

*FUELLING THE SUSTAINABLE DEVELOPMENT DEBATE IN  
SOUTH AFRICA*

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INTRODUCTION

Prescribing and implementing legal doctrine are two interrelated but distinct tasks, the latter frequently proving far more challenging than the former. This is very evident in the domestic implementation of the sustainable development doctrine, generally regarded as ‘the fundamental building block around which environmental law norms have been fashioned both internationally and in South Africa’ (J Glazewski ‘The environmental right’ in M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of*

*Rights* (2002) 423). Notwithstanding the fact that its origins date back over two decades, the exact meaning and ambit of sustainable development remains subject to debate (see Elmene Bray 'Towards sustainable development: Are we on the right track?' (1998) 5 *SAJELP* 1; P Birnie & A Boyle *International Law & the Environment* 2ed (2002) 44–7; Philippe Sands *Principles of International Environmental Law* 2ed (2003) 252–6). South Africa's legislators have sought to define the doctrine in the country's constitutional, framework and sectoral legislation.

Section 24 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') prescribes that: '[e]veryone has the right — (a) . . . (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that — (i) . . . (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. The National Environmental Management Act 107 of 1998 (NEMA), South Africa's framework environmental law, defines sustainable development in s 1 as 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'. NEMA further prescribes, in s 2, a range of national environmental management principles which apply to the actions of all organs of state that may significantly affect the environment. These principles are centered on the tenet, stipulated in s 2(3), that development 'must be socially, environmentally and economically sustainable'. Finally, references to the notion of sustainable development, use and management permeate many sectoral laws including the National Water Act 36 of 1998, Marine Living Resources Act 18 of 1998, National Forests Act 84 of 1998, National Environmental Management: Biodiversity Act 10 of 2004, National Environmental Management: Protected Areas Act 57 of 2003, Minerals and Petroleum Resources Development Act 28 of 2002, Development Facilitation Act 67 of 1995 (DFA) and Local Government: Municipal Systems Act 32 of 2000. In an attempt to rationalize the approach to sustainable development and satisfy South Africa's international commitments, particularly under *Agenda 21*, the *United Nations Millennium Declaration* and the *Johannesburg Plan of Implementation*, the Department of Environmental Affairs and Tourism has recently initiated a process to develop a *National Strategy for Sustainable Development*.

The South African Government has clearly gone a long way toward prescribing a legislative regime incorporating the sustainable development doctrine. However, as is mentioned above, complexities often arise when seeking to implement a new legal doctrine. It is frequently left to the courts to unravel these complexities and judicial co-operation is therefore viewed as an essential requirement for the successful implementation of new legal doctrine (see W Futrell 'The transition to sustainable development law' 2003 (21) *Pace Environmental LR* 192).

The South African judiciary has recently been called upon to unravel the notion of sustainable development in the context of marine living resources

(see *Bato Star Fishing (Pty) Ltd v Minister Environmental Affairs* 2004 (4) 490 (CC); *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (C)) and the preparation of environmental impact assessments (EIAs). This note considers the latter context and specifically two decisions of the High Court relating to the establishment of filling stations in Gauteng, namely: *Sasol Oil (Pty) Ltd & another v Metcalfe* NO 2004 (5) SA 161 (W) and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W). The appeal against the former judgment has recently been decided in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & another* (as yet unreported) Supreme Court of Appeal Case 368/04, judgment of Cachalia AJA handed down on 16 September 2005).

EIA is in theory an essential tool for implementing sustainable development as it provides a process through which authorities can weigh up socio-economic and environmental considerations prior to decision-making. These cases considered this tool in two main respects: first, whether the mandate of environmental authorities extends to social and economic issues; and secondly, if so, how should these authorities integrate sustainable development considerations into their decision-making? As will be seen from the following analysis, the courts' approach to the above enquiries has been disturbingly disparate. Having initially undermined the implementation of the sustainable development doctrine, the courts have fortunately reaffirmed it as the core principle underlying South Africa's emerging environmental jurisprudence.

