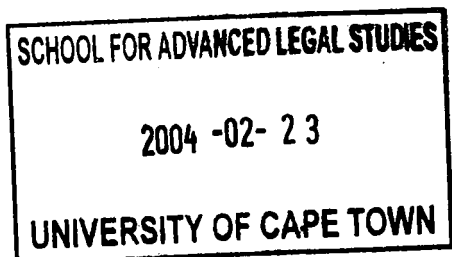


KATHINKA VAN EEDEN
STUDENT NUMBER: PRNKAT001
MASTERS IN LAW (LLM)
SUPERVISOR: PROFESSOR JAN GLAZEWSKI

**ENVIRONMENTAL IMPACT ASSESSMENT (EIA)
AND SOUTH AFRICAN COURTS' INTERPRETATION OF THE
LEGISLATIVE FRAMEWORK**



Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters in Law (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *LLM* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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PART I: LEGISLATIVE BASIS

1. INTRODUCTION

The debate on the issue of the submission of environmental impact assessments (EIAs) goes back to the 1970s.¹ The value of EIAs was first recognised by the South African government in 1976 with a report by the-then South African Council for the Environment entitled *Identification and Evaluation of the Effects of Development Projects on the Environment* and in 1980 with the publication of the *White Paper on a National Policy regarding Environment Conservation*.² The White Paper formed the basis for the Environment Conservation Act (ECA) 73 of 1989, which included some provisions for EIAs.

In 1982 the Environment Conservation Act 100 of 1982 was promulgated but unlike its successor did not contain any specific provisions regarding EIA.

In 1992 the-then Council for the Environment published the *Integrated Environmental Management (IEM) Guideline Series*, which included a section on integrated environmental management. Although it had no binding effect, this guideline document laid the foundation for and accepted the idea that environmental concerns need to be integrated into development actions.

In 1993 the government published a White Paper entitled *Policy on a National Environmental Management System for South Africa*. Being a White Paper, it also had no binding effect but provided only guidelines.

In 1996 the Green Paper entitled *An Environmental Policy for South Africa* was published. This was followed by the *White Paper on Environmental Management Policy for South Africa* in 1998.³ Although the White Paper addressed policy issues generally, it expressly provides that IEM '... will be a prerequisite for government approvals of all activities with potentially

¹ J Van Wyk *Planning Law* 1999, p 239

² *ibid*

³ Government Gazette 18894 dated 15 May 1998

adverse environmental impacts.⁴

The Environment Conservation Act (ECA) promulgated in 1989 was the first national statute requiring persons wishing to undertake activities, which may have a detrimental effect on the environment, to complete and submit an EIA report.⁵ However, this provision in fact only became effective once the Minister of Environmental Affairs and Tourism actually identified these activities, which he did by regulation in 1997.

In 1997 the-then Minister of Environmental Affairs and Tourism passed three discrete Regulations in terms of sections 21(1), 26 and 28 of the ECA (the EIA Regulations). The first Regulations, which were passed in terms of section 21(1) (in GN R1182) identify and list certain activities which may have a detrimental effect on the environment and the second Regulations, which were passed in terms of sections 26 and 28 (in GN R1183) prescribe the procedure for EIA. The third set (in GN R 1184) designate certain "competent authorities" for the purposes of authorising listed activities after compliance with the procedures stipulated in GN R 1183.

It has been noted that the ECA and its EIA Regulations were '... not dovetailed with the emerging IEM procedure although these two developments took place at roughly the same time.'⁶

However, in 1997 the government promulgated The National Environmental Management Act (NEMA), which expressly incorporates the IEM philosophy⁷ and requires the principles of IEM to be followed and applied in the preparation and processing of EIAs.

Accordingly, both the EIA Regulations and the provisions of the NEMA need to be read together when it is sought to undertake an activity, which is listed in the GN R1182 Regulations and which may have a detrimental effect on the environment. As will appear from what is discussed hereinbelow not all EIAs are governed by GN R 1182.

⁴

⁵ s 22

⁶ J Glazewski *Environmental Law in South Africa* 2000, p. 280, par 8.4.1

There have been several court decisions regarding EIAs (and more specifically, analysis of the relevant legislative framework) since the passing of the EIA Regulations in 1997.

This paper will firstly look at and explain the EIA legal regime as embodied in the above-mentioned statutes, regulations and policy document and secondly consider and critically assesses relevant judicial decisions in order to ascertain how the courts have interpreted the EIA provisions. It will also be considered how the courts have dealt with related issues such as *locus standi* and legal costs, which are incurred by a litigant in such matters.

2. INTEGRATED ENVIRONMENTAL MANAGEMENT (IEM) GUIDELINE SERIES, 1992

Part 1 of this guideline document deals with integrated environmental management (IEM), which is described as a philosophy prescribing a code of practise for ensuring that environmental considerations are fully integrated into all stages of the development process in order to achieve a desirable balance between conservation and development.⁸ The IEM procedure is designed to ensure that the environmental consequences of developments are understood and adequately considered in the planning process.⁹ The principles and objectives of IEM have been included in the NEMA¹⁰ and will be discussed in chapter 5 below. One of the tools of the IEM procedure is EIA.

PART II: FRAMEWORK LEGISLATION

3. ENVIRONMENT CONSERVATION ACT 100 OF 1982

The Environment Conservation Act 100 of 1982 established the Council for the Environment for the purpose of making '... provision for the co-ordination of all actions directed at or liable to have an influence on the environment'.¹¹ Although the council may '... initiate or cause to be conducted and co-ordinate investigations into, studies of, surveys of and research on any

⁷ Chapter 5

⁸ *ibid* p. 247

⁹ *ibid* p. 249

¹⁰ Chapter 5

¹¹ preamble

matter affecting the environment..¹² and '... hear representations by any person with regard to matters affecting the environment...¹³ it does not contain any provisions expressly requiring EIAs to be conducted where a proposed activity may have an adverse effect on the environment.

4. ENVIRONMENT CONSERVATION ACT 73 OF 1989

Part V of the Environment Conservation Act (ECA) 73 of 1989, which deals with the "control of activities which may have detrimental effect on the environment", provides for EIA.

Sections 21, 22 and 26 set out the EIA procedure. Section 21 empowers the Minister of Environmental Affairs and Tourism to identify certain listed activities which in his or her opinion may have a substantial detrimental effect on the environment include land use and transformation, water use and disposal, waste and sewage disposal etc.

Section 22 prohibits such listed activities to be undertaken without a written authorisation issued by the Minister. The Minister in turn may only issue an authorisation after consideration of an EIA report, which must be compiled and submitted by any person wishing to undertake a listed activity.

Therefore an EIA is only required in terms of section 22(2) where a person wishes to undertake an activity, which the Minister has identified in terms of section 21(1) as having a substantial detrimental effect on the environment.

Section 26 empowers the Minister to make regulations regarding environmental impact reports. These may include provisions concerning the scope, content, drafting and evaluation of environmental impact reports.

On 5 September 1997 the-then Deputy Minister passed three Regulations in terms of sections

¹² s 4(h)

¹³ s 4(j)

21(1), 26 and 28 of the ECA. The first Regulations¹⁴, passed in terms of section 21(1) (GN R 1182 in Government Gazette No. 18261) identify and list certain activities, which may have a detrimental effect on the environment. Activities listed are:

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

¹⁴ in Government Notice R. 1182, Government Gazette No. 18261, 5 September 1997

- (h) racing tracks for motor-powered vehicles and horse racing but not including indoor tracks;
- (i) canals and channels, including structures causing a disturbance to the flow of water in a river bed, and water transfer schemes between water catchments and impoundments;
- (j) dams, levees and weirs affecting the flow of a river;
- (k) reservoirs for public water supply;
- (l) schemes for the abstraction or utilisation of ground or surface water for bulk supply purposes;
- (m) public and private resorts and associated infrastructure
- (n) sewerage treatment plants and associated infrastructure;
- (o) buildings and structures for industrial, commercial and military manufacturing and storage of explosives or ammunition or for testing or disposal of such explosives or ammunition.

2. The change of land use from-

- (a)
- (b)
- (c) agricultural or zoned undetermined use or an equivalent zoning to any other land use;
- (d) use for grazing to any other form of agricultural use; and
- (e) use for nature conservation or zoned open space to any other land use.

3. The concentration of livestock, aquatic organisms, poultry and game in a confined

structure for the purpose of commercial production, including aquaculture and mariculture.

4. The intensive husbandry of, or importation of, any plant or animal that has been declared a weed or an invasive alien species.
5. The release of any organism outside its natural area of distribution that is to be used for biological pest control.
6. The genetic modification of any organism with the purpose of fundamentally changing the inherent characteristics of that organism.
7. The reclamation of land, including wetlands, below the high-water mark of the sea and in inland waters.
8. The disposal of waste as defined in section 20 of the Act, excluding domestic waste, but including the establishment, expansion, upgrading or closure of facilities for all waste, ashes and building rubble.
9. Scheduled processes listed in the Second Schedule to the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965).
10. The cultivation or any other use of virgin ground."

The second Regulations¹⁵, passed in terms of sections 26 and 28 (GN R 1183 in Government Gazette No. 18261) prescribe the procedure for EIA.

