JUDICIAL GUIDANCE REGARDING THE DRAFTING AND APPLICATION OF RELEVANT POLICIES AND GUIDELINES IN THE CONTEXT OF EIA DECISION MAKING: Achieving Administrative Justice

1. Introduction

The greater part of our environmental law comprises legislation, with the State's role in implementing the laws vital. As the supreme legal framework for South Africa's environmental laws, the environmental right in the Constitution introduced a new regime in terms of which a variety of different administrative functions were introduced and are required to be carried out by administrative bodies in order for the environmental legislation to be effective.

These powers include management-, legislative-, judicial-, staffing and authorisation functions. In most cases, the powers conferred on officials are discretionary, with a wide range of Constitutional- and other relevant policies, legislation, guidelines, norms and standards that have to be taken into account when exercising decision-making powers in relation to the integrated development of the environment[1].

Environmental law has therefore been described as administrative law in action[2], for the reason that environmental conflicts often depend on the exercise of administrative decision-making powers. At the core of these functions are discretionary environmental authorisations on which much of the environmental legislation depends for its effectiveness.

In order to assist the organs of state in applying these measures and to properly exercise their discretion in doing so, provision is made for the development of policies and standards to guide decision- making. In addition, instruments such as environmental impact assessments (EIA) have been available since 1972 and are now recognized internationally in, *inter alia*, the Rio Principles and the 1991 Espoo Convention[3].

It is, however, apparent from contemporary case law that the consequences which are well intended by the new legal framework are not always achieved. The authorities fail on many occasions to properly apply the available guidelines and to dispense administrative justice, particularly in the EIA regime.

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[1] BP Southern Africa (Pty) Ltd V MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W) 151

[2] G 26-12

[3] Kidd *Environmental Law* 235

It has been mooted that the principal reasons for many of the authorities' past failures can be ascribed to the absence of sufficient staffing and skills in the various departments[4]. Not only are the processes often inordinately delayed, but the standards and policies are improperly interpreted and applied.

With the Constitution as a foundation and aided by the provisions of the Promotion of Administrative Justice Act 3 of 2 000 (PAJA), the flawed administrative processes and incorrect application and policies and standards often lead to review proceedings with the courts being called upon to pronounce on the decision-making.

In dealing with the various reviews, judicial guidance is delivered and many lessons are learned on the shortcomings of the system and the enforcements thereof. These pronouncements will be critically analysed along the various key lessons which have transpired from the cases.

But first the legal framework in which these processes take place must be stated.

2. Statutory Framework

2.1. Challenging Administrative Decisions: The Constitution and PAJA

The requirements for challenging administrative decisions of the EIA process were appropriately set out in *Bato Star Fishing (Pty) Ltd V Minister of Environmental Affairs and Others.*[5]

The applicant in the matter was dissatisfied with the allocation of fishing quotas it had received and sought to take the allocation on review. The review succeeded in the Cape High Court, but on appeal the judgment was overturned by the Supreme Court of Appeal (SCA). The case raised the question of the extent to which such a decision was subject to review under the new constitutional dispensation.

In the court's analyses it held that the provisions of section 6 of PAJA divulged a clear purpose to codify the grounds of judicial review of administrative action. The cause of action for the judicial review of administrative action now ordinarily arose from PAJA and not from the common law. The constitution entrenched the authority of PAJA to ground such causes of action. PAJA gives effect to section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) and therefore matters relating to the interpretation and application of PAJA would be constitutional matters.

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[4] Kidd 262

[5] 2004 (4) SA 490 (CC)

The court came to the conclusion therefore that, *in casu*, PAJA was of application and the case could not be decided without reference to it. The court decided that, to the extent that neither the High Court nor the Supreme Court of Appeal (SCA) considered the claims made by the applicant in the context of PAJA, they had erred[6].

2.2 The Toolkit: EIA, Guidelines and Policies

Since the promulgation of the Environmental Conservation Act 73 of 1989 (ECA) and the framework legislation which replaced it to a large extent, the National Environmental Management Act 107 of 1998 (NEMA) and the regulations promulgated in terms thereof, certain activities are required to be first authorised on the basis of environmental impact assessments before they can be commenced with.