#### EMPTYING THE TANK

The above issues were first considered in *Sasol Oil* (supra). The applicants wished to establish a filling station and convenience store on the outskirts of Johannesburg. In terms of s 22 of the Environment Conservation Act 73 of 1989 (ECA), read with the EIA Regulations promulgated under it (see GNR 1182–1184 in GG 18261 of 5 September 1997, as amended), anyone intending to undertake certain 'listed activities' must complete an EIA and seek authorization from the provincial environmental authorities prior to commencement. One such listed activity relates to the construction, erection or upgrading of manufacturing, storage, handling, treatment and processing facilities for dangerous or hazardous substances. Due to the proliferation of filling stations in the area, generally regarded as constituting such a listed activity, the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs developed guidelines to assist its decision-making. The guidelines prescribed that development must be socially, environmentally and economically sustainable and stipulated that the Department would generally not approve an application to construct a filling station in an urban, residential or built-up area if it would be situated within three kilometers of an existing filling station.

The applicants appointed consultants to undertake an EIA and submitted an application for authorization to the Department. The Department refused the application, a key ground being that the proposed filling station contravened the guidelines as it would be constructed within three kilometers of an existing filling station. The applicants submitted an appeal to the respondent who, having considered the guidelines, similarly refused the application. The applicants thereafter approached the High Court for a declarator that the distance clause in the guidelines was ultra vires the ECA, and therefore invalid and unenforceable; and, in the alternative, an order reviewing and set aside the respondent's decision to reject their application.

The applicants challenged the decision on two main grounds. First, they argued that their activity did not constitute a listed activity and therefore did not trigger the need to undertake an EIA. They contended that, although the respondent had the power to authorize the construction of structures for the storage or handling of hazardous substances at filling stations, this power did not extend to the construction of filling stations themselves. The applicants maintained that the respondent's consideration of the guidelines was accordingly irrelevant and inappropriate. Secondly, the applicants argued that the Department's mandate only extended to environmental and not socio-economic issues. Therefore, even if the activity did require authorization, the Department was not entitled to develop and apply the guidelines as they were predominantly based on socio-economic considerations.

The respondent contended that: the construction of a filling station did constitute a listed activity requiring authorization under the ECA, the Department's mandate did extend to socio-economic and environmental considerations, and the guidelines were therefore intra vires and had been reasonably applied.

With regard to the applicants' first ground, the High Court advocated a very narrow interpretation of the listed activity in question. It held (at 171J–172B) that, although the respondent had authority to regulate the construction of structures used for storing or handling hazardous substances at filling stations, this did not extend to constructing filling stations per se. The applicants were therefore not required to obtain authorization under the ECA prior to constructing the filling station.

The Court further ruled (at 170A–E) that the guidelines did not constitute 'administrative action' as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000. The guidelines were therefore held (at 171C–D) not to be ultra vires, but just irrelevant and inappropriate as they were considered and applied on the wrong premise, namely that the respondent had the power to authorize the construction of filling stations.

Finally, following a very precursory analysis, the Court held (at 171E–172B) that the sustainable development principles contained in s 2 of the NEMA and s 3 of the DFA, did not extend the department's mandate to take socio-economic factors, in addition to environmental factors, into account when considering applications under the ECA. According to Willis J (at 171I), these principles only serve to restrain authority and cannot confer

power upon an organ of state which does not already possess it. In light of the above, the Court (at 172B–C) set aside the respondent's decision not to authorize the construction of the filling station for two reasons: first, the decision was taken for a reason not authorized in the empowering legislation; and secondly, irrelevant considerations, namely the guidelines, had been taken into account.

The Court's decision is flawed for several reasons. The distinction between constructing a filling station as opposed to structures used for storing and handling hazardous substances at filling stations appears wholly arbitrary. It is difficult to imagine when constructing a filling station would not involve constructing tanks for storing hazardous petroleum products.