"Responsibility in terms of regulations

3. (1) An applicant-
 - (a) must appoint an independent consultant who must on behalf of the applicant comply with these regulations.
 - (b) is solely responsible for all costs incurred in connection with the employment of the consultant or any other person acting on the

¹⁵ in Government Notice R. 1183, Government Gazette No. 18261, 5 September 1997

applicant's behalf to comply with these regulations;

- (c) Must ensure that the consultant has no financial or other interest in the undertaking of the proposed activity, except with regard to the compliance with these regulations;
 - (d) Must ensure that the consultant, while complying with these regulations, has –
 - i expertise in the area of environmental concern being dealt with in the specific application.
 - ii The ability to perform all the relevant tasks contemplated in these regulations;
 - iii The ability to manage the public participation process contemplated in paragraph (f);
 - iv The ability to timeously produce thorough, readable and informative documents;
 - v Adequate recording and reporting systems to ensure the preservation of all data gathered; and
 - vi A good working knowledge of all relevant policies, legislation, guidelines, norms and standards;
 - (e) Must ensure that the consultant provides to the relevant authority access to, and opportunity for review of, all procedures, underlying data, reports and interviews with interested parties, whether or not such information may be reflected in a report required in terms of these regulations;
 - (f) is responsible for the public participation process to ensure that all interested parties, including government departments that may have jurisdiction over any aspect of the activity, are given the opportunity to participate in all the relevant procedures contemplated in these regulations; and
 - (g) must indemnify the government of the Republic, the relevant authority and all its officers, agents and employees, from liability arising out of the content of any report, any procedure or any action for which the applicant or consultant is responsible in terms of these regulations.
- (2) If any provision of subregulation (1) is not complied with by the applicant and not immediately attended to, after having been made aware of it by the relevant authority, the application is regarded to have been withdrawn.
- (3) The relevant authority must –
- (a) ensure that officers, agents or consultants employed by the relevant authority to evaluate any reports submitted in terms of these regulations have –

- i expertise in the area of environmental concern being dealt with in the specific application.
 - ii the ability to perform the evaluation tasks contemplated in these regulation efficiently.
 - iii the ability to timeously product thorough, readable and informative documents; and
 - iv a good working knowledge of all relevant policies, legislation, guidelines, norms and standards;
- (b) ensure that the evaluation and decisions required in terms of these regulations are done or reached efficiently and within a reasonable time, and that the applicant is informed immediately of any delay and is provided with a written explanation for any delay that may occur;
 - (c) provide the applicant with any guidelines, as well as access to any other information in the possession of the relevant authority, that may assist the applicant in fulfilling its obligations in terms of these regulations; and
 - (d) try to keep the inputs required from the applicant to the minimum that are necessary to make an informed decision on the application, without putting any limitation on the rights that interested parties may have in terms of these regulations.
- (4) While working for any applicant in terms of these regulations, a consultant may not work for any relevant authority in terms of these regulations in respect of the same application.
 - (5) Any interested party who wishes to participate in the public participation process contemplated in subregulation (1) (f) must respond within the time agreed to between the relevant authority and the applicant.

Application for authorisation to undertake activity

- 4. (1) Application must be made on a form obtainable from the relevant authority.
- (2) An application must be submitted to the relevant provincial authority for contemplated in subregulation (3) or (4) must be referred for consideration as indicated in those subregulations.
- (3) Subject to subregulation (3A), the provincial authority must refer the application to the Minister for consideration-
 - (a) where the activity concerned has direct implication for national environmental policy or international environmental commitment or relations;
 - (b) where the activity concerned will take place within an area that is demarcated

as an area of national or international importance, but does not include the sea-shore, conservancies, protected natural environments, proclaimed private nature reserves, natural heritage sites, and the buffer zones and transitional areas of biosphere reserves and world heritage sites;

- (c) where the Minister and provincial authority jointly decide that an application in respect of a specific activity should be considered by the Minister;
 - (d) where a national government department, the relevant provincial authority or a statutory body other than a municipality contemplated in section 12 of the Local Government: Municipal Structures Amendment Act, 2000 (Act No. 33 of 2000) is the applicant; or
 - (e) where the activity has the potential to affect the environment across the borders of two or more provinces.
- (3A) Notwithstanding subregulation (3), the Minister and the provincial authority may jointly decide that an application or classes of application dealing with similar types of activities referred to in paragraphs (a), (b), (d) or (e) of that subregulation may be considered by the provincial authority: Provided that where the interests of more than one province are affected-
- (a) the joint decision that the application be considered with the provincial sphere must be taken by the Minister and every provincial authority concerned; and
 - (b) the application must be jointly considered by every provincial authority concerned.
- (4) If a local authority has been designated by the Minister in terms of section 22 of the Act to issue authorisation for an activity specified by the Minister, the provincial authority must refer an application in respect of such activity to the local authority for consideration.
 - (5) The relevant authority must keep a register of all applications received.
 - (6) The relevant authority must inform the applicant whether the applicant must advertise the application, and of the manner in which this must be done.

Plan of study for scoping

- 5. (1) After considering the application made in accordance with regulation 4, the relevant authority may request the applicant-
 - (a) to submit a plan of study for scoping for the purposes of a scoping report referred to in regulation 6; or
 - (b) in a suitable case, to submit such scoping report without a prior plan of study.
- (2) A plan of study for scoping must include-
 - (a) a brief description of the activity to be undertaken.

- (b) A description of all tasks to be performed during scoping.
 - (c) A schedule setting out when the tasks contemplated in paragraph (b) will be completed;
 - (d) an indication of the stages at which the relevant authority will be consulted; and
 - (e) a description of the proposed method of identifying the environmental issues and alternatives.
- (3) The relevant authority may, after receiving the plan of study referred to in subregulation (1) (a) and after considering it, request the applicant to provide additional information that the relevant authority requires to accept the plan of study for scoping.

Scoping report

6. (1) On being informed by the relevant authority that the plan of study submitted in accordance with regulation 5 (1) (a) has been accepted or on receiving the request referred to in regulation 5 (1) (b), as the case may be, the applicant must submit a scoping report to the relevant authority, which must include-
- (a) a brief project description;
 - (b) a brief description of how the environment may be affected;
 - (c) a description of alternatives identified; and
 - (d) an appendix containing a description of the public participation process followed, including a list of interested parties and their comments.
- (2) The relevant authority may, after receiving the scoping report referred to in subregulation (1) and after considering it, request the applicant to make the amendments that the relevant authority requires to accept the scoping report.
- (3) After a scoping report has been accepted, the relevant authority may decide-
- (a) that the information contained in the scoping report is sufficient for the consideration of the application without further investigation; or
 - (b) that the information contained in the scoping report should be supplemented by an environmental impact assessment which focuses on the identified alternatives and environmental issues identified in the scoping report.
- (4) In the event of a decision contemplated in subregulation (3) (a), the relevant authority must consider the application in accordance with regulation 9.

Plan of study for environmental impact assessment

- 7.** (1) In the event of a decision contemplated in regulation 6 (3) (b), the applicant must submit a plan of study for an environmental impact assessment, which must include-
- (a) a description of the environmental issues identified during scoping that may require further investigation and assessment;
 - (b) a description of the feasible alternatives identified during scoping that may be further investigated;
 - (c) an indication of additional information required to determine the potential impacts of the proposed activity on the environment;
 - (d) a description of the proposed method of identifying these impact; and
 - (e) a description of the proposed method of assessing the significance of these impacts.
- (2) The relevant authority may, after receiving the plan of study referred to in subregulation (1) and after considering it, request the applicant to make the amendments to the plan of study that the relevant authority requires to accept the plan.

Submission of environmental impact report

- 8.** After the plan of study for the environmental impact assessment has been accepted, the applicant must submit an environmental impact report to the relevant authority, which must contain-
- (a) a description of each alternative, including particulars on –
 - i the extent and significance of each identified environmental impact; and
 - ii the possibility for mitigation of each identified impact;
 - (b) a comparative assessment of all the alternatives; and
 - (c) appendices containing descriptions of-
 - i the environment concerned;
 - ii the activity to be undertaken;
 - iii the public participation process followed, including a list of interested parties and their comments;
 - iv any media coverage given to the proposed activity; and
 - v any other information included in the accepted plan of study.

Consideration of application

9. (1) After the relevant authority has made a decision contemplated in regulation 6 (3) (a), or has received an environmental impact report that complies with regulation 8, as the case may be, the relevant authority must consider the application and may decide to-
- (a) issue an authorisation with or without conditions; or
 - (b) refuse the application.
- (2) The relevant authority must determine the period of validity of the authorisation.
- (3) The relevant authority may, from time to time, on new information, review any condition determined by it as contemplated in subregulation (1) (a), and if deemed it necessary, delete or amend such condition, or at its discretion, determine new condition, in a manner that is lawful, reasonable and procedurally fair.

Record of decision

10. (1) The relevant authority must issue a record of the decision that was taken under regulation 9 (1) to the applicant, and on request to any other interested party.
- (1A) The record of decision contemplated in subregulation (1) must indicate the period within which, and the method how, the applicant must make the record of decision available to any interested party who has complied with regulation 3 (5) or who is included in the appendix contemplated in regulation 6 (1) (e).
- (2) The record of the decision must include-
- (a) a brief description of the proposed activity, the extent or quantities and the surface areas involved, the infrastructural requirements and the implementation programme for which the authorisation is issued;
 - (b) the specific place where the activity is to be undertaken;
 - (c) the name, address and telephone number of the applicant;
 - (d) the name, address and telephone number of any consultant involved;
 - (e) the date of, and persons present at, site visits, if any;
 - (f) the decision of the relevant authority;
 - (g) the conditions of the authorisation (if any), including measuring to mitigate, control or manage environmental impacts or to rehabilitate the environment;
 - (h) the key factors that led to the decision;

- (i) the date of expiry or the duration of the authorisation;
- (j) the name of the person to whom an appeal may be directed as contemplated in regulation 11;
- (k) the signature of a person who represents the relevant authority; and
- (l) the date of the decision.