EIA's are processes which produce written statements which are to be used to guide decision-making with information on the environmental consequences of proposed activities, policies and programmes[7]. These assessments are required to influence decisions and provide for the participation by potentially affected persons in the decision-making process.

Further assistance is offered to decision makers by the provisions of section 24 of the NEMA, which regulates environmental authorisations, probably the most encountered aspect of South African environmental law in practice[8]. The section gives effect to the general objectives of integrated environmental management, the potential consequences for or impacts on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority.

The NEMA not only allows for an extensive toolkit in the form of EIA's to be at the disposal of competent authorities when confronted with environmental authorisations, but also empowers the Minister or MEC to develop or adopt norms or standards for activities irrespective of whether they require EIA's.[9] Such norms and standards are required to provide for rules, guidelines or characteristics which may commonly and repeatedly be used; and against the performance of activities may be measured for the purpose of achieving the objects of the Act.[10]

The use of guidelines and policies has been a longstanding practice which is encouraged in the exercise of discretion by competent authorities. Reference to

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[6] 506I - 507

[7] Sands 799

[8] Kidd 239

[9] NEMA section 24(10)

[10] NEMA section 24(10)(b)

general principles is essential for the intelligent exercise of administrative discretion.[11]

This view is further supported in the judgment of *Findlay v Secretary of State for the Home Department and Other Appeals*[12] where the court stated that it had difficulty in understanding how the relevant State organ could properly manage the complexities of its statutory duty without a policy. The issues in that case were of such a complex nature that an approach based on a carefully formulated policy was called for.

The courts in South Africa feel equally as strong about the application of such guidelines. In the *BP Southern Africa (Pty) Ltd V MEC for Agriculture, Conservation, Environment and Land Affairs*[13] case, which concerned an application for the review and setting aside of a decision by the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs to refuse the applicant's application for an authorisation in terms of s 22(1) of the ECA to develop a filling station on one of its properties. The department had applied departmental guidelines which provided, *inter alia*, that new filling stations would not generally be approved if they were situated within a three kilometer radius of an existing filling station.

The court stated that the department in that case had been not only lawfully entitled, but had been duty-bound, to take its guidelines into consideration in arriving at a decision in regard to the applicant's application. The court also felt that the complexity of the factors to be taken into account by the department in exercising its discretion to refuse or allow an application for a new filling station in that matter was such that a guideline had been called for[14].

However, these policies and standards are not available in all circumstances of administrative decision-making. In the *BP Southern Africa* case the court acknowledges though the three principles governing the circumstances in which a public authority may apply policy or standards as enunciated by Baxter[15]. They may do so where: (i) this will not totally preclude the exercise of discretion; (ii) the policy, standards or precedents are compatible with the enabling legislation; and (iii) they are disclosed to the person affected by the decision before the decision is reached.

The court held that there were clearly circumstances in which a State organ, such as the department in that case, would wish to formulate a particular policy to guide the

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[11] Per Innes CJ in Britten and Others v Pope 1916 AD 150 at 158

[12] [1984] 3 All ER 801 (HL) at 827 - 829

[13] 2004 (5) SA 124 (W) at 155

[14] 155

[15] Baxter *Administrative Law* (1984) at 416

exercise of its discretionary powers, provided it was not implemented in a rigid and inflexible manner. The adoption of a guiding policy was not only legally permissible but, in certain circumstances, might be both practical and desirable[16].

The application of the EIA process and other statutory assistance offered in terms of the legislation have been tested in our courts on many occasions, with valuable lessons being learned for the streamlining of future processes and hearings.

3. Jurisprudence

3.1 Key guideline 1: The policies and standards may not preclude the exercise of discretion

The court in the *BP Southern Africa* case[17] refers to the principles cited by Baxter[18] as those which govern the circumstances in which a public authority may apply policy or standards. The first is that such policy or standards should not totally preclude the exercise of discretion. In that case the court accepted the respondent's categorical statement that the guidelines and, in particular, the distance stipulation did not preclude the exercise of her and/or the department's discretion.

