CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 67/06

FUEL RETAILERS ASSOCIATION OF SOUTHERN AFRICA	Applicant
versus	
DIRECTOR-GENERAL ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE	First Respondent
MEC DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE	Second Respondent
DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE	Third Respondent
MINISTER OF WATER AFFAIRS AND FORESTRY	Fourth Respondent
REGIONAL DIRECTOR, DEPARTMENT OF WATER AFFAIRS AND FORESTRY	Fifth Respondent
MEC DEPARTMENT OF TRANSPORT AND PUBLIC WORKS, MPUMALANGA PROVINCE	Sixth Respondent
MBOMBELA LOCAL MUNICIPALITY	Seventh Respondent
SOPHIA LEKEISANG INAMA NO	Eighth Respondent
MATEBOGO MARIA INAMA NO	Ninth Respondent
PODUDU OWEN INAMA NO	Tenth Respondent
ARCHIBALD INAMA NO	Eleventh Respondent
LOWVELD MOTORS (PTY) LTD	Twelfth Respondent

Heard on : 6 March 2007

Decided on : 7 June 2007

JUDGMENT

NGCOBO J:

Introduction

[1] This application for leave to appeal against the decision of the Supreme Court of Appeal concerns the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment.[1] In particular, it concerns the interaction between social and economic development and the protection of the environment. It arises out of a decision by the Department of Agriculture, Conservation and Environment, Mpumalanga province (the Department), the third respondent, to grant the Inama Family Trust (the Trust)[2] authority in terms of section 22(1) of the Environment Conservation Act, 1989 (ECA)[3] to construct a filling station on a property in White River, Mpumalanga (the property).

[2] Section 22(1) of ECA forbids any person from undertaking an activity that has been identified in terms of section 21(1) as one that may have a substantial detrimental

[1] The decision of the Supreme Court of Appeal is reported as *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga, and Others* 2007 (2) SA 163 (SCA).

[2] The Trust was represented in the proceedings by its trustees who are the eighth to eleventh respondents.

[3] Act 73 of 1989.

impact on the environment without written authorisation by the competent authority.[4] It was not disputed that the MEC Agriculture, Conservation and Environment, Mpumalanga, (the MEC) the second respondent, is the competent authority designated by the Minister.[5] Before authorisation can be granted, a report concerning the impact of the proposed development on the environment must be furnished. The relevant authority has a discretion to grant or refuse such authorisation. In granting it, the relevant authority may impose such conditions as may be necessary to ensure the protection of the environment.

[3] Section 21(1) of ECA empowers the Minister of Environmental Affairs and Tourism (the Minister) to identify activities which in his or her opinion may have a substantial detrimental effect on the environment.[6] Subsection (2) sets out some of

[4] Section 22 of ECA provides:

> "(1) No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the *Gazette*.
>
> (2) The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.
>
> (3) The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.
>
> (4) If a condition imposed in terms of subsection (3) is not being complied with, the Minister, any competent authority or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned."

[5] These proceedings were conducted on the footing that Dr Batchelor and Mr Hlatshwayo were duly designated by the Minister for the purposes of considering applications for authorisation in terms of section 22 (1).

[6] Section 21 of ECA provides:

> "(1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

these activities and they include land use and transformation.[7] In Schedule 1 of GN R1182, dated 5 September 1997, the Minister identified the activities that may have a substantial detrimental effect on the environment. These include the construction or upgrading of "transportation routes and structures, and manufacturing, storage, handling or processing facilities for any substance which is dangerous or hazardous and is controlled by national legislation".[8] It is common cause that the construction of a filling station falls within this category and thus requires the authorisation contemplated in section 22(1) of ECA.

[4] The decision to grant or refuse authorisation in terms of section 22(1) of ECA must be made in the light of the provisions of the National Environmental

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(2) Activities which are identified in terms of subsection (1) may include any activity in any of the following categories, but are not limited thereto:

(a) Land use and transformation;

(b) water use and disposal;

(c) resource removal, including natural living resources;

(d) resource renewal;

(e) agricultural processes;

(f) industrial processes;

(g) transportation;

(h) energy generation and distribution;

(i) waste and sewage disposal;

(j) chemical treatment;

(k) recreation.

(3) The Minister identifies an activity in terms of subsection (1) after consultation with—

(a) the Minister of each department of State responsible for the execution, approval or control of such activity;

(b) the Minister of State Expenditure; and

(c) the competent authority of the province concerned."

[7] Section 21(2)(a).

[8] Schedule 1 item 1(c).

Management Act, 1998 (NEMA).[9] One of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. One of these principles requires environmental authorities to consider the social, economic and environmental impact of a proposed activity including its "disadvantages and benefits".[10]

[5] The Fuel Retailers Association of Southern Africa (incorporated in terms of section 21 of the Companies Act), the applicant, challenged the decision to grant authorisation in the Pretoria High Court on various grounds. However, the only ground that concerns us in this application is that the environmental authorities in Mpumalanga had not considered the socio-economic impact of constructing the proposed filling station, a matter which they were obliged to consider. In resisting the application on this ground the Department contended that need and desirability were considered by the local authority when it decided the rezoning application of the property for the purposes of constructing the proposed filling station. Therefore it did not have to reassess these considerations.