Manner of appeal

- 11.** (1) An appeal to the Minister or provincial authority under section 35 (3) of the Act, must be done in writing within 30 days from the date on which the record of decision was issued to the applicant in terms of regulation 10 (1).
- (2) An appeal must set out all the facts as well as the grounds of appeal, and must be accomplished by all relevant documents or copies of them which are certified as true by a commissioner of oaths.

Access to information

- 12.** After the record of the decision contemplated in regulation 10 has been issued by the relevant authority, any report submitted for the purposes of these regulations becomes a public document, subject to the rights of the owner of it.

Commencement

- 13.** These regulations shall commence as set out in Schedules 1 and 2 of Government Notice No. R.1182 of 5 September 1997."

Firstly, it is important to note that these regulations only apply to activities that commenced **after** the first Regulations (GN R 1182) commenced.¹⁶ This means that activities that had commenced prior to this date do not require an EIA to be completed in accordance with the GN R 1183 Regulations.

In summary, the following steps need to be taken **before** a listed activity is commenced with: Firstly, a person wishing to undertake an activity listed in the GN R 1182 Regulations needs to submit an application for authorisation to undertake the activity.¹⁷ Secondly, he needs to submit a plan of study for scoping.¹⁸ Third, when the plan of study has been

¹⁶ Reg 2(1)

¹⁷ Reg 4(1)

¹⁸ Reg 5(1)

accepted he needs to submit a scoping report.¹⁹ Fourthly, if the relevant authority decides that the information contained in the scoping report needs to be supplemented, the applicant may be required to submit a plan of study for an EIA.²⁰ On the plan of study for an EIA being accepted he is then required to submit an EIA report.²¹ Only once the relevant authority has considered the application and issued an authorisation may the person commence with the activity. However, since an appeal can be brought against the decision of the relevant authority within thirty days from the date on which the record of decision was issued it appears that the applicant should wait for these thirty days before commencing with the activity.²²

If a person commences with the activity without following all of the above steps and before an authorisation is issued he would be criminally liable and if found guilty may have to pay a fine of R100 000,00 or go to prison for ten years.²³

The third Regulations²⁴ designate certain "competent authorities" for the purposes of authorising listed activities after compliance with the procedures stipulated in the second Regulations.

Sections 21, 22 and 26 and the notices and regulations issued in terms of the ECA and in force on the date of commencement of the NEMA will be repealed with effect from a date to be published. That date may not be earlier than the date on which regulations published in terms of section 24 of the NEMA are promulgated and the minister is satisfied that any regulations in terms of the ECA have become redundant.²⁵

5. NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

Chapter 5 of the National Environmental Management Act (NEMA) 107 of 1998 compliments the EIA provisions of the ECA and the Regulations passed in terms thereof by providing for

¹⁹ Reg 6(1)

²⁰ Reg 7(1)

²¹ Reg 8

²² Reg 31

²³ s 29(4)

²⁴ in Government Notice R. 1184

the philosophy of integrated environmental management to be applied in the carrying out of EIAs.

The Act sets out certain steps that are required in the integrated environmental management (IEM) procedure.²⁶

The first step is to determine which activities can have a potential impact on the environment. To this end the Minister of Environmental Affairs and Tourism may with the concurrence of the MEC and every MEC may with the concurrence of the Minister, identify activities and geographical areas in which specified activities may not be commenced without an authorisation from the Minister of MEC.²⁷ Regulations in respect of such authorisations, the procedures to be followed and the report to be prepared may be made.²⁸

Secondly, the activities which require the Minister's authorisation *and* which may significantly affect the environment must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with the authorising, permitting or otherwise allowing the implementation of an activity.²⁹ Thus the question to be asked in determining whether an activity is required to be considered, investigated and assessed is two-fold: firstly, is the activity one of the activities identified by the Minister and secondly, may the activity significantly affect the environment.

This raises the question: is an activity, which has not been identified but may have a significant effect on the environment, required to be considered, investigated and assessed?

Thirdly, the procedures for the investigation, assessment and communication of the potential impact of the identified activities must comply with certain minimum requirements.³⁰

The provisions dealing with EIAs in this Act are very similar to those contained in the ECA

²⁵ s 50(2) National Environmental Management Act 107 1998

²⁶ ss 24(1), (2), (3)(b) and (7)

²⁷ ss 24(2)(a) - (b)

²⁸ s 24(2)(c)

²⁹ s 24(1)

³⁰ s 24(7)

and need to be read together. In fact some activities, which may not fall under the ambit of the EIA Regulations issued in terms of section 21 of the ECA may well require an EIA to be undertaken in terms of section 24(7) of this Act.

Although section 50 repeals most of the provisions of the ECA it specifically states that sections 21, 22 and 26 will only be repealed once "regulations or notices issued under section 24 of this Act are promulgated and the Minister is satisfied that the regulations and notices under sections 21 and 22 have become redundant."

To date no regulations or notices have been issued under section 24 of this Act.

Although not yet adopted, the National Environmental Management Second Amendment Bill³¹ proposes to make some significant changes to section 24 of NEMA.

Firstly, the proposed section 24(1) has amended section 24(1) of the NEMA in that it requires listed activities to be considered, investigated, assessed and reported on. This amendment is welcomed as it removes the uncertainty regarding the issue that only an activity which has been identified by the minister and which may significantly affect the environment is required to be considered, investigated and assessed. It creates more certainty as to when an environmental impact assessment is required. Although the words "prior to their implementation" have been omitted it is quite clear that the "listed activities" are the "activities" referred to in section 24(2) "which may not commence without environmental authorisation".

Secondly, the proposed section 24F(1) expressly prohibits the commencement of "an activity listed in terms of section 24(2)(a), (b) or (c) without an environmental authorisation" and "the continuation of an existing activity listed in terms of section 24(2)(d) if an application for an environmental authorisation has been refused". Section 24 of Act 107 of 1998 does not have such an express prohibition.

Similarly to section 24(2) of the NEMA, the Minister of Environmental Affairs and Tourism

³¹ published in Government Gazette No. 25289 of 1 August 2003

may identify activities and geographical areas in which identified activities may not commence without environmental authorisation³². He may also identify existing activities which may have a detrimental effect on the environment, whether they were previously authorised or not, in respect of which an application for environmental authorisation must be made.³³

Another significant and welcomed inclusion is that he may identify geographical areas in which specified activities may be excluded from authorisation³⁴. This means that certain activities may not be authorised at all. The NEMA does not have such a provision.

Section 24(4) sets out the procedures that need to be followed when doing an EIA "with respect to every application for an environmental authorisation." The inclusion of these words indicates that an EIA report is to be submitted with every application for environmental authorisation.

Unlike the NEMA this Bill criminalizes the commencement or continuation of a listed activity without the required environmental authorisation or the contravention of the conditions applicable to any environmental authorisation³⁵ and imposes a substantial penalty³⁶.

PART III: SECTORAL LEGISLATION

6. MINERALS ACT 50 OF 1991

Prospecting and mining is not included in the list of activities of the 1997 Regulations because the Minerals Act 50 of 1991 provides it's own environmental management programme for prospecting and mining.

The Act requires prospecting and mining companies to whom a prospecting or mining permit

³² s 24(2)(a)-(b)

³³ s 24(2)(d)

³⁴ s 24(2)(c)

³⁵ s 24(F)(2)

³⁶ s 24(F)(4)

has been issued, to complete environmental management programmes (EMPRs) before mining may commence.³⁷ These EMPRs must contain an EIA as well as an environmental management programme indicating how the impacts will be managed.

However, it is concerning to note that although prospecting and mining may only commence when the environmental management programme has been approved³⁸ an applicant for a prospecting or mining permit is not required to submit an EIA together with the application for the permit. This effectively means that a prospecting or mining permit can be issued without the impact on the environment of a mining project having been assessed.

Furthermore, the holder of a permit may even be exempted from having to submit an environmental management programme³⁹ or he may be granted temporary authorisation for mining to commence pending the approval of the environmental management programme⁴⁰.

7. NATIONAL WATER ACT 36 OF 1998

Although the 1997 Regulations include several activities, which are directly related to matters falling within the ambit of the National Water Act 36 of 1998, this Act itself includes a number of provisions regarding EIA. Firstly, an applicant applying for a licence to use water may be required to carry out and provide an assessment by a competent person of the likely effect of the proposed licence on the resource quality.⁴¹ Not all water use requires a licence. Only where it does not fall within the uses listed under Schedule 1, which includes the use of water for reasonable domestic purposes and for watering of animals and small gardens, or within one of the four uses under a general authorisation is a licence required.

Secondly, before the construction of a government water work may commence an EIA is required to be carried out⁴² and to this end the regulations passed in terms of section 26 of the ECA relating to the procedure that such EIA must follow are to be complied with.