The same issue was raised by the applicant in the *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd*[19] in which it was argued that that the adoption of a set of criteria for the assessment of the criteria had the effect of precluding the decision-maker from properly exercising his discretion. Counsel for the respondent relied in this regard on section 6(2)(c), (d) and (f) of PAJA in support of the proposition that, while a functionary may have regard for guidance to a predetermined rule of which it approves, it would not be exercising its discretion if it treated the rule as a hard and fast one to be applied as a matter of course in every case.

The court, however, found that the position must necessarily be somewhat different where the decision-maker is faced with a large volume of competing applications and the need for consistency becomes an imperative requirement for fairness. The court considered that a feature of the method adopted was in any event the provision for adjustment in circumstances where the criteria and weighting were for any reason inappropriate. It was therefore the court’s view that the adoption of a set of criteria and a system of scoring for their assessment cannot be faulted and one which was objective, rational and practical in the circumstances.

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[16] 153

[17] 156

[18] Baxter 416

[19] 2005 (6) Sa 182 (SCA)

3.2 Key guideline 2: The policies and standards must be compatible with the enabling legislation

The Court applied this second Baxter principle in the *BP Southern Africa* case and after considering the Constitution, the ECA, NEMA and the Development Facilitation Act 1976 0f 1995 (DFA), decided that the department's mandate stems from those statutes and that the guidelines are compatible with those enabling provisions.[20]

3.3 Key guideline 3: The policies must be disclosed to the person affected by the decision before it is reached.

The third *Baxter* principle was also applied in the *BP Southern Africa* case and, in order to establish whether a proper administrative process had been followed, the court found on the facts that the applicant had been aware of the contents of the policies which were applied.

In the *Scenematic Fourteen* case[21] this criteria was also raised when it was found that the applicants for fishing rights ought to have been told in advance of the procedure to be adopted when the department decided on their respective allocations. It was argued that the failure of the authorities to properly to advise applicants rendered the allocation process procedurally unfair.

The respondent argued that section 3(2)(a) of PAJA expressly provides that what is procedurally fair depends on the circumstances of each case. In that case the applicants for fishing rights were required to complete a detailed application form which indicated precisely what information was required and on how to complete the form and guidelines setting out in broad terms the considerations which the decision-maker regarded as material for the purpose of making the allocations. The court found that an applicant would therefore have been fully aware of the information that was required and on which the allocations were to be made. The court rejected the argument and remarked that administration cannot be expected to share with the individual every phase of its final decision-making process.[22]

3.4 Key guideline 4: The guidelines may not be rigid or inflexible

The national and provincial guidelines issued by the various departments were the subject of scrutiny in the *BP Southern Africa* case.[23]. The applicant sought the review and setting aside of the department's decision to apply the guideline pertaining to the distance between filling stations in considering its application.

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[20] 155

[21] 199

[22] 199

[23] 2004 (5) SA 124 (W)

The respondent contented that the departmental guidelines were established for purposes of evaluating applications of that nature and that they were general guidelines only and that the distance stipulation in the guidelines is not regarded as rigid or inflexible. The distance stipulation was in fact preceded by the introduction that the purpose of the guideline is to provide an overview of the department's approach to the management of applications with a view to ensuring that the department's responsibility in respect of the protection of the environment are carried out in an efficient and considered manner. The department had allegedly taken, *inter alia*, international approaches, the views of stakeholders, the department's legislative obligations and its experience in the processing of environmental impact assessments into account.[24]

The court accepted that the distance guideline was not used in a rigidly manner and/or as the only measurement, but that it is but one of the factors considered during the process and, where appropriate, the distance stipulation is departed from.

These principles were echoed in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty)Ltd*[25] where the court stated that once it is 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 that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy[26].

3.5 Key guideline 5: Competing interests, norms and rights should be balanced.

In the *BP Southern Africa* case the court found that the constitutional right to environment[27] was on the same level as the rights to freedom of trade, occupation, profession and property, embodied in sections 22 and 25 of the Constitution, and these rights had to be balanced against one another in any situation in which all of them came into play. None of them enjoyed priority over any other of them[28].