[6] The High Court upheld the contention of the Department and dismissed the application. So did the Supreme Court of Appeal. Hence this application for leave to appeal.

[9] Act 107 of 1998.

[10] Section 2(4)(i).

[7] The Director-General, Environmental Management in the Department, the first respondent, as well as the Department and the MEC are opposing the application. For convenience they are referred to as the environmental authorities. The Trust represented by its trustees and Lowveld Motors (Pty) Ltd are also opposing the application.[11]

Factual background

[8] During July 2000, the Trust, through an environmental consultant firm, Globecon Environmental Management Services (Globecon), applied to the Department for authorisation to construct a filling station on the property in terms of these provisions.[12] A scoping report, a geotechnical and geohydrological report (the Geo3 report) were submitted in support of the application.[13] The scoping report dealt with, among other matters, socio-economic factors and the presence of an aquifer in the property. In addition, the scoping report contained an evaluation of the impact of the proposed filling station, identified certain areas of concern and proposed recommendations to address these concerns.

[11] The Trust subsequently sold its interest in the proposed development to Lowveld Motors (Pty) Ltd.

[12] The application was made on a prescribed form which is called a Plan of Study for Scoping.

[13] A scoping report is an environmental impact report that must be submitted in support of an application for authorisation under section 22(1) of ECA. Section 26, which empowers the Minister to make regulations concerning the scope and content of the environmental reports envisaged in section 22(1), contemplates that reports will include matters such as the identification of the economic and social interests which may be affected by the proposed activity; the extent and the nature of the effect of the proposed activity on social and economic interests; and how the adverse impact is to be minimised. By regulations regarding activities identified under section 21(1), GN R1183 of 5 September 1997, the Minister published the regulations concerning the scope and the contents of reports. These reports have come to be known as "scoping reports". The provisions of ECA relating to the nature and scope of the environmental authority's obligation when considering an application for authorisation under section 22(1), as well as the scope and contents of the report that must be submitted in support of such application, must be understood in the light of the provisions of NEMA.

[9] Under the heading "Socio-Economic Components", the scoping report referred to the implications of the proposed filling station for noise, visual impacts, traffic, municipal services, safety and crime, and cultural and historical sites. It also dealt with the feasibility of the proposed filling station and stated that—

> "Various other locations do exist for the proposed development, as the positioning of a filling station is dictated by traffic flow, visibility, availability of land and the location of other filling stations in the area.
>
> As the proposed filling station is directly targeting traffic moving between White River, Hazyview and the Numbi Gate of the Kruger National Park, a specific location along the said route was identified. Once the site was identified a feasibility study was done based on locating the filling station at the specific site. Once the feasibility of the filling station on the specific site was identified, and the availability of the property was confirmed, no other options were considered."

[10] One of the issues identified in the report as requiring attention was the protection of an existing aquifer, a significant clean groundwater resource below the surface of the property. In the past this aquifer had been used to augment the water supply in White River. The report noted that the aquifer needed protection from pollution. The report recommended that the water quality of the aquifer through the borehole should be tested bi-annually. It proposed that if the Department of Water Affairs and Forestry (Water Affairs and Forestry) required it, an impermeable layer should be installed in the base of the pit to ensure that no contaminants from the tanks reach the aquifer. In addition, it recommended that a reconciliation programme should be in place to detect any leakage. These recommendations were made in the light of the Geo3 report.

[11] The applicant, through its environmental consultants, Ecotechnik, objected to the construction of the proposed filling station on several grounds, one being that the quality of the water in the aquifer might be contaminated. Ecotechnik submitted an evaluation report which criticised the consideration of alternatives to the development as being vague and non-specific and pointed out that "demand and activity alternatives were not investigated." The report also took issue with the manner in which the public participation process had been conducted, pointing out that there were interested persons who had not had the opportunity to express their views on a proposed filling station that might affect them.

[12] There was a further exchange of reports by the opposing consultants which dealt with the adequacy or otherwise of the proposed measures for the prevention of the contamination of the aquifer.[14] In the light of these reports and in particular, the existence of the aquifer, the Department referred the Geo3 report together with the objections raised by the applicant to Water Affairs and Forestry for comment.

[14] In relation to the contamination of underground water, Globecon reiterated that if required by Water Affairs and Forestry, an impermeable layer would be installed at the base of the pit and that this would ensure that no contaminants from the tanks reach the aquifer. In relation to the public participation process, it acknowledged that the neighbours referred to in the Ecotechnik evaluation report had not been notified but blamed this on the local authority which "did not supply the consultant with all the relevant information." In a further response Ecotechnik criticised the installation of an impermeable layer at the base of the pit and the leak detection system as inadequate. It pointed out that leaks not only occur from tanks but also from pipes. It added that in any event, given the present day construction methods, "it is unlikely . . . [that] constructing impermeable layers . . . can be guaranteed to be 100% leak proof." It questioned the adequacy of the contamination safeguards suggested in the geological report. It expressed the opinion that if