatives of today are guided by trends in the global economy.³⁸ Other important considerations include the use of modern technologies and many of today's proposed projects are often large- or mega-scale.³⁹ In order to understand the nature and scope of the environmental and related social and economic impacts of such proposed projects fully, one must comprehend a wealth of information and technical data.⁴⁰

Seemingly, the Canadian system does not attract as much of the concept of an independent EAP as is the case in SA environmental law. However, independence has been emphasised thoroughly in the Impact Assessment Agency of Canada by the IAA on the prospect of one assessment body. In Canada, the focus is on ensuring the playing field is level

³⁷ T Murombo, 2008. 'Beyond public participation: The disjuncture between South Africa's Environmental Impact Assessment (EIA) law and sustainable development'. *Potchefstroom Electronic Law Journal*, 11(3): 1–34. 4.

³⁸ L Vosloo, 2009. *Local economic development in a globalised world economy: A South African perspective*. MCom thesis, Department of Economics, Rand Afrikaans University 33.

³⁹ MH Sadar & WJ Stolte. 2012. 'An overview of the Canadian experience in Environmental Impact Assessment (EIA)'. *Impact Assessment*, 14(2): 215–288 225.

⁴⁰ Ibid.

between both EAPs representing the developer and the I&APs. This is ensured by the establishment of the IF which is managed by the CA. SA can also adopt this approach (without negating the need for independence) as this will yield best results where developments are proposed outside urban areas due to lack of information dissemination, infrastructure coupled with resource and financial constraints. One can therefore conclude that there are similarities between the SA, Kenyan, and Canadian EIA systems as well as that of Botswana; and SA is on a par with the developing and developed countries in relation to EIA implementation. There are, however, some strengths that can be drawn from Canada such as the IF system that can improve the independence of the EAP regime in SA instead of EAPs entering into an employment contract and paid directly by the project proponent. The Kenyan principle of keeping a list of registered EAPs with the CA and EAPs failure to act independently being a criminal offence in Botswana are some of the differences that SA can learn from. In the next chapter, recommendations will be outlined based on the strengths of other jurisdictions.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

I CONCLUSION

This research has set out to study the extent to which the SA EIA regulations ensures independence of EAPs while conducting EIAs on behalf of the project proponent in pursuit of sustainable development. It has provided the international background to EIAs and how the concept of sustainable development manifested. A historical view was given of how EIAs emerged in SA from a voluntary exercise and progressed to mandatory EIAs through the legislative framework. The study has shown how the EIA legislation has undergone a metamorphosis¹ emanating from implementation challenges such as poor quality and application of the law, among other factors.

The SA Constitution, 1996 introduced an environmental right which informed the development of NEMA. The NEMA EIA regulations have also been through rigorous changes and through their introduction, there has since been a shift from poor application of the law to the realisation of the importance of sustainable development and the balancing of the economic, social and environmental impacts of development. Undoubtedly, the changes to EIA legislation have given some clear guidance on the implementation challenges that were experienced in the past.

The study further recognises and defines the roles and responsibilities of the different role players during the EIA process, namely, the EAP, CA and the members of the public. The EAP is responsible for co-ordinating and managing the EIA process and the compilation of the EIR on behalf of the project proponent with the input from Specialists where applicable. The CA's responsibility is to grant or reject the EA for the proposed development, a decision which is informed by the information provided by the EAP. Moreover, the involvement of the public is undoubtedly necessary during the public participation consultative process as required by law. Thus, all these role players play a critical role in the success of the EIA process regardless of the outcome. By law, EAPs are required to be independent throughout the EIA process. They are now guided by the Code of Conduct of the EAP professional registration body, EAPASA. However, there are various factors that may interfere

¹ J Ridl, & E Couzens, 2010. Misplacing NEMA? A Consideration of some problematic aspects of South Africa's new EIA regulations. *Potchefstroom Electronic Journal*, 13(5): 80–121 82.

with EAP independence. A considerable debate still exists on whether the accreditation of EAP is sufficient to address their independence as outlined in chapter 4.