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[24] 138

[25] 2006 (5) SA 483 (SCA)

[26] 492A – 492E

[27] Section 24 the Constitution

[28] 143B - C/D

Similarly, in the *Bato Star* case[29] the department was called upon to strike equilibrium between a range of competing considerations and followed a route via a distance stipulation to arrive at a decision. In that case Claassen J was in agreement that the constitutional right to environment is on the same level as the rights to freedom of trade, occupation, profession and property entrenched in sections 22 and 25 of the Constitution. In any decisions concerning property, land and freedom to trade, the environmental rights requirements should be part of the factors to be considered without any prioritising of the rights. It requires a balancing of rights where competing interests and norms are concerned.

According to Claassen J it was clear that Parliament intended to confer discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision had to strike a reasonable equilibrium between the different factors but the factors themselves did not determine any particular equilibrium. Which equilibrium was the best in the circumstances was to be left to the decision-maker and the Court's task was merely to determine whether the decision made was one which had achieved a reasonable equilibrium in the circumstances[30].

The court stated that such a criteria is in line with the sanction set out in section 24(b)(iii) that ecologically sustainable development and the use of natural resources are to be promoted jointly with justifiable economic and social development[31].

According to Claassen J, the balancing of environmental interests with justifiable economic and social development is to be conceptualised well beyond the interests of the present living generation, in line with section 24(b) which requires the environment to be protected for the benefit of present and future generations.

3.6 Key guideline 6: International norms may be considered when drafting departmental guidelines

The court in the *BP Southern Africa* case pronounced that the department is duty bound to develop environmental law in accordance with the statutory provisions, which delineate its mandate. When interpreting the constitutional right to a safe and healthy environment entrenched in section 24, it is permissible to take cognisance of international law as provided in s 39(1)(b) of the Constitution, which is what the

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[29] [49] at 515C - E

[30] 514

[31] 515

department did in relation to the drafting of the policy documents and the inclusion therein of a distance stipulation by reference to comparable approaches elsewhere.[32]

3.7 Key guideline 7: The principles must be drafted and applied reasonably

In the *BP Southern Africa* case the department opted for a distance stipulation as one of the standards by which an application for the development of a new filling station will be considered. The fact that a better or different standard may have been set is irrelevant. In its view the department acted *bona fide* in setting such a distance stipulation after consultation with the industry and particularly after it reduced the distance stipulation in favour of the petroleum industry of which the applicant had been a member.

In the *Bato Star* case the court held that what would constitute a reasonable decision would depend on the circumstances of each case, much as what will constitute a fair procedure would also depend on the circumstances of each case. Factors relevant to determining whether a decision was reasonable or not would include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected.[33]

3.8 Key guideline 8: The process of decision-making must be procedurally fair.

In the *Scenematic Fourteen* case the court stated that the process of decision-making must be procedurally fair, with the enquiry whether the process fell foul of the grounds of review set out in section 6(2) of PAJA. The grounds upon which reliance have been placed included procedural unfairness within the meaning of section 6(2)*(c)*.

The court found that it was not established and decided that the object of streaming the applications into two groups and affording greater weight to transformation in the case of new entrants was to give effect to the statutory requirements referred to in section 18(5) of the Marine Living Resources Act 18 of 1998 (MLRA). The court had foreseen that the objectives of the MLRA could have been achieved by adopting another and notionally better method than the streaming and the weighting in favour of transformation in the case of new entrants into the fishing industry, but noted that that was not the test. The rationale underlying the method was obviously to

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[32] 157B - C

[33] Paragraph [45] at 513B - D/E

accommodate the two conflicting considerations referred to in the guidelines. The decision to stream with a bias in favour of transformation criteria in the case of new entrants would seem in the circumstances to be both a logical and fair way of going about an undeniably difficult task.