In addition, the Court, when considering the breadth of the Department's mandate, failed to give due regard to many relevant legislative provisions. First, s 24(b) of the Constitution compels the state to take 'reasonable legislative and other measures that — (i) . . . (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. The words 'other measures' have been held, in the context of the constitutional right to housing, to include well-directed policies and programmes aimed at realizing the right in question (*Government of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 42). In the context of the environmental right, the intended result of these policies and directives is ecological sustainable development, which expressly involves balancing environmental, economic and social considerations. The Department therefore clearly had a constitutional mandate to develop the guidelines, which extended to include socio-economic issues.

Secondly, the principles contained in NEMA specifically prescribe that the 'social, economic and environmental impacts of activities . . . must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment' (see s 2(4)(i) of NEMA). According to s 2(1)(c), these principles 'serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of . . . any statutory provision concerning the protection of the environment'. This is reinforced in Chapter 5 of NEMA, where the integrated environmental management objectives reiterate the need to promote compliance with the above principles and 'to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage' (see s 23(2)(a) and (b)). Authorities, such as the department in question, must therefore clearly consider environmental, social and economic issues when undertaking administrative action. A failure to do so would constitute a breach of their statutory obligations.

Similar principles are contained in the DFA, which prescribes that administrative action relating to land development must 'promote the integration of social, economic, institutional and physical aspects of land development' (see s 2(c) read with s 3(1)(c)(ii)).

It is also worth noting that the word 'environment', in both NEMA (defined in s 1 to include the 'physical, chemical, aesthetic and cultural

properties and conditions . . . that influence human health and well-being') and the ECA (defined in s 1 as the 'aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms') are broad enough to incorporate both socio-economic and environmental considerations.

Cumulatively, these provisions clearly found, and do not only fetter, power, and dictate that departments must integrate socio-economic and environmental considerations in their decision-making so as to achieve sustainable development. It is therefore unclear how the department in question could have fulfilled its constitutional and legislative mandate were the scope of its authority limited to environmental considerations.

### FILLING THE TANK

A different judge of the Witwatersrand Local Division of the High Court was fortunately given an opportunity to reconsider the decision in *Sasol Oil* (supra) in *BP Southern Africa* (supra). This case, heard shortly after the *Sasol* matter, dealt with an identical set of facts. Following its failure to secure the necessary approval to establish a filling station, the applicant sought to review and set aside the respondent's decision to apply the guidelines and refuse its application. In addition, the applicant sought an order remitting the application to the Department for reconsideration.

One distinguishing aspect of this case is that it was common cause that the construction of a filling station clearly involved the erection of a structure for storing and handling hazardous substances, was a listed activity and therefore required authorization under the ECA prior to commencement. The applicant, in challenging the respondent's refusal to approve its application, therefore sought to rely solely on the argument that the Department had exceeded its mandate, as derived from the ECA and EIA Regulations, in applying guidelines based on socio-economic and not environmental considerations. The applicant contended that the reason for refusing the application had been the Department's desire to regulate the economy and protect the commercial interests of existing filling stations, not environmental interests, which fell beyond the purview of its lawful mandate (at 136B–G).

The respondent argued that it had a broad mandate rooted in the Constitution, ECA, EIA Regulations, NEMA and DFA. These provisions mandated the department to take into account, and balance, socio-economic and environmental considerations in its decision-making (at 140A–D).

According to the Court (at 140E–F), the question whether or not the respondent and the department had acted fairly in refusing the application rested on the correctness of the parties' opposing views regarding the scope of the Department's mandate. The Court considered all relevant legislation when undertaking this enquiry and the statements of Claasen J on the role of the Constitution in resolving this enquiry are very noteworthy.