The general objective of this research is to study the extent to which the current EIA regulations ensure EAP independence. The research clearly indicates that despite all the efforts to regulate the EAP industry, EAP independence still continues to be a topical issue. Appeals have been lodged against favourable EAs, questioning EAP independence. It is submitted that the common feature from the case studies reviewed is that appeals were lodged where conflict of interest with the project proponent was identified. The study has shown that while the EIA system in SA has progressed over the years, for so long as the applicant pays the fees of the EAP, there will always be the possibility of a perception of bias.² Furthermore, the potential undue interference by the applicant during the impact assessment threatens the independence of the profession.

A comparative assessment of Kenya and Botswana's EIA regime reveals that SA EIA system is mature compared to the two other African countries. While the SA EIA system places more emphasis on the independence of the EAP to ensure success of the EIA, lessons learnt from other systems illustrate that independence is not part of the regulatory requirements on the part of the EAP. However, independence is emphasised indirectly by the EAP accreditation process. The list of registered EAPs residing with the CA and EAPs failure to act independently being a criminal offence are the differences noted from the two African countries.

In comparison with SA as a developing country, EIAs in Canada are at an advanced state. Its EIA system also went through changes and the recent focus is on the opinions and views of the communities directly affected by the development. In parallel with this focus, an IF is available to assist indigenous communities to participate during the EIA process. In Canada, the Agency is the only responsible body for the management and co-ordination of impact assessments. Importantly, the EIA process is funded by the proponent. However, the agency manages and co-ordinates the EIA process, whereas in SA, the EAP facilitates the whole EIA process.

² Ibid. 101–102.

II

RECOMMENDATIONS

Considering that SA has vast experience in EIAs and that the economic developments of today are guided by trends in the global economy, it stands to reason that SA may need to duplicate Canada's creation of the I F for compensating EAPs for services rendered during the EIA process. The introduction of such a Fund would eliminate the EAP-client relationship since it would be managed by the CA. However, the proponent would still pay for the EIA process through the Fund. The CA will remain the only body that will compensate the EAPs for their services through the fund.

The establishment of the EAP's professional accreditation system in SA is a positive step in addressing independence. However, independence is seen to be undermined through the employment relationship or through direct payment for services.³ Interestingly, in comparison with the administration of insolvent cases in the Insolvency Act,⁴ 'an insolvent debtor who is incapable of managing his/her own affairs, may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his debtors'.⁵ In other words, if an individual or entity realises that his/her liabilities far exceed their assets to cover the debts owing, they can voluntarily approach the court for relief. Similarly, the creditors may also approach the court if they have reason to believe that the debtor's assets or estate will not be able to settle the monies owed to them. The Master of the High Court compiles a report for consideration by the High court based on the submissions made as to whether the person or the entity qualifies to be insolvent. The process involves the publication of a petition wherein all creditors are invited to provide proof of claims against the estate.

If the High court is satisfied with the submissions made and declares the person or the entity insolvent, an executor⁶ is appointed by the Master of the High Court to administer the estate. The executor is accountable to the Master of the High Court and there is no direct relationship between the applicant⁷ and the executor. All reports prepared by the executor are communicated to the Master of the High Court and not the applicant. Similarly, the costs associated with the administration of the estate are borne by the applicant. Relating the executor/applicant/Master of High court relationship in insolvent matters to the appointment

³ Department of Environmental Affairs (DEA) *Environmental Impact Assessment and Management Strategy: Subtheme 5: Quality Assurance and Independence of Environmental Assessment Practitioners* (Pretoria 2011) 38.

⁴ Act 24 of 1936.

⁵ Section 3(1).

⁶ Individual appointed to manage the estate.

⁷ The applicant in the insolvency matters can either be the debtor or the creditor

of EAPs, the EAPs are fulfilling the same role as the executors while the Master of the High court represents the CA. The applicant remains the proponent in both instances.

Can the same principle be applied in the appointment of the independent EAP? In order to de-link any possible connection between the EAP and the project proponent, the duty of appointing the independent EAP must rest with the CA and not with the proponent, as is done in insolvency matters. In essence, the EAP fulfills the same responsibility as that of the executor in insolvency cases.