3.9 Key guideline 9: Developments are required to be socially, economically and environmentally sustainable

In the *Fuel Retailers Association Of Southern Africa v Director-General: Environmental Management, Department Of Agriculture, Conservation And Environment, Mpumalanga Province*[34] case the court identified this NEMA requirement and concluded that unsustainable developments are in themselves detrimental to the environment. This is particularly true of developments contemplated in section 21 of ECA, which may have substantial detrimental impact on the environment, as would be in the case of a proliferation of filling stations which arises from the limited end use of filling stations upon their closure[35].

3.10 Key guideline 10: The *audi alteram partem* rule applies during all stages of the EIA process

In the *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* case[36] the respondent argued the EIA Regulations prescribe the manner in which environmental impact reports (EIR) are to be compiled and submitted, which is "fair but different" from the provisions of PAJA. This implied that full public participation in the process was required, but only up to submission of the final EIR. Thereafter, according to their argument, public participation is limited to the extent that interested parties have a right of appeal to the Minister against the decision.

The court rejected this approach as fundamentally unsound and stated that the regulations provide for full public participation in all the relevant procedures contemplated in the EIA regulations[37]. After submission of the EIR, however, the adjudicative phase of the process commences, involving not only consideration and evaluation of the EIR, but also more broadly of all other facts and circumstances that may be relevant to the decision. There is nothing in ECA or the regulations that expressly excluded public participation or application of the *audi alteram partem* rule

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[34] 2007 (6) SA 4 (CC)

[35] 32

[36] 2006 (2) All SA 632 (W)

[37] Regulation 3(1)(f)

during this second stage of the process. Therefore, it follows that procedural fairness demands application of the *audi alteram partem* rule also at this stage.

The court further pointed out that if such new matter is to be considered by the decision-maker, fairness also requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made.
In *The SLC Property Group (Pty) Ltd v The Minister Of Environmental Affairs and Economic Development (Western Cape)*[38] case the court had to decide if an appeal process was procedurally unfair in that a condition in a record of decision was imposed without warning and without giving the applicants an opportunity to comment.

The court found that the imposition of the condition arises from policy considerations which were at no stage canvassed with the applicants. The policy considerations do not feature in a (first) record of decision, nor is there any reference thereto in the executive summary prepared by the head of the first respondent's department. In the executive summary to the record of decision (ROD), the first respondent's attention is drawn to the fact that attention must be given to the *audi alteram partem* principle whereby all parties in the matter must be given an equal opportunity to state their case.

The court came to the conclusion that the applicants were not given the opportunity to state their case on matters which vitally affect the proposed development decided that the pertinent condition should be set aside under the provisions of section 6(2)(c) of PAJA.

3.11 Key guideline 11: Discretionary functions may not be sub-delegated

The court referred in the *Scenematic Fourteen* case to the principle that a functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. Scott J considered the case law on the subject and accepted the well-established rule that a discretionary power vested in one official must be exercised by that official and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else. The official must act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.[39]

The court goes further and states that, as to the reliance on the advice of another, the functionary must at the least have to be aware of the grounds on which that advice was given, but it does would have to read every word of every application and

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[38] 2007 JDR 1064 (C)

[39] Paragraph [20] at 199C - I

may not rely on the assistance of others. The functionary may not adopt the role of a rubber stamp and rely on the advice of others, in which event it cannot be said that it was the functionary who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. However, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have exercise his discretion properly. This would be particularly so if that advice was merely one of the factors on which he relied to arrive at his ultimate decision. Whether, there has been an abdication of the discretionary power vested in the functionary must be decided on the facts of each case.

3.12 Key guideline 12: Decision-makers are obliged to investigate and evaluate alternative proposed activities, including the option not to act

Section 22(2) of the ECA and the regulations required the functionary who has to decide whether the necessary environmental authorisation should be granted, to consider reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, any other possible course of action, including the option not to act.

In the *Sea Front for All v MEC, Environmental and Development Planning, Western Cape* case[40] the court remarked that the relevant functionary is obliged to investigate and evaluate alternative proposed activities, including the option not to act. The court pointed out that the functionary is therefore required to consider reports which should not only concern the impact of the proposed activity, but also alternative courses of action, including the option not to act.