³⁷ s 39

³⁸ ss 39(1)

³⁹ s 39(2)(a)

⁴⁰ s 39(4)

⁴¹ s 41(2)(a)(ii)

⁴² s 110(1)

8. MARINE LIVING RESOURCES ACT 18 OF 1998

The Marine Living Resources Act, 18 of 1998 also contains a provision regarding EIAs. An applicant applying for a right to undertake commercial or subsistence fishing, engage in mariculture or operate a fish processing establishment may be required to submit an EIA report.⁴³

The use of the permissive "may" in section 18(3) is with regard to mariculture perhaps unfortunate as it's impact is notoriously difficult to assess. It is submitted that such a report should be compulsory when applying for a right to undertake mariculture. It is rather more difficult to obtain a precise and reliable assessment on fishing resources and the permissive form is therefore more applicable here.

9. DEVELOPMENT FACILITATION ACT 67 OF 1995

The Development Facilitation Act 67 of 1995 contains numerous provisions relating to environmental issues. Chapters V, which relates to the urban context, authorises the tribunal, when approving an application to establish a land development area, to include a condition relating to the environment or environmental evaluations.⁴⁴ Chapter VI, which relates to the rural context, has an identical provision.⁴⁵

The Act defines an "environmental evaluation" as

'an evaluation of the environmental impact of a proposed land development, conducted in accordance with the integrated environmental management guidelines which are from time to time issued or amended by the Department of Environment and Tourism'.⁴⁶

The official integrated management guidelines are those contained in the document entitled

⁴³ s 18(1)-(3)

⁴⁴ s 33(2)(n)

⁴⁵ s 51(2)(e)

⁴⁶ s 1

*Integrated Environmental Management Procedure.*⁴⁷

The most significant provision is, however, contained in the regulations passed in terms of the Act in 2000.⁴⁸ A land development applicant is now required to include in his or her application an environmental scoping report, prepared in accordance with the environmental impact assessment guidelines or other requirements which are from time to time issued or amended by the national Department of Environmental Affairs and Tourism.⁴⁹

10. WESTERN CAPE PLANNING AND DEVELOPMENT ACT 7 OF 1999

The Western Cape Planning and Development Act 7 of 1999 includes principles of sustainable development in its General Planning and Development Principles.⁵⁰ It provides that "efficient and integrated planning and development should be promoted by *inter alia* encouraging environmentally sustainable planning and development practises and processes".⁵¹ Another principle provides that "sustainable development should be promoted by *inter alia* promoting sustained protection of the environment".⁵² A further principle provides that "development in unsuitable environments, such as areas with a high water table, swamps, flood plains, steep slopes and areas sensitive to drift-sands, should be discouraged".⁵³

There is a section devoted to EIAs.⁵⁴ In much the same way as under the national legislation, activities may be identified which require EIAs. Section 67(1) provides that

"the Provincial Minister (defined as "the member of the Provincial Cabinet of Western Cape responsible for planning and related matters") may by notice in the *Provincial Gazette* identify activities which require environmental impact assessments."

Section 67(2) provides that

⁴⁷ Guideline Document: part 1 of the IEM Guideline Series, 1992

⁴⁸ Development Facilitation Regulations R1 in *Government Gazette* No. 20775 dated 7 January 2000

⁴⁹ Reg 31

⁵⁰ Schedule IV cl 6

⁵¹ Principle 5.4.8

⁵² Principle 6.1.3

⁵³ Principle 7.3

"an environmental impact assessment shall be compiled and submitted by such person and in such manner as may be prescribed."

Although the subsection does not expressly state when an EIA shall be compiled and submitted it can be inferred that it would be required in those instances where a person wishes to undertake an activity which has been identified in terms of section 67(1).

Certain prescribed activities may be undertaken only where written authorisation has been issued. Section 67(3) provides that

"the Provincial Minister may require that certain prescribed activities shall not be undertaken, except in accordance with a written authorisation issued by the Provincial Minister or the council of a responsible municipality."

Section 67(4) then obliges the person issuing the authorisation to consider the environmental impact assessment before issuing the authorisation. It provides that

"the authorisation referred to in subsection (3) shall only be issued after considering an environmental impact assessment."

PART IV: CASE LAW ANALYSIS

Having set out the legislative framework, this paper now turns to deal with the case law which may be relevant to its interpretation or such cases as have pertinently dealt with the interpretation of the framework.

11.1 DIRECTOR: MINERAL DEVELOPMENT, GAUTENG REGION, AND ANOTHER V SAVE THE VAAL ENVIRONMENT AND OTHERS 1999 (2) SA 709

This is an appeal against a judgement granted in favour of a voluntary association of people owning property along the Vaal River and who were concerned about the potential environmental impact of the second appellant's proposed open-cast mine.

The association had opposed an application in terms of section 9 of the Minerals Act 50 of 1991 by the appellant, the holder of certain mineral rights, for a mining licence to enable it to proceed with open-cast mining. Its objections were *inter alia* that the operation of the proposed open-cast mine would have a substantial detrimental effect on the environment, a permanent negative effect on the property market in the area and that in considering and granting the mining permit, the appellant should have notified the respondent of the application and given them an opportunity to raise their objections in writing.

The primary issue which the court was required to address was whether or not the *audi alteram partem* rule is applicable to an application for a mining licence in terms of section 9 of the Minerals Act 50 of 1991.

The court found that the rule does in fact apply and that the respondents should have been notified of the application for a mining licence and be given an opportunity to raise their objections⁵⁵.

Although the court dismissed the appeal and ordered the appellant to pay the costs, of relevance and concern to the issue of EIAs and more specifically to the environmental management programme provided for in the Minerals Act 50 of 1991 is the court's statement that "the issue of a licence in terms of section 9 enables the holder to proceed with the preparation of an environmental management programme, which if approved, will enable him to commence mining operations".⁵⁶ It is only once the permit has been issued that an EIA is required to be carried out.

This finding has been criticised as detracting "... from one of the fundamental principles of environmental assessment which is that alternatives to the (mining) project should be considered before any authorisation is granted".⁵⁷ As the court pointed out "the granting of the section 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the

⁵⁵ 718J -719A par [20]

⁵⁶ 718 [17] C

⁵⁷ Glazewski J at 8.4.3.3

commencement of mining operations⁵⁸ before the impact on the environment has been assessed.⁵⁹

It is suggested that the Act should be amended to include the requirement that an EIA report be submitted together with an application for a prospecting or mining licence in terms of sections 6 and 9 of the Act.

11.2 THE SAVE KLEIN HANGKLIP ASSOCIATION V THE MINISTER OF PLANNING AND ADMINISTRATION AND CULTURE OF THE PROVINCE OF THE WESTERN CAPE AND 2 OTHERS, UNREPORTED UNDER CASE NO. 10543/1998

This is an application to review the respondents' decision to rezone and subdivide certain land described as one of "outstanding natural beauty and located on an undeveloped mountain area and a wetland adjoining the coastline ... within the municipal border of Rooi Els."

The applicant's primary contention was that the first respondent had failed to comply with the provisions of section 3 of the Environment Conservation Act 73 of 1989 ("the ECA") in that it had failed to call for an EIA concerning the development of the property.

The erstwhile general policy in terms of section 3 (now repealed) of the ECA does not refer to an EIA expressly. It merely required that a competent authority must undertake "a planned analysis before embarking on any large-scale or high impact development project."⁶⁰ The general policy laid down in terms of section 3(2A) also required that all interested and affected parties must be involved in such planned analysis.

Additionally, the policy required that the principles of integrated environmental management be employed to sustain utilisation of resources and that particular efforts

⁵⁸ 718 [17] D

⁵⁹ see also discussion in ch 6

⁶⁰ p. 4 last par

must be made to prevent the destruction of wetlands and other environmentally sensitive areas.

The policy on nature conservation provided that government institutions must apply measures based on scientific knowledge to ensure the protection of designated and ecologically sensitive and unique areas.

It was not in dispute that Klein Hangklip is an environmentally and ecologically sensitive area. The court held that it was doubtful whether the first respondent had sufficient environmental information at his disposal when making it's decision. In answer to the first respondents contention that "... die minister het wel die riglyne van die beleid gevolg" the judge said that "... I am prepared to accept that the first respondent intended to follow the guidelines of the ECA. Good intentions are, however, not adequate compliance with the ECA. There is no mention of the ECA in the long report on the Property made to the first respondent by the director of his department. The first respondent failed to take an essential step in the process of arriving at a conclusion on the establishment of a township on the Property."⁶¹

The court set aside the first respondent's decision to rezone and subdivide the property and ordered it to pay the costs of the application.

It is clear that the court in this instance did not find expressly that an EIA had to be obtained in order for the Minister to have complied with the policy in respect of land use and nature conservation then in existence. The court did, however, find, by implication, that the Minister did not have enough scientific knowledge at his disposal and had not undertaken a planned analysis necessary to have enabled him to exercise his power effectively.

EIAs would therefore be required under circumstances where they are not expressly called for in legislation. This authority may remain relevant insofar as there may be loopholes in the existing legislation expressly requiring EIAs.

⁶¹ p. 6

11.3 WILDLIFE AND ENVIRONMENT SOCIETY OF SOUTH AFRICA V MINISTER OF FINANCE & DEVELOPMENT PLANNING (WESTERN CAPE) & OTHERS JUDGEMENT GRANTED BY CONSENT UNDER CASE NO. 2620/2000⁶²

In this matter the order was granted by consent and, accordingly, no judgement was handed down.