It is recommended that the list of all EAPASA-registered EAPs must reside with the CA just as it does in Kenya. In comparison with insolvent estates, the estates are administered by professionals who are registered to fulfill the executor role under a strict code of ethics. They are referred to as Insolvency Practitioners (IPs), who also undergo a registration process similar to that of the EAPs. A list of approved registered IPs is kept by the Master of the High Court on the National IPs database.⁸ The list is kept in an alphabetical order in office of the respective Master of the High Court. In this way, the appointment of IPs is made in a transparent manner, where the Master of the High Court has a clear view of who has been/not been appointed. There is no direct relationship between the insolvent person or the entity and the executor. A similar approach is recommended for the list of registered EAPs to be shared with the CA. The applicants must approach the CA during the pre-application process to advise of their proposed developments. . Accordingly, the CA will appoint EAPs according to the alphabetical list in each region. In this way, the CA would have a view of EAPs that have not been allocated projects. This would encourage fair distribution of work among the EAPs. The CA can also use their discretion in exceptional cases to appoint EAPs according to specific categories, experience and the magnitude of the project on behalf of the applicants/project proponents.

The above recommendation will allow the rotation of EAPs, transparency and restore public confidence in the industry. It will eliminate paralysing uncertainty and provide much needed predictability about the appointment of EAPs. In addition, EAPs will practise their profession in the full glare of publicity and the CA. The fear of public exposure of bad or dishonest work and the fear of being struck off the roll of EAPs will go a long way to ensure absence of bias

⁸ Department of Justice and Constitutional Development Office of the Master of the High Court: A Guide. (Pretoria 2016) 31.

in the production of EIA reports and the acceptable standards of integrity⁹. On the flip side, the recommendation may be susceptible to some challenges such as corruption and over-regulation. To fight the scourge of corruption, it is imperative that the CA identify innovative ways of making corruption a criminal offence and place a duty on officials holding a position of authority to report on corrupt transactions.¹⁰ The nature of public service such as the CA results in unintended consequence of over regulation however the decentralisation of powers to provinces has to a large degree led to better responsiveness. In conclusion, if general rules similar to those employed in the appointment of executors can be implemented wherein the power of EAP appointment is transferred to the CA, EAP independence will be strengthened.

Given SA's background in respect of EIAs and how far it has come in addressing EAP independence, this study has shown that SA is on a par with international and other African standards, although there is still potential for improvement. Research acknowledges that EAP independence is one of the aspects that hinders the EIA process and this hindrance has not been comprehensively investigated. This study has endeavored to make a contribution to the body of literature in this subject and further research is warranted to address the risks associated with CA appointing the EAPs.

⁹ D Barnard Environmental 1999. *Law for All: A practical guide for the business community, the planning professions, environmentalists and lawyers*. Impact Books Pretoria 221.

¹⁰ Preamble of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

BIBLIOGRAPHY

A. TABLE OF STATUTES

SOUTH AFRICAN LEGISLATION

Primary Legislation

Environmental Conservation Act 73 of 1989

Insolvency Act 24 of 1936

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Waste Act, 59 of 2008

Prevention and Combating of Corrupt Activities Act 12 of 2004

Secondary Legislation

Environmental Impact Assessment Regulations GNR 325 in GG 40772 of 7 April 2017

Environmental Impact Assessment Regulations GNR 543–546 in GG 33306 of 18 June 2010

Environmental Impact Assessment Regulations GNR 982–985 in GG 38282 of 4 December 2014

Regulations regarding Activities Identified Under Section 21(1) of the Environment Conservation Act 73 of 1989: GNR1183 of GG 8261 of 5 September 1997

Regulations in terms of Chapter 5 of the National Environmental Management Act 107 of 1998: GNR 385, 386 and 387 in GG 28753 of 21 April 2006

Official Notices

Department of Economic Development, Tourism and Environmental Affairs, 2018. Environmental authorization for the Residential development on Portion 10 of the farm Hilton No.12304, Portion 2 of farm Hilton No.12304 and the Remainder of the farm Ongegund No.795 located in Hilton within uMngeni Local Municipality, uMgungundlovu District Municipality. DC22/0039/2017.

BOTSWANA: PRIMARY AND SECONDARY LEGISLATION

Environmental Assessment Act 10 of 2011

Environmental Assessment Regulations, 2012

CANADA: PRIMARY AND SECONDARY LEGISLATION

Canadian Environmental Assessment Act, 2012

Impact Assessment Act, 2019

KENYA: PRIMARY AND SECONDARY LEGISLATION

Environmental Co-ordination Act of 1999

Environmental Impact Assessment and Audit Regulations, 2003

B. TABLE OF CASES

SOUTH AFRICAN CASE LAW

Sea Front for All v MEC: Environmental and Development Planning, Western Cape Provincial Government 2011 (3) SA 55 (WCC)

C. SECONDARY SOURCES

TEXTBOOKS

Aucamp, PJ *Environmental Impact Assessment: A Practical Guide for the Discerning Practitioner* 9th ed (Hatfield, Pretoria: Van Schaik Publishers, 2009).