In that case it appeared that the MEC, contrary to advice given to her, failed to consider reports of alternative proposed activities and, in particular, the no-go option, which the court regarded as fatal for her case. The court made it clear that the consideration of such reports is a jurisdictional prerequisite for the exercise of her decision-making function in terms of section 22 of the ECA.

The court regarded, as a matter of substance, an expert report on the crucial question whether the land should not be retained as public open space as an indispensable prerequisite. In the absence of such a report, the court was of the opinion that the MEC could not lawfully discharge her decision-making duties. The court emphasised that the fact that decision-makers who are confronted with applications which involve the utilisation of public open spaces, should appreciate the importance of the decision and not to proceed with the decision-making process in the absence of an expert report dealing fully with the strategic significance of any change of land use, from zoned open space to any other land use.

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[40] 2011 (3) SA 55 (WCC)

3.13 Key guideline 13: EIA is not a remedy on its own and is of no consequence where no authorisation has been sought.

In the *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye* case[41] the court analysed the ECA legislative framework in its totality, and concluded that an EIA fits into a scheme which has been set up to ensure that official approval is granted before certain land can be put to specific uses as defined. A person who performs an identified activity without seeking and obtaining authorisation, acts unlawfully. It would appear that, in general, a person who performs an identified activity unlawfully without authorisation cannot be forced to comply with the procedure applicable to one who has in fact sought authorisation.

In the court's view, the ECA and the regulations do not envisage that an EIA can be "wrenched" from its particular purpose as conceived in the legislation and be employed as an independent remedy. An EIA commissioned after the plan of study and scoping request had been completed, would not have been undertaken pursuant to an application, it would not have been considered by the authorities and it would have no effect on the respondent's activities. The court notes that it may serve the purpose of elevating applicants to the moral high ground in this dispute in the event that an EIA supported its views of the development, but it would hold no legal significance in terms of the legislative structure in which an EIA is located[42].

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In addition, the court noted that s 24(1) of the NEMA does not envisage the commissioning of an EIA once the activity for which authorisation is required has already taken place. Simply put, it would serve no legal purpose.

In the matter of *Eagles Landing Body Corporate v Molewa NO*[43] the court held differently and decided that it was appropriate for an EIA to be requested after commencement of the activity but before completion of construction.

NEMA has since these two pronouncements stipulated remedies for activities which commences without authorisation[44].

3.14 Key guideline 14: It would be unlawful if the policies were irrebutable

In the *BP Southern Africa* case[45] the court referred to the views of the House of Lords in *Findlay v Secretary of State for the Home Department and Other Appeals[46]*,

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41 2002 (1) SA 478 (C)

42 489

43 2003 (1) SA 412 (T)

44 Section 24F

where it was held that the complexities are such that an approach based on a carefully formulated policy was called for. Applying the policy would only be unlawful if it were irrebuttable, ie if it precluded considerations of other factors. Ultimately the House of Lords held that applying the policy did not constitute a fettering of the official's discretion, nor did it undermine his independence.

3.15 Key guideline 15: Exemptions granted in terms of the legislation must be in writing

In the matter of *South Durban Community Environmental Alliance v Head of Department: Department of Agriculture and Environmental Affairs, Kwazulu-Natal*[47] the issue of the validity of a purported exemption granted in terms of s 28A of the ECA was in contention. The relevant section allowed the Minister or a competent authority to grant, in writing, an exemption from compliance with any or all of the provisions of any regulation or notice, or direction, subject to such conditions as he may deem fit.

The first respondent made a decision in terms whereof the third respondent was exempted from following certain procedural regulations in its proposed construction of a multifuel fluidised bed combuster for the production of steam and power at the Mondi Paper Mill. An exemption was purportedly granted orally and confirmed some time later. The date of the granting of the exemption became relevant as regards the process which followed.

The court found that section 28A demanded that the application for, and the granting of, the exemption must be in writing. The court concluded that the decision to grant the so-called exemption was a nullity, for the reason that it was not given in writing, nor was it based on a written application wherein reasons were given to be given for the exemption[48].