Paradyskloof Golf Estate (Pty) Ltd (Paradyskloof), one of the respondents, had bought land from the Municipality of Stellenbosch for the purposes of developing a golf course, a hotel and a housing estate. In order to do so, they required an amendment of the applicable structure plan and rezoning under the Land Use and Planning Ordinance 15 of 1985 (LUPO). It also needed authorisation under section 22 of the Environment Conservation Act 73 of 1989 (ECA), which may be granted only if and when an application complies with the requirements of the 1997 Environmental Impact Assessment Regulations (EIA Regulations) promulgated under the ECA, read with section 24(7) of the National Environmental Management Act 107 of 1998 (NEMA).

The applicant objected to the EIA process adopted by Paradyskloof and made representations concerning this process to the Stellenbosch Municipality, the third respondent, whose recommendation was required for the town planning approvals. The applicant also made representations to the first and second respondents, the Minister of Finance and Development Planning (Western Cape) and the Minister of Environmental and Cultural Affairs (Western Cape) concerning this issue.

Despite these objections, the first respondent granted the planning approval and the decision by the Western Cape Department of Environment, Conservation, Agriculture and Sport (DECAS) to grant environmental authorisation was upheld on appeal by the second respondent. The applicant accordingly launched an application for review in the Cape High Court.

⁶² this section is based largely on the review by T Winstanley in *De Rebus*, May 2002

The applicant's primary basis for review was that the EIA process had not been completed and therefore it was unlawful for the first and second respondents to grant the planning approvals and the environmental authorisation.

The applicant argued that in considering the planning applications the first respondent was obliged to take into account EIA reports and accordingly should have deferred his decision on the planning approvals until he could apply his mind in light of the results of the EIA procedures under both the EIA regulations and section 24(7) of NEMA. It was therefore contended that the planning decision could not have been informed by findings of the EIA and was consequently unlawful.

It was argued further that the environmental approval was unlawful because the second respondent had made its decision conditional upon a further EIA relating to a dam which was an integral part of the proposed development. The second respondent required this EIA to be addressed as part of the environmental management plan which was to be implemented during the construction and operation phases of the development. The applicant argued that the dam was not a conditional component of the proposed development, that it was essential to the development and that there was no legal basis to defer a decision regarding its environmental impact.

By consent the court order set aside both of the planning approvals and the environmental authorisation and ordered the first two respondents to pay the applicant's costs.

This case has been labelled as a "landslide victory" for environmentalists in that it conveys a "clear message to developers ... that EIAs must be carried out ... and ... that until the environmental impact has been assessed and the environmental authorisation has been granted, it is inappropriate for planning authorities to make decisions which would grant or remove rights."⁶³

⁶³ *ibid*

**11.4 MYBURGH PARK LANGEBAAN (PTY) LTD V LANGEBAAN MUNICIPALITY
& OTHERS 2001 (4) SA 1144**

On 30 March 1998 the applicant, a property developing company and owner of 63 hectares of land situated in the Langebaan municipal area, had delivered an application to the first respondent, the Langebaan Municipality, for the rezoning and subdivision of the area to be developed (the new development application).

Shortly thereafter, the applicant brought an application to the High Court seeking a declaration that the issue of various permits and authorisations in terms of the environment Conservation Act 73 of 1989 were not prerequisites for the proposed development by the applicant and that it was unnecessary that it comply with the EIA regulations passed in terms of the ECA (in GN R 1182).

The applicant also sought an order directing that the first and second respondents consider and determine the new development application.

In terms of section 2 of Schedule 1 of the EIA regulations (in GN R 1182) various changes of land use have been identified as "activities" which "may have a substantial detrimental effect on the environment" and which may not be undertaken without a written authorisation issued in terms of section 22(1) of the ECA.

The court had to decide whether or not the Regulation 1182 applies to the new development application as the applicant argued that it had been granted certain permits and authorisations by the first respondent before the regulations came into force. Regulation 1182 had been "amended by Government Notice 1355 of 17 October 1997 which added to the second paragraph the following proviso:

'provided that this Notice is not applicable to an activity that was commenced with before the date of commencement fixed in respect of that activity as indicated in the said Schedule.'⁶⁴

⁶⁴ 1160 at A-B

It is of cardinal importance that the court adopted the view of the parties that item 2 of GN R1182 relates to an actual change of land use and not to merely an application for permission to change the land use.

In other words if an actual change of land use had taken place before the date of commencement of the regulations, the regulations could not (in terms of the aforementioned proviso) be applicable.

In this matter the applicant contended that the actual use of land immediately prior to the date of commencement of the government notice had already changed and that it was not used "for nature conservation nor zoned open space". In this regard the applicant relied on the fact that the installation of bulk services had taken place already prior to 1 November 1991.

On the part of the second respondent it was contended that in assessing whether or not a change in land use has occurred for the purposes of item 2 of Regulation 1182 the court should only take into account lawful use. In other words if the installation of the infrastructure was affected as a result of an invalid permit, it cannot in law, be recognised as the foundation for asserting that the existing use is already what is contemplated. In other words the actual use contemplated by the Regulation 1182 applies only to a lawful actual use.

The court found on the facts that for all practical purposes the use of the new development area had, since the installation of the bulk services and infrastructure prior to 1 November 1991, actually been as a township in the process of development.⁶⁵

In considering the question of whether use for the purposes of item 2 of Regulation 1182 refers to lawful actual use, the court held that both authorised and unauthorised use constitutes actual use. The judge held further that this reasoning does not mean that illegal use must be recognised and accepted for these purposes.

⁶⁵ p. 1162 at H

It should be noted that the court had found that the applicant had acted *bona fide* in having installed the bulk services in the first place.⁶⁶

Although the judgement may have set a precedent for the use of self help by developers under circumstances where they are obliged to comply with EIA requirements before changing the use of land, the clear indication by the court that such intentional use would not be accepted for the purposes of considering whether change in land use has taken place at any particular time is to be welcomed.

As regards the question of whether the change in land use was lawful the court held that the actual change of land use is what is envisaged by section 21 of the ECA as an actual activity, not merely an application for permission to change the land use and that the actual change in land use includes both lawful and unlawful use.⁶⁷

It has been said that "the aspect of this judgement which will have the widest implications for legal practitioners and their clients is that relating to the applicability of the EIA regulations in the context of a change in land use."⁶⁸

The implication for land development applicants is that "notwithstanding any land use rights which they may have, if an activity which they propose to undertake is listed in GN R1182 and the activity (including the actual land use) has not commenced prior to the coming into force of the regulations, then it will be necessary to comply with the regulations and to obtain permission in terms of section 22(1) of the ECA before that activity may lawfully commence."⁶⁹

If, on the other hand, the developer commences a use which is not approved, such use will not be considered to exempt him from the necessity to comply with the provisions of the ECA.

⁶⁶ p. at 1163 E

⁶⁷ 1162 at J & 1163 at A - B

⁶⁸ Terry Winstanley, *De Rebus* September 2001, p. 61

⁶⁹ Terry Winstanley, *De Rebus* September 2001 p. 61

**11.5 MINISTER OF PUBLIC WORKS AND OTHERS V KYALAMI RIDGE
ENVIRONMENTAL ASSOCIATION AND OTHERS (CC) (CASE CCT55/2000
UNREPORTED 25.5.2001)**

The dispute in this matter related to the decision by the Minister of Public Works to establish a transit camp to house a community of people that had been affected by the flooding of the Jukskei River. The river runs through the Alexandra Township in Gauteng. The transit camp was to be erected on a portion of state-owned land on which Leeuwkop Prison was situated.

The government did not inform or discuss their plan with residents in the vicinity of Leeuwkop who first learned of the government's plan when a contractor moved on to the prison site and started work. They therefore formed a residents' association (the Kyalami residents) and sent a written demand to the Minister of Public Works to suspend operations on the grounds that the establishment of the transit camp on the site involved an alteration in the use of the land and that accordingly compliance with the Environment Conservation Act, 73 of 1989 (ECA) and the National Environmental Management Act, 107 of 1998 (NEMA) was necessary.

The demand was not complied with and the residents applied for an interim interdict restraining the government from inter alia proceeding with the establishment of the transit camp. The High Court granted the interim interdict, which was to remain in force pending the determination of an application in which the applicants claimed an order setting aside the decision to establish the transit camp on the prison farm and directing the government to reconsider the decision after consulting with and taking into account any representations that the Kyalami residents may make and after giving due consideration to the environmental impact of establishing a transit camp there.

The issues raised by the appeal concerned the powers of the national executive to provide relief to victims of flooding, the legality of the government's decision to establish a transit camp on the prison farm and the allegation of the Kyalami residents

that their right to just administrative action had been infringed.

The Kyalami residents argued in relation to the legality of the government's decision firstly, that the government had no powers other than those conferred on it by legislation but that there was no legislation that authorised the government to take the action that it took. As this issue is not strictly relevant to this paper but is significant, it is merely noted that the Constitutional Court rejected this argument. It did so on the basis that the government, in fulfilling its duties as executive power, has the same rights as any other owner of property subject to overriding legislation specifically curtailing its powers as owner of property.⁷⁰ The court considered the applicability of a number of statutes in this regard and held that none of the statutes referred to were designed or appropriate to the provision of relief to the flood victims.⁷¹

In relation to the administrative issues raised and the applicability of the doctrine of legality based on the provisions of the NEMA and the ECA, the Kyalami residents argued that the decision to establish the transit camp was unlawful because the government had failed to comply with the provisions of the Township Ordinance, the relevant town planning scheme, the ECA, the NEMA and the National Building Regulations and Building Standards Act.