Barnard, D *Environmental Law for All: A practical guide for the business community, the planning professions, environmentalists and lawyers.* (Pretoria: Impact Books 1999).

Faure, MG & Du Plessis, W *The Balancing of Interests in Environmental Law in Africa* (Pretoria: Pretoria University Law Press (PULP), 2011).

Glasson, J, Therival, R & Chadwick, A *Introduction to Environmental Impact Assessment* 3rd ed (London, UK: Routledge, 2005).

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

Kidd, M, Retief, F & Alberts, R 'Integrated Environmental Assessment and Management' in King N, Strydom H and Retief F (eds) *Environmental Management in South Africa* 3rd ed (Cape Town: Juta & Co Ltd, 2018).

- Strydom, H.A. 'Essentials of International Environmental Law' in King N, Strydom H and Retief F (eds) *Environmental Management in South Africa* 3rd ed (Cape Town: Juta & Co Ltd, 2018).
- Ross, W 'The Independent Environmental Watchdog: A Canadian Experiment in EIA Follow-up' in Morrisson-Saunders, A & Arts, J (eds) *Assessing Impact: Handbook of EIA and SEA Follow-up* (London, UK: Earthscan, 2012). 178.
- Wood, CM *Environmental Impact Assessment: A Comparative Review* 2nd ed. (Harlow, UK: Prentice Hall, 2003).

JOURNAL ARTICLES

- Betey, CB & Godfred, E 'Environmental Impact Assessment and Sustainable Development in Africa: A Critical Review (2013) 3(2) *Environment and Natural Resources Research*. Canadian Centre of Science and Education.
- Bosek, JK 'Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges' (2014) 14(2) *African Human Rights Law Journal* 489–508.
- Du Pisani, JA & Sandham, LA 'Assessing the Performance of SIA in the EIA Context: A Case Study of South Africa' (2006) 26 *Environmental Impact Assessment Review* 707–724.
- Fasken 'Something Old, Something New: Canada's Proposed Impact Act' (22 March 2018) *Environmental Bulletin*.
- Laden M.T. 'SDGs Framework as the Blueprint for Climate Change Action and Sustainable Development in Africa: Role of Law and Parliaments' (2016) 22. *The South African Journal of Environmental Law and Policy* 159-190.
- Marais, M, Retief, FP, Sandham, LA & Cilliers, DP 'Environmental Management Frameworks: Results and Inferences of Report Quality Performance in South Africa' (2015) 97(1) *South African Geographical Journal* 83–99.
- Mounir, ZM 'Evaluation of the Quality of Environmental Impact Assessment Reports using the Lee and Colley Package in Niger Republic' (2014) 9(1) *Modern Applied Science* 89–95.
- Morgan, RK 'Environmental Impact Assessment: The State of the Art' (2012) 30(1) *Impact Assessment and Project Appraisal* 5–14.
- Murombo, T 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 11(3) *Potchefstroom Electronic Law Journal* 1–34.