3.16 Key guideline 16: Socio-economic factors must be taken into consideration when granting an authorisation

The requirement that socio-economic factors must be considered in EIA decision-making has been misinterpreted and improperly applied in several instances, leading to review by our courts.

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[45] 155

[46] [1984] 3 All ER 801 (HL) at 827 - 829

[47] 2003 (6) SA 631 (D) 635I - J

[48] 635F-635I

One familiar contention of many of the applicants was the objection that the authorities masked economic regulation under the veil of socio-economic considerations. This was particularly so in the *BP Southern Africa* case where the applicant contended that, whilst the department worded its refusal to be as a result of environmental concerns, the real reason had been its desire to regulate the economy so as to protect the commercial interests of existing filling stations. The applicant argued that such commercial interests were of a socio-economic consideration which were unrelated to and had no significant relationship to the environment. The applicant therefore felt that the department had exceeded its mandate and its decision accordingly constituted unreasonable administrative action[49].

The Court decided that, whether the department had acted administratively fairly in making that determination depended upon the scope of its mandate which determined the considerations it had been required to take into account in reaching its decision. The scope of the department's mandate was determined by the sources of its mandate. The court decided that the department's statutory obligations in terms of the Constitution, the ECA, NEMA and the DFA made it clear that its mandate included a consideration of socio-economic factors as an integral part of its environmental responsibility. It is clear that the intention of the Legislature was to establish a co-operative and integrated policy of protecting the environment which will take into account social, economic and environmental factors in the planning, implementation and evaluation thereof for the benefit of present and future generations.[50]

The court interpreted the definition of “environment” as contained in section 1 of the ECA to mean that the environment was a composite right which included social, economic and cultural considerations in order to ultimately result in a balanced environment.[51]

In the *Fuel Retailers* case[52] Ngcobo J assessed similar principles and determined that the obligation to consider the impact of the proposed development on socio-economic conditions must be viewed in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment. Once it is accepted, it is argued, that socio-economic development and the protection of the environment are interlinked, it follows that socio-economic conditions have an impact on the environment. A proposed filling station may affect the sustainability of existing filling stations with consequences for the job security of the employees of those filling stations.

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[49] 140C/D - G

[50] 147

[51] 144H - 145A.

[52] Paragraph [62] at 27E - F

The court stressed two further points by firstly pointing out that the Constitution, ECA and NEMA do not protect existing developments at the expense of future developments. The Constitution and environmental legislation introduce a new measure for considering future developments while pure economic factors are no longer decisive. The need for development must be determined by its impact on the environment, sustainable development and social and economic interests. The court emphasized that the duty of environmental authorities is to make decisions that are informed by these considerations of the impact of the proposed development on the environment and socio-economic conditions[53].

Second, the court stated the objective of this exercise is to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit. One of the environmental risks associated with filling stations is the impact of a proposed filling station on the feasibility of filling stations in close proximity. The court regarded the assessment of such impact necessary in order to minimise the harmful effect of the proliferation of filling stations on the environment[54].

The court pointed out the NEMA requirement of a risk-averse and cautious approach to be applied by decision-makers[55]. This precautionary approach is especially important in the light of section 24(7)*(b)* of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed. This conclusion makes it clear that the obligation to consider the socio-economic impact of a proposed development is wider than the requirement to assess need and desirability under the Town-planning and Townships Ordinance, 1986 (the Ordinance). It also demands the obligation to assess the cumulative impact on the environment of the proposed development. The court pointed out that need and desirability are factors that must be considered by the local authority in terms of the Ordinance from the perspective of town planning, while an environmental authority considers whether a town-planning scheme is environmentally justifiable.

A final remark in the *Fuel Retailers* case in this regard was that, according to the environmental authorities, once an applicant for authorisation indicates that the property has been rezoned for the purposes for which it is intended to be used, the environmental authorities accept that the need and desirability has indeed been considered by the local council in accordance with the town-planning legislation. Their obligation, as they saw it, is to apply their mind to the question of whether the

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property on which the proposed filling station is to be constructed has been rezoned for that purpose and from the fact of rezoning, they conclude that need and desirability aspects have been addressed. They left the consideration of this vital aspect of their environmental obligation entirely to the local authority. The court regarded that as a failure to properly discharge of their statutory duty and an unlawful delegation of their duties to the local authority[56].