In this regard the argument was advanced that the decision was clearly wrong because it could not be implemented without complying with the various statutes and other relevant legislation.

This distinction between the taking of the decision and its implementation proved to be the decisive issue in the matter (it also proved to be the decisive distinction in relation to the need for *inter alia* an EIA to be carried out).

It was held that "... the taking of a decision is logically anterior to the procurement of consents that may be necessary for its execution. Indeed, it is only after a decision has been taken and details of the work to be done have been determined, that an

⁷⁰ pars 41 and 42

application for consent can properly be made and considered. The absence of such consent may found an application for an interdict to restrain implementation of the decision. In itself, however, it is not a ground on which the decision can be set aside."⁷²

The fact that consents are required by the applicable legislation and are necessary for the implementation of the decision, under circumstances where the government believes that the consents are not necessary does not make the decision itself invalid.⁷³

"If consents are necessary and are not obtained, the decision can not be implemented, not because it was an invalid decision, but because the conditions necessary for it's implementation, have not been fulfilled."⁷⁴

Of course, one of the conditions necessary for the implementation of the decision in the matter under consideration would have been for the government to have obtained an EIA terms of section 22 of the ECA. A change of land use from undetermined to any other use has been identified as an activity in respect of which an EIA must be obtained.⁷⁵

This objection was in fact raised to the decision of the government but as the court upheld the distinction between the validity of the decision itself and the implementation thereof, the objection was held not to be relevant.

The court decided that the government's decision had been lawful and that it is necessary to distinguish between the taking of the decision and it's implementation. It found that the decision itself was lawful but that it was in implementing the decision that compliance with the provisions of the ECA and the NEMA was necessary and that the consent of certain Ministers needed to be obtained. It remarked that "it could hardly be said that there is no prospect that the consents that are needed would be obtained." The application was accordingly premature insofar as it attempted to set

⁷¹ par 49

⁷² par 60

⁷³ par 64

⁷⁴ ibid

⁷⁵ par 79

aside the decision and not simply interdict the activity which was unlawful.

The Kyalami residents also argued that the government had failed to comply with the principles of sections 2(4)(g) and (k) of the NEMA that "decisions must take into account the interests, need and values of all interested and affected parties..." and that "decisions must be taken in an open and transparent manner...".

The court agreed that the principles must be taken into account by the relevant government authorities but that it was necessary that "... they be balanced against other relevant considerations including the state's obligation to fulfil its constitutional obligations in respect of social and economic rights."⁷⁶

It rejected the EIA report relied upon by the Kyalami residents as "... based upon hypotheses, having been prepared [...] after only one visit to the site and without knowledge of the details of the proposed development."⁷⁷

The court found further that the principles listed in section 2 of the NEMA "... are applicable only to activities that may significantly affect the environment"⁷⁸ and that "... the Kyalami residents ... had not shown as a probability that the establishment of the transit camp will have a significant effect on the environment."⁷⁹

It found that the government, however, had indeed given attention to environmental considerations.⁸⁰

It is clear under the circumstances that the court placed the onus for establishing that the provisions of the NEMA were applicable to the decision on the Kyalami residents who had to discharge that onus by adducing cogent and convincing reasons why the activity would have a significant impact on the environment.

⁷⁶ p. 34 at [69]

⁷⁷ p. 35 at [71]

⁷⁸ p. 37 at [75]

⁷⁹ p. 38 at [76]

⁸⁰ p. 35 at [72]

The case demonstrates that the court will scrutinise evidence adduced to discharge this evidentiary duty closely. An applicant charged with convincing the court that an activity will have a significant effect on the environment should ensure that the evidence adduced on its behalf is clear, well founded and adduced by qualified experts.

It should, for example, not be content to rely on something termed a "preliminary report" or on identification of "potential environmental issues". As with all expert evidence it can not be based upon hypothesis and should take cognisance only of objectively established fact.

In addition, it is clear that the court took a dim view of the assumption that housing activity on any land is likely to constitute a nuisance. The general rule that reasonable use of land by an owner is not subject to restrictions was reiterated. If such reasonable use causes prejudice to others, that is not enough to put a stop to it.

In this regard the court, in dealing with the submission that the use to which the property was to be put would constitute a nuisance, found that the site was ideal for the purpose and had been used intensively for a considerable period of time, containing four prisons for 600 prisoners, housing villages for 850 staff members and their families, training centres, sport and recreational facilities, shops and crèches as well as numerous farming installations and activities. The court accordingly found that the use to which the government intended to put its own property, was not unreasonable.

In assessing the effect of land use in EIAs adduced either for the purposes of the ECA or the NEMA or even the common law, regard should be had to the fact that the highest court of the land is clearly not overly sensitised to the maintenance of pristine dwelling conditions adjacent to areas where high intensity use has been allowed for a considerable period of time.

It was, however, held that "the power that the government has to use its own land for the purposes of establishing a transit camp, is not a power that in itself entitles it to

the purposes of establishing a transit camp, is not a power that in itself entitles it to eliminate or ignore rights that the Kyalami residents might have under environmental, township or other legislation. If they have such rights, they are entitled to seek to enforce them. But their rights, if any, lie there. As long as the decision is implemented lawfully, they have no right to object to the prison farm as a site of the proposed development.⁸¹

The overriding significance of this decision is that it demonstrates that an objection to the absence of an EIA may, under particular circumstances, be premature. It is only when a change of land use is implemented that the owner of such land can be forced to comply with the conditions for the change of use. The mere decision by an owner (whether it be the state or someone else) does not establish a ground for obliging such owner to obtain an EIA.

This does not, however, mean that a party may not have a reasonable apprehension that his or her rights may be infringed once a decision is taken, but before the change of land use actually occurs. The mistake made by the Kyalami residents was that the attack was directed, not at the offending use of the land (although this was the subject of the interim interdict) but at the decision to implement. But for this misdirection, they would no doubt have been successful in stopping the government from proceeding with the development of the land.⁸²

If the Kyalami residents had somehow obtained knowledge of the decision before its implementation and could have established that the government did not intend to obtain the necessary consents (and an EIA) the Kyalami residents would have been able to satisfy the court that they are entitled to an interdict on the basis that they have a reasonable apprehension that the government would implement its decision unlawfully.

⁸¹ par 106

⁸² par 65

11.6 THE EAGLES LANDING BODY CORPORATE V MOLEWA NO AND OTHERS 2003 (1) SA 412

The issue in this application was the lawfulness of the action taken by the three respondents in respect of the construction of certain earthworks undertaken by the third respondent, the developer of a golfing estate, on a section of the bank of the Hartebeespoort Dam (the Peninsula). While the works were in the process of construction, the applicant, the body corporate of the Tradewinds Sectional Title Scheme, situate on the bank of the dam adjacent to the Peninsula, lodged a complaint with the Department of Agriculture, Conservation and Environment of the North West Province (the department) against the works.

Invoking the provisions of section 28 of the National Environmental Management Act 107 of 1998 (NEMA), the department had issued a directive to the third respondent, Pecanwood Holdings (Pty) Ltd, the developer of a golfing estate on the banks of the dam, including the peninsula, to cease the works and submit an application for authorisation under section 22 of the ECA, an EIA and an environmental management plan (EMP) in terms of section 28 of NEMA.

The third respondent complied with the directive and it applied for authorisation to continue the works. Authorisation was granted in terms of section 22 of the ECA.

The applicant was aggrieved at this decision and noted an appeal to the first respondent, Member of the executive council in terms of section 35 of the ECA. The appeal was dismissed and the grant of the authorisation to the third respondent confirmed. Thereafter the peninsula was completed.

One of the points raised by the respondent was that the establishment, functions and powers of the applicant were regulated by sections 36 to 39 of the Sectional Titles Act 95 of 1986. Since the relief sought had no bearing on the functions and operation of the sectional title scheme the applicant had no *locus standi* to seek the relief.

In this regard the court held that section 36(6) of the Sectional Titles Act accorded the applicant legal personality and *locus standi* if read with section 32(1) of the NEMA. In terms of section 32(1) of the NEMA "any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1 or any other statutory provision concerned with the protection of the environment or the use of natural resources", *inter alios* such persons may seek such relief "in the interests of protecting the environment."

The court held that insofar as a direct interest in the subject matter of the proceedings was required in order to clothe the applicant with *locus standi* the fact that the applicants' scheme is a neighbouring property, the fact that it was the applicant's complaint which caused the directive in terms of section 28 of NEMA to be issued and the fact that it was the applicant who was the unsuccessful appellant against the decision taken by the department, the applicant had *locus standi* to approach the court for the relief sought.

In addition the court found that the applicant also had *locus standi* on the basis that the application was brought in the interest of the protection of the environment and that it had *locus standi* on that basis whether or not any interests of the members of the applicant would also be served thereby.

Strictly speaking the contents of paragraph 53 at page 429 of the judgement may be said to have been watered down by the fact that there is a reference to the considerations referred to in paragraph 51 at page 429B.