- Rebelo, C & Guerreiro, J ‘Comparative Evaluation of the EIA Systems in Kenya, Tanzania, Mozambique, South Africa, Angola, and the European Union’ (2017) 8 *Journal of Environmental Protection* 603–636.
- Ridl, J & Couzens, E ‘Misplacing NEMA? A Consideration of Some Problematic Aspects of South Africa’s New EIA Regulations’ (2010) 13(5) *Potchefstroom Electronic Law Journal* 80–121.
- Ridl, J. Environmental law. *Continuing legal education seminars*. (2013) 1-17
- Sadar, MH & Stolte WJ ‘An Overview of the Canadian Experience in Environmental Impact Assessment (EIA)’ (2012) 14(2) *Impact Assessment* 215–288. doi: 10.1080/07349165.1996.9725897
- Sandham, LA, Van Heerden, AJ, Jones, CE, Retief, FP & Morrison-Saunders, AN ‘Does Enhanced Regulation Improve EIA Report Quality? Lessons from South Africa’ (2013) 38 *Environmental Impact Assessment Review* 155–162.
- Shah, A, Salimullah, K, Shah, MH, Razaulkah, K & Irfan, UJ ‘Environmental Impact Assessment (EIA) of Infrastructure Development Projects in Developing Countries’ (2010) 1(4) *OIDA International Journal of Sustainable Development* 47–54.
- Sowman, M, Fuggle, R & Preston, R ‘A review of the evolution of environmental evaluation procedures in South Africa’ (1995) 15 *Environmental Impact Assessment Review* 46–67.
- Stærdahl, J, Schroll, H, Zakaria, Z, Abdullar, M, Dewar, N & Panich, N ‘Environmental Impact Assessment in Malaysia, South Africa, Thailand, Denmark’ (2004) 3(1) *The Journal of Transdisciplinary Environmental Studies* 2.
- Wessels, J ‘Factors that Influence the Independence of EIA Follow-up Verifiers: A Developing Country Perspective’ (2013) 31(3) *Impact Assessment and Project Appraisal* 169–179.
- Wessels, JA & Morrison-Saunders, AN ‘Defining the Role of the Independent Environmental Control Officer in Compliance Monitoring and Enforcement’ (2011) *South African Journal of Environmental Law and Policy* 18–27.

CONFERENCES

- Action Plan of the United Nations Conference on the Human Environment* [1972] UN document A/CONF.48/5.
- Boer, A & O’Beirne, S (2008) ‘Independence and Decision Making: What Can We Learn from Other Countries?’ (Paper presented at the International Association of Impact Assessment South Africa Conference Limpopo, South Africa).

Davies, T (2016) Keynote Address at the Annual National Conference of the South African Affiliate of the International Association for Impact Assessment in Port Elizabeth. The theme of the conference was 'Environmental Change & Challenges: Resilience, Adaptation & Sustainability'.

Makhudu, SM & Hill, RC (2018) 'Enhancing Impact Assessment Professionalism in South Africa' (Paper presented at the 38th Annual International Association of Impact Assessment (2018) held in Durban, South Africa).

Wood, C (2003) Environmental Impact Assessment in Developing Countries: An Overview. (Paper presented at Conference on New Directions in Impact Assessment for Development: Methods and Practice. University of Manchester).

NEWSPAPER AND PERIODICAL ARTICLES

Bega, S 'Insight: Striving for Balance' *Saturday Star* (19 May 2018).

POLICY DOCUMENTS

Department of Environmental Affairs *Environmental Impact Assessment and Management Strategy. Subtheme 5: Quality Assurance and Independence of Environmental Impact Assessment Practitioners* (Pretoria 2011).

Department of Environmental Affairs *Efficacy of SA's Environmental Impact Assessment (EIA) Regime*. Portfolio Committee in the Parliamentary Hearing. Pretoria.

Department of Environmental Affairs (2014) *Environmental Impact Assessment and Management Strategy for South Africa* (Draft). Department of Environmental Affairs (DEA) (Pretoria 2013).

Department of Environmental Affairs and Tourism *Overview of Integrated Environmental Management* (Integrated Environmental Management, Information Series 0) (Department of Environmental Affairs and Tourism (DEAT) (Pretoria 2004).

Department of Justice and Constitutional Development *Office of the Master of the High Court: A Guide* (Pretoria 2016). 31.

Interim Certification Board for Environmental Assessment Practitioners of South Africa *Working Group Final Draft Proposal* (2010).

Saidi, TA *Environmental Impact Assessment as a Policy Tool for Integrating Environmental Concerns in Development* AISA Policy Briefing No 19 (2010).

REPORTS

Fasken ‘Something Old, Something New: Canada’s Proposed Impact Act’ (22 March 2018) *Environmental Bulletin*.

Kwazulu-Natal Ministry of Economic Development, Tourism and Environmental Affairs
Appeal decision for the proposed residential development on the “Dairy site” located in
Hilton, uMngeni Local Municipality, uMgungundlovu District Municipality
DC22/0039/2017 (2018).

Lindgren, RD (Counsel, Canadian Environmental Law Association) Briefing Note on Bill C-
69: Canada’s Impact Assessment Act: The #BetterRules are Neither Better Nor Rules
(13 February 2018).