In the *SLC Property Group* case[57] the court was also confronted with the principle of considering the social, economic and environmental impact of the activities identified in the applicant's application for an authorisation. In doing so the Minister relied on a policy document of her department entitled Western Cape Provincial Spatial Development Framework ("WCPSDF") which records the intention of the Western Cape Government to make relevant policies contained in the WCPSDF mandatory in terms of legislation and to include these policies in appropriate legislation.

The court found that, in terms of the provisions of ECA the first respondent is empowered, and obliged, to consider the impact of the proposed development and associated activities on the environment and socio-economic conditions. However, the first respondent is not empowered by ECA to implement housing policies aimed at rectifying injustices of the past[58].

The imposition of a condition which is aimed at the implementation of a housing policy is not rationally related to the purpose for which the powers under ECA were given.

It needs to be noted that, prior its amendment, NEMA was explicit in its concerns with the potential impact on the environment, socio-economic conditions and the cultural heritage. In its current amended form, the reference to socio-economic conditions and to cultural heritage has been removed. However, the definition of "environment" in the Act includes the cultural properties of the surroundings within which humans exist, which implies that the principle should still be considered in the EIA process as part of the environment. As regards socio-economic aspects, the decision in the *BP Southern Africa* makes it clear that the mandate of a department carrying out environmental authorisations includes the consideration of socio-economic considerations as part of its environmental responsibility.[59] It seems that the removal of the express reference to these aspects was to reduce the scope of EIA, which has been regarded as a retrogressive step and a possible reinforcement of the view that environmental law is concerned solely with "green" issues and not

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[59] Strydom & King *Environmental Management in South Africa* 1026

environmental justice.[60] It is argued though that the body of case law quoted above suggests that socio economic considerations do form part of EIA.[61]

4. Conclusion

When the various cases and the pronouncements by our courts on the performance of competent authorities in the application and consideration of policies and guidelines in the EIA regime is considered, it becomes clear that the process often involves complex issues which require proper staffing, systems, training and performance management.

Performance evaluation is regarded as one of the most important components of any well-functioning environmental assessment (EA). Performance evaluation is particularly important to address the concerns of the South African government about the impact delays and costs of this nature have on economic growth and development[62].

Briefly, an assessment of the efficiency in, and quality of, EA should be considered.

From past surveys on efficiency of EA, it appears that, although delays are often caused by the complexity of projects, controversy and pollution potential, the main cause seems to be related to the lack of government capacity within provincial authorities. Overall skills- and staff shortages and lack of training seem to be the major contributing factors[63]. Government is attempting to address the situation by supplementing capacity, and by the introduction of the new time frames in the EIA regulations and by the introduction of SEA[64].

As regards the quality of EA, it seems that in South Africa much emphasis is placed on anecdotal evidence and perceptions, while little empirical research that underpins decision making in the EA system is undertaken[65]. Progress has been made to adapt international report review packages to the South African context and report quality review has already been undertaken in certain of the provinces. In general the key weaknesses relate to identification and analysis of potential impacts, the ranking in

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terms of significance and the identification of sound alternatives and mitigating measures to address impacts[66].

As to the way forward, the vision of the former Minister of Environmental Affairs and Tourism, Mr. Marthinus van Schalkwyk, can be echoed: “Environmental Protection: Quicker, Simpler, Better”.[67]

Whether that aspiration can ever become a reality needs to be seen. To make the EIA system “quicker”, the government will have to address its implementation of the legal mandate prescribed in legislation. To achieve a “simpler process”, requires a major challenge when one considers the diverse biophysical and socio-economic contexts, hampered by the opposing interests of development and preservation of the environment. If we are to achieve a “better” system, will depend on whether South Africa is able to implement a reliable performance management system on the EIA regime[68].

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