It would however appear to enforce a clear meaning of section 32(1) of the NEMA, which contemplates that a party who does not fall within subparagraphs a to d of section 32(1) (i.e. does not have an interest on it's own behalf or on behalf of others or in the public interest) would still have *locus standi* upon the proceedings being marked as being "in the interest of protecting the environment". This creates a basis for national environmental groups to challenge decisions which may have no bearing on

their own interests at all.

11.7 SILVERMINE VALLEY COALITION V SYBRAND VAN DER SPUY BOERDERYE AND OTHERS, 2002 (1) SA 478

This case concerned the use of land in the Simonstown area ("the property"). The applicant is a voluntary organisation composed of ten non-governmental organisations (NGOs) concerned with the conservation of the environment. The first respondent is the lessee of a portion of the property. The lessor is the second respondent. The third respondent is the owner of the neighbouring property on which first respondent rehabilitated a dam which, apparently he uses for irrigation purposes. Fourth respondent is the Department of Environment, Cultural Affairs and Sport who is responsible for the administration of the EIA Regulations (promulgated under GNR 1183 on 5 September 1997) in the Western Cape.

The property is situated in an area which was declared to be a nature area in terms of section 4 of the Physical Planning Act 88 of 1967 and subsequently deemed to be a protected natural environment under section 16 of the Environment Conservation Act 73 of 1989 (ECA). However, it appeared that the property had been used as a gravel quarry since 1945. In 1998 first respondent believed the site had potential for a vineyard and applied for an exemption from compliance with the EIA regulations. The exemption was granted by the Provincial Administration, Western Cape, Cape Nature Conservation and Redhill Conservation Group (Redhill), a member of the applicant organisation appealed against that decision. The MEC for Environment Cultural Affairs and Sport upheld the appeal and the first respondent informed the fourth respondent that it did not agree with the reasons for upholding the appeal and that they had been advised by senior counsel that it was entitled to establish a vineyard on the property without the need for obtaining an exemption or an authorisation under the ECA and its regulations as the regulations were inapplicable. Accordingly it was entitled to proceed with the proposed planting of the vineyard.

Fourth respondent also advised Redhill that according to advice obtained from senior

counsel it was unable to interdict first respondent from establishing the vineyard on the property as the activity did not constitute a change of land use and therefore the proposed planting of the vineyards did not require authorisation or exemption as contemplated in the ECA and its regulations.

Earthworks for the construction of the vineyard commenced in August 1999. The applicant instituted the present application on 8 February 2001 seeking an order directing the first respondent to commission an EIA under section 21 of the ECA, alternatively in terms of the general environmental policy determined under section 2 of the ECA, alternatively in terms of section 24 of the NEMA, in respect of the planting of the vineyards and the construction of dams.

The court analysed the relevant provisions of the ECA and the NEMA and found that the respondent should have applied for authorisation and in not doing so had acted unlawfully. However, it found that a person who performs an identified activity unlawfully without authorisation cannot be forced to comply with the procedure retrospectively because an EIA cannot be removed from its particular purpose as conceived by the legislative structure.⁸³ It found that it could not order the respondent to comply with the EIA procedure as there are other remedies available to the applicant and that an EIA cannot be employed as an independent remedy. The court reasoned that "... section 24(1) of NEMA does not envisage the commissioning of an EIA once the activity for which authorisation is required has already taken place ... and that ... the investigative process envisaged by section 24 was intended to aid authorising officials to decide whether a permit should be granted."⁸⁴

The court found that "if a person undertakes an activity for which a permit is required without obtaining permission, he acts unlawfully and ... for such conduct there may be civil remedies and criminal prosecution might well be initiated, but an EIA would only be required for the process of authorisation."⁸⁵

⁸³ p. 488 at C - F

⁸⁴ p. 489 at B

⁸⁵ p. 489 B - C

Although the court dismissed the application it regretted doing so and expressed concern with the manner in which the case had come before it. It found that the fourth respondent had failed to protect the environment and that if it had performed its environmental stewardship it would not have been necessary for the applicant to institute legal proceedings. For this reason it found it inappropriate to award costs in favour of the first respondent. It found that the applicant had acted in the public interest and that " ... NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment."⁸⁶

It is submitted, with respect, that the court's reasoning is not entirely free from criticism. It cannot be said that an EIA can not be carried out after an unauthorised activity has begun. In fact, section 28(1) of NEMA expressly provides that "... every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring..."⁸⁷ Section 28(3) lists the different measures that may be required in terms of section 28(1) and includes a measure to "... investigate, assess and evaluate the impact on the environment."⁸⁸ Furthermore, section 28(4)(a) empowers the Director-General or provincial head of department to direct any person who fails to take the measures required under section 28(1) to "investigate, evaluate and assess the impact of specific activities and report thereon." This clearly indicates that an EIA may be required where an activity, whether authorised or not, has already commenced.

**11.8 HICHANGE INVESTMENTS (PTY) LTD V CAPE PRODUCE COMPANY (PTY) LTD
t/a PELTS PRODUCTS AND OTHERS (CC) UNREPORTED DECISION UNDER
CASE NO. 1050/2001**

The case arose from an allegation by the applicant that noxious gases emitted by its

⁸⁶ p. 493 at D

⁸⁷ see discussion in chapter 5 above

⁸⁸ S 28(3)(a)

neighbour, the first respondent (a tannery), were creating offensive odours, corroding metal structures on its property and were prejudicing the health and well being of its employees and other inhabitants in Port Elizabeth. This had allegedly continued for a number of years.

Despite the foregoing it was alleged that the Chief Air Pollution Control Officer appointed under the Atmospheric Pollution Prevention Act No. 45 of 1965 (APPA) had repeatedly renewed the first respondent's provisional registration certificate and that first respondent failed to comply with the conditions of the said certificate.

For the purposes of considering the relevance of an EIA to the case, the only issue relating thereto was the consideration of prayer two of the proposed court order, which essentially required an order "that the fourth respondent (the head of the Department of Economic Affairs and Tourism, Eastern Cape) direct the first respondent (the tannery) to investigate, evaluate and assess the impact of the gases emitted from the tannery ... in accordance with the EIA procedure prescribed in GN R1183 of 5 September 1997..."⁸⁹

The applicant based its relief on section 28(4) of the NEMA. That subsection requires the fourth respondent to direct a person who fails to take measures required under subsection 28(1) to investigate, evaluate and assess the impact of specific activities and report thereon.

Section 28(1) applies specifically to a person who "causes, has caused or may cause significant pollution or degradation of the environment".

The first contention on behalf of the first respondent, the tannery, in this regard was that EIAs were set up to ensure that official approval is granted before certain land can be put to a specific use. This argument was derived from and based on the decision in the case of *Silvermine Valley Coalition*.⁹⁰

⁸⁹ p. 15

The argument adduced on behalf of the first respondent was that an EIA is intended to assist in authorisation of an activity prior to it being carried out and is entirely unsuited to considering the legitimacy of an ongoing operation.

The court rejected this argument on the express wording of section 28(1).⁹¹

The court then turned to assess the meaning of the phrase "significant pollution or degradation of the environment" as a prerequisite for relief sought under sections 28(1) and (4) read with section 28(12).

The court accepted that it must be shown that the pollution complained of must be significant. In assessing the degree of significance the court agreed with the views of Glazewski⁹² that the threshold level of "significance" is not particularly high.⁹³

The court held that there had been pollution of the environment at a level, which must be regarded as significant and accordingly the requirements for relief to be granted under section 28(12) had been met.⁹⁴

The court then turned to consider the procedural prerequisites for relief to be granted under section 28(12).⁹⁵

The first respondent contended that in terms of section 28(12) thirty days notice had to be given to the relevant authority, who must have failed to inform the applicant that he had directed the first respondent to take one of the steps in section 28(4), before such an application can be brought.⁹⁶

This contention was rejected as the fourth respondent maintained that it was not the competent authority to deal with the complaints of the applicant (this despite the fact

⁹⁰ par 11.7 above

⁹¹ p. 31 par 1

⁹² *supra* at 5.2.8.2

⁹³ p. 32 par 2

⁹⁴ p. 32 par 3

⁹⁵ p. 34 par 2

that it was expressly enjoined to do so in terms of the applicable legislation).

The court held that "the problems at the first respondent's tannery are long standing, and persist despite the efforts taken thus far to curtail them. Accordingly, in the light of the relevant facts and circumstances ..., this seems to me to clearly be a matter in which the fourth respondent should be ordered to direct the first respondent to investigate, evaluate and assess the impact of it's activities and to report thereon."⁹⁷

The court held that the procedure set out for EIAs prescribed in GN R1183 (which applicant sought to be made part of the order) were not appropriate where the activity complained of is already in existence and where the object of the investigation is to identify and overcome an already existing problem.⁹⁸ The court accordingly directed the investigation to be in terms of section 28(4)(a) of the NEMA.⁹⁹ It held that the EIA provisions contained in section 28 of the NEMA were not intended solely for prior assessment in order to authorise the operation of a facility, but also to ongoing assessments of existing operations in order to prevent pollution from continuing.

Accordingly EIAs under section 28 of the NEMA are *sui generis* and are not simply to comply with regulations made under the ECA.

In assessing the extent of it's order and whether an order should be granted against the third respondent, the Chief Air Pollution Control Officer to suspend the operation of the provisional registration certificate of the first respondent, the tannery, and an order that first respondent halt all activities at the tannery pending compliance with section 28(4), the court held that the applicant had adduced only three scientific reports of the Council for Scientific and Industrial Research (CSIR) which were not adduced under oath nor contained evidence of the current levels of pollution emanating from the tannery.