Referring to the case of *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment* 1999 (2) SA 709 (SCA), the Court held (at

142C–D) that, by virtue of s 24, environmental considerations, often ignored in the past, have been given rightful prominence by their inclusion in the Constitution. According to Claasen J (at 143B–C), the constitutional right to a non-harmful, healthy environment must be regarded on a par with the rights to freedom of trade, occupation, profession and property entrenched in the Constitution. Where competing rights are at issue, a court is required to balance the rights in line with the injunction in s 24(b)(iii) of the Constitution that ecologically sustainable development and the use of natural resources must be promoted jointly with justifiable economic and social development (at 143C–D). The Court further stated (at 143D–F) that this balancing act must be conceptualized well beyond the interest of the present living generations. In addition, the court recognized (at 144B) that ‘[t]he concept of “sustainable development” is the fundamental building block around which environmental legal norms have been fashioned . . . as reflected in s 24(b)(iii) of the Constitution’, and that:

‘Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principles of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.’ (at 144C–D)

In light of the above, and following a detailed analysis of NEMA, the ECA, EIA Regulations and the DFA, the Court held (at 151D–E) that it was abundantly clear that the Department’s mandate included socio-economic factors as an integral part of its environmental responsibility. The Court therefore rejected (at 151F) the applicant’s contention that socio-economic considerations fell outside the purview of the Department’s mandate. The Court further rejected (at 151F–H) the contention that the Department was not permitted to apply the NEMA principles as this ‘flew in the face of s 2(1)(e) of NEMA which obliges all organs of state to apply these principles when implementing NEMA and any other law concerned with the protection of the environment’. This dictum thankfully resolves the uncertainty created by the reluctance of Chaskalson P, in *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho intervening)* 2001 (3) SA 1151 (CC) para 69 to pronounce on the broad application of NEMA’s principles in guiding decision-making (see E Witbooi ‘From *Diepsloot* to *Kyalami*: Environmental concerns and informal housing — Has anything changed?’ 2002 (6) *Buttenworths Property Law Digest* 15 and M Kidd ‘The Constitutional Court’s dilution of NEMA: *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another*’ 2001 (8) *SAJELP* 119).

The Court therefore concluded (at 153C–D and 154F–G) that the adoption of policy guidelines by the Department was not only legally permissible, but practical and desirable given that the guidelines did not preclude the exercise of discretion, were compatible with the enabling legislation, and were disclosed to the applicant before the decision was taken. In reaching this conclusion, the Court specifically referred (at 154G–5B) to the valuable role the guidelines played in resolving a complex issue, the

breadth of the Department's mandate and the reasonable manner in which the guidelines had been applied. Citing the reasoning of the Constitutional Court in *Bato Star Fishing* (supra) paras 48–9) the Court reiterated that respect must be shown for decisions taken by authorities with specific expertise in an area where the decision requires an equilibrium to be struck between a range of competing factors and considerations (at 155C–6D). Looking at the conduct of the authorities in question, the Court concluded (at 157I) that the prescription and application of the distance stipulation was both reasonable and desirable.

With regard to the *Sasol* matter, the Court stated (at 159D–I) that the decision of Willis J in this case regarding the narrow ambit of the Department's mandate was incorrect given the imperatives contained in the Constitution, NEMA, ECA and DFA. In addition, the Court disagreed with Willis J's ruling that the construction of a filling station did not constitute a listed activity under the EIA Regulations as, 'absent the storage and handling of petroleum products in a filling station, what is then left of the "filling" station?' (at 159I–60E )

The decision in the *BP* matter is to be welcomed in that it correctly ratifies the incorporation of the sustainable development doctrine as a part of South Africa's emerging environmental jurisprudence and provides guidance on the manner in which it should inform the future administrative approach to environmental concerns. In the words of Claasen J (at 144D–E):

'By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.'

#### TOPPING UP THE TANK

The confusion caused by these two conflicting judgments has fortunately been resolved by the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* (supra). No doubt inspired by the decision of Claasen J in the *BP* matter, the appellants in the *Sasol Oil* case filed leave to appeal Willis J's judgment setting aside their decision to reject the respondent's application to establish a filling station. The respondents (on appeal) cross-appealed the court a quo's decision to uphold the validity of the guidelines.

As in the *BP* matter, the SCA considered the provisions contained in the Constitution, NEMA and the ECA in order to define the ambit of the activities identified in the EIA Regulations (paras 13–15). Having undertaken this enquiry, the court held (para 16) that

'to attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development. . . . The adoption of a restricted and literal approach . . . would defeat the clear purpose of the enactment.'