Terratest (Pty) Ltd Final Basic Assessment: Proposed residential development on the “Dairy
site” located in Hilton, uMngeni Local Municipality, uMgungundlovu District
Municipality (2017).

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

THESES

Arendse, C *An Evaluation of the Development of Environmental Legislation Governing
Environmental Impact Assessments and Integrated Environmental Management in South
Africa* (LLM thesis, University of Western Cape, Cape Town, 2012).

Barczewski, B *How Well do Environmental Regulations Work in Kenya? A Case Study of the
Thika Highway Improvement Project* (LLM thesis, Centre for Sustainable Urban
Development, Columbia University, 2013).

Boyco, MW *Political Opportunity and Public Participation: EIA in Northern Canada and
South Africa* (MS thesis, University of Guelph Library, 2010).

Cele, SC *Exploring Post-authorisation Follow-up and EIA Effectiveness in South Africa: Case
Studies from KwaZulu-Natal* (MSSc thesis, University of KwaZulu-Natal, 2016).

Coetzee, JH *Sustainable Development in the South African Environmental Law and Its
Relationship with the National Development Plan* (LLM thesis, North-West University,
Potchefstroom, 2016).

Vosloo, L *Local Economic Development in a Globalised World Economy: A South African
Perspective* (MCom thesis, Department of Economics, Rand Afrikaans University, 2009)

INTERNET SOURCES

Approval for Wild Coast N2 Toll Road available at:

<https://www.iol.co.za/news/south-africa/approval-for-wild-coast-n2-tol>, accessed on 24 October 2019.

Cullinan and Associates 2017. *Environmental Assessment Practitioners: Reform and Regulation at Last?* Available at: <http://cullinans.co.za/blog/article/environmental-assessment-practitioners-reform-and-regulation-at-lastc>, accessed on 14 April 2019.

Department of Environmental Affairs *Roles and Responsibilities of Role-players* (2013), available at: https://www.environment.gov.za/sites/default/files/docs/chapter7_rolesandresponsibilities_roleplayers.pdf, accessed on 08 September 2019.

Environmental Careers Organization (ECO) Canada. nd. *About the Canadian Environmental Certificate and Approval Board (CECAB)* available at: <http://www.eco.ca/certification>, accessed on 1 February 2020.

Environmental Consultants SA available at:

<https://www.groundup.org.za/article/independence-environmental-consultant>, accessed on 24 October 2019.

Ezemvelo KZN Wildlife Trust available at:

<https://provincialgovernment.co.za/units/view/202/kwazulu-natal/ezemvelo-kzn-wildlife>, accessed on 19 September 2019.

Kidd, M ‘International Conventions on the Environment: A South African Perspective’. Briefing to the Environmental Affairs and Tourism Portfolio Committee (2000). Meeting summary available at: <https://pmg.org.za/committee-meeting/3234/>, accessed on 07 April 2019. King, N & O’Beirne, S *Improving the Contribution of EIA to Achieving Sustainable Development in South Africa: A Case for Formalised Independent Review in the EIA Process* (2014) 2 available at: <http://www.sesolutions.co.za/wp-content/uploads/2014/.../IR-in-EIA-King-and-OBeirne-Final1.do....>, accessed on 02 February 2020.

Lynn, S & Wathern, P ‘Intervener Funding in the Environmental Assessment Process in Canada’ (1991) 6(3) *Project Appraisal* 169–173, available at <https://doi.org/10.1080/02688867.1991.9726814>, accessed on 27 October 2019.

- National Strategy for Sustainable Development *Sustainable Development Planning* GoLegal available at: <https://www.golegal.co.za/sustainable-development-planning>, accessed on 08 September 2019.
- Ogola, PFA, *Environmental Impact Assessment Procedures* (2007) available at: <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>, accessed on 07 September 2019.
- Rule Book of Environmental Assessment Practitioners of South Africa* available at: www.environment.gov.za, accessed on 05 March 2019.
- UNEP (United Nations Environmental Programme) (2002) *Resource Training Manual*, available at: <http://www.unep.org>, accessed on 28 March 2019.
- Warburton Attorneys *A Summary for EAPs on the Recent Changes to the NEMA 2014 EIA Regulations and Listing Notices* (2017), available at: <https://www.polity.org.za/article/a-summary-for-eaps-on-the-recent-changes-to-the-nema-2014-eia-regulations-and-listingnotices>, accessed on 08 September 2019.