⁹⁶ p. 34 par 3

⁹⁷ p. 39 par 2

⁹⁸ p. 39 par 3

⁹⁹ p. 40 par 1

The court held that no express provision was made for the orders sought as set out above either under section 28 or 32(1) of the NEMA. Section 32(1) provides for "appropriate relief" under certain circumstances.

Even if the court had the power to issue the orders sought the exercise thereof would be determined by proof of the level and severity of the offending pollution. The applicant had based its contention for such relief on the constitutional right to an environment that is "not harmful to their health or well being".¹⁰⁰

The court held that it "would be far more inclined to direct closure of a factory where there is evidence of persistent, serious and ongoing pollution than in a case where, even if there is a degree of pollution, it can neither be regarded as particularly serious nor likely to persist indefinitely in the future. With this observation in mind, it is on a consideration of the facts disclosed in the papers that the applicant's case runs into troubled waters."¹⁰¹

The court regarded the reports by the CSIR as hearsay and as being outdated as further steps had not been taken by the first respondent since the last report. The court was therefore not willing to grant an interdict effectively suspending the operations of the tannery without sufficient clear proof.

The decision clearly indicates that a court will only be willing to grant relief under section 32(1) of the NEMA, which regulates legal standing, where the applicant has provided up-to-date evidence quantifying the level and severity of the pollution at the time when the application is brought.

Although the court dismissed the application it did, however, exercise its discretion under section 32(2) of NEMA in favour of the applicant and ordered the first and fourth respondents to pay the applicant's costs of the application. This shows that it must have been "of the opinion that the applicant acted reasonably out of concern for the

¹⁰⁰ s 24 the Constitution of the Republic of South Africa, Act 108 of 1996

¹⁰¹ p. 24 par 2

public interest or in the interest of protecting the environment.”¹⁰²

11.9 THE RATEPAYERS ASSOCIATION GOURITSMOND AND OTHERS V ANDRE THIRION AND ANOTHER (CPD) (UNREPORTED DECISION UNDER CASE NO. 4754/2003)

This case involves a proposed development on a property located on the banks of the Gourits River near its mouth allegedly situated in an ecologically sensitive area, one of only two areas in the Western Cape to support marine breeding and nursery and which is a constitutionally and statutorily protected national asset.

The applicants applied for an interim interdict pending final adjudication of an application for review brought by them against the Minister and Chief Director of the Department of Environmental Affairs and Development Planning, Western Cape Provincial Government. In the review application, which is only expected to be heard early in 2004, the applicants seek to set aside a decision by the Chief Director granting authorisation for the development and also the Minister’s decision on appeal, confirming the Chief Director’s decision.

In this case the applicants sought an interim interdict to prevent the respondents from continuing with the large scale excavation, construction and building activity initiated by the respondents after and allegedly on the strength of being authorised to do so.

The court granted the interdict and although its reasons for doing so are not relevant to this paper it made some relevant observations regarding EIAs.

It was common cause that the proposed development constitutes an activity requiring written authorisation by the Minister or a competent authority in terms of sections 21 and 22 of the Environment Conservation Act 73 of 1989 (ECA). Section 22 requires that an EIA be done.

¹⁰² s 32(2)

The respondent contended that by virtue of section 35 of the ECA the applicants should have initiated their review proceedings within 30 days of having been furnished with reasons for the decision to be reviewed. It was, however, held that section 35 of the ECA was not peremptory as it states that a person affected by a relevant decision "may" take steps within the time period stipulated. These time periods are therefore not peremptory. The court accordingly rejected the respondents contention that the applicant's application had not been brought timorously.

In this instance, where the Director had approved the development against the recommendation of his own officials, where the Minister had backdated his decision on appeal at a time when he was no longer the Minister and where he had failed to furnish reasons for his decision indicated *prima facie* that the decisions of both the Chief Director and the Minister were irregular.

In considering the requirement for the granting of an interdict that, in the absence of granting it, the applicant would suffer irreparable harm, the court accepted that for purposes of the application the work that had already been completed had affected the ecology detrimentally. The court also held that to allow the work to continue would aggravate the damage already done and result in irreparable damage to the ecology in the medium and long term.¹⁰³

This finding satisfied the requirement of irreparable harm and weighed strongly in the courts assessment of the balance of convenience.

Despite the respondents contentions that it would also suffer financial loss if the interim interdict was granted, the court found that the balance of convenience and fairness nonetheless favoured the applicant.

The finding demonstrates that proper EIA prior to the granting of an authorisation to commence building works might also form the basis for measuring the prejudice suffered by the public in the event of a developer proceeding with building works whilst

¹⁰³ p. 16 at [38]

his authorisation is under review.

The court ordered further that the respondents pay the costs of the application.

11.10 SOUTH DURBAN COMMUNITY ENVIRONMENTAL ALLIANCE v HEAD OF DEPARTMENT: DEPARTMENT OF AGRICULTURE AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL 2003 (6) SA 631

At issue in this matter was the validity of a purported exemption granted in terms of section 28A of the Environment Conservation Act (ECA) 73 of 1989.

In terms of the aforementioned section the first respondent is empowered after considering an application to grant exemption in writing from any or all of the provisions of any regulation, notice or direction in terms of the Act.

The effect of such an exemption would have been that the third respondent would not be obliged to comply with the requirements for conducting an EIA and preparing and submitting an EIA report in respect of its proposed multifuel fluidised bed combustor.

The first respondent opposed the application to have the exemption set aside on the grounds that the time restriction imposed in terms of section 36 of the Act had been exceeded.

That section provides that "any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days of receiving the request."

Section 36(2) provides that after being furnished with such reasons the person in question may apply for a review of the decision.

The court held that, although the applicant was aware of the exemption before 6 March

2003, it only became aware that the exemption was granted in writing as required by section 28A on 6 March 2003. Accordingly, the 30-day period started to run only on 7 March 2003.

In casu the applicant had launched the review application without requesting reasons in terms of section 36(1). The court held that the 30-day period for furnishing of reasons is a period that may be waived by the applicant if the decision concerned is so palpably wrong that no reasons can save it. Clearly an applicant that does so, does so at its own risk as reasons may be furnished in the application, which makes the review nugatory.

12. CONCLUSION

1. An EIA **is required** in the following instances:

1.1 In terms of section 22(2) of the Environment Conservation Act 73 of 1989 where a person wishes to undertake an activity, which is listed in the Regulations (GN R 1182 Government Gazette No. 18261)¹⁰⁴ passed in terms of section 21(1) on 5 September 1997 and for which he needs authorisation;

1.2. In terms of section 24(1) of the National Environmental Management Act 107 of 1998 where a person wishes to undertake an activity which requires the authorisation of the Minister of Environmental Affairs and Tourism and which may significantly affect the environment.¹⁰⁵ If the National Environmental Management Second Amendment Bill¹⁰⁶ is adopted then an EIA will be required where certain "listed activities" are proposed to be undertaken;

1.3. In terms of section 39 of the Minerals Act 50 of 1991 the holder of a

¹⁰⁴ see chapter 4 above

¹⁰⁵ see chapter 5 above

¹⁰⁶ *ibid*

prospecting permit or mining authorisation is required to submit and environmental management programme to the Director of Mineral Development;¹⁰⁷

- 1.4 In terms of Regulation 31 passed under the Development Facilitation Act 67 of 1995 in 2000 where a person wishes to develop land they are required to submit an environmental scoping report together with their land development application.¹⁰⁸
- 1.5 In terms of section 67(2) of the Western Cape Planning and Development Act 7 of 1999 (not yet in force) where a person wishes to undertake an activity identified in terms of section 67(2).¹⁰⁹

2. **An EIA may be required** in the following instances:

- 2.1 In terms of section 41(2)(a)(ii) of the National Water Act 36 of 1998 where a person applies for a licence to use water other than for purposes listed under Schedule 1 or under the general authorisation issued under section 39;¹¹⁰
- 2.2 In terms of section 18(3) of the Marine Living Resources Act 18 of 1998 where a person applies for a right to undertake commercial or subsistence fishing, engage in mariculture or operate a fish processing establishment;¹¹¹

Turning to the criteria with which EIAs need to comply it is evident from the decisions in the cases discussed above that the procedures prescribed in the Regulations GN R 1183 are not all that the courts require EIAs to comply with.

¹⁰⁷ see chapter 6 above

¹⁰⁸ see chapter 9 above

¹⁰⁹ see chapter 10 above

¹¹⁰ see chapter 7 above

¹¹¹ see chapter 8 above

For instance, an applicant who applies for a mining licence in terms of section 9 of the Minerals Act should also ensure that all interested parties are notified and given an opportunity to raise their objections in writing.¹¹²

Also, where legislation does not expressly require an official or authorising body to call for an EIA before considering and granting a land development application, he may nevertheless be compelled to do so according to the judgement handed down in *The Save Klein Hangklip Association v The Minister of Planning and Administration and Others*.¹¹³

Furthermore, if an EIA is to be used as evidence in court it should be clear, well founded, up-to-date and prepared by a qualified expert.¹¹⁴

¹¹² *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (see discussion in par 11.1 above)

¹¹³ see discussion in par 11.2 above

¹¹⁴ *Minister of Public Works and Other v Kyalami Ridge Environmental Association and Others and Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd* (see discussions in paras 11.5 and 11.8 above)

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