The Department, in light of its broad mandate, was deemed to have the authority to regulate the activity and its decision to develop and apply guidelines to inform this process was ruled to be *intra vires* (para 17).

In their cross-appeal, the respondents contended, in the alternative, that even if the guidelines were not *ultra vires*, their review application should still succeed because the guidelines had been applied mechanically and rigidly without due regard to relevant environmental considerations. Reiterating the statements of the court in the *Sasol* matter, Cachalia AJA confirmed (para 19) that the adoption of policy guidelines to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and desirable particularly where the decision is complex and requires the balancing of a range of competing interests or considerations by decision-makers with specific expertise. The Court further stated that, once it has been established that the policy is compatible with the enabling legislation, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly and affected parties should be aware of it. In the absence of the above, an affected party would have to demonstrate that there is something exceptional in his or her case that warrants departure from the policy.

Referring to the contents of the record which accompanied the department's decision, Cachalia AJA concluded (paras 21–2) that there was no substance in the argument that the guidelines had been applied in a purely mechanical and irrational manner or that the decision was based solely on socio-economic considerations. Considerations specifically referred to by the Court included the fact that the filling station would be located diagonally opposite a church, be adjacent to properties zoned for residential development, would have a detrimental environmental impact, significantly impact on scenic vistas, degrade the existing visual character or quality of the site and the surroundings, create a new source of substantial light pollution, impact on the surrounding communities' physiological health, and increase ambient noise levels. In addition, the Court held (para 22) that the respondents had failed to demonstrate that there was something exceptional in their application that warranted a departure from the usual application of the guidelines prepared by the Department. The appellants were therefore successful in their appeal while the respondents' cross-appeal was dismissed with costs.

## CONCLUSION

Despite a somewhat uncertain start, the judiciary has ultimately provided significant guidance on interpreting and implementing the sustainable development doctrine in South Africa and circumscribed the manner in which it should inform administrative processes impacting on the environment.

The Supreme Court of Appeal has resolved the uncertainty created by the conflicting judgments of the High Court in the *Sasol* and *BP* matters. The increasing status of environmental concerns in South Africa has been reaffirmed. Sustainable development is clearly entrenched as the central tenet of South Africa's burgeoning environmental jurisprudence. The environ-

mental authorities' mandate has been broadly delineated to encompass the three pillars of sustainable development: environment; social and economic, a conclusion recently reaffirmed in *Capital Park Motors CC v Shell South Africa Marketing (Pty) Ltd* (as yet unreported) TPD Case 3016/05, judgment of Claasen J, at 16–17). Finally, the role of NEMA's principles and the departmental guidelines in informing decision-making has been clarified.

Cumulatively, the above developments heed the call of the Supreme Court of Appeal over five years ago to accord environmental considerations 'appropriate recognition and respect in the administrative processes in our country' and to 'change our legal and administrative approach to environmental concerns' (*Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (supra) at 719C–D). All bodes well for the continued implementation and growth of the sustainable development doctrine in South Africa and subsequent judicial debate will hopefully provide further clarity rather than fuel uncertainty.

However, one aspect which could inhibit the ability of administrators and the judiciary to achieve this goal is the prescription of a listing approach for screening activities subject to EIA. As the above cases illustrate, this listing approach affords developers latitude to argue that their activities fall outside the scope of those specifically listed in the EIA Regulations, and hence the entire EIA regime. With EIA constituting an essential tool for implementing sustainable development, it is advisable to afford environmental authorities discretion to subject any activity which may cause significant harm to the environment to an EIA, irrespective of whether it is listed or not. The retention of a listing approach under South Africa's future EIA regime (see s 24 of NEMA read with the draft NEMA EIA Regulations published for comment in GN 12 in GG 27163 of 14 January 2005) is accordingly disconcerting, and the Department of Environmental Affairs and Tourism would be well advised to reconsider the inclusion of some form of discretion such as that proposed above.

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#### METAPHORS

'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.'

— Benjamin Cardozo in *Berkey v Third Avenue Ry Co* 155 NE 58 (1926) at 61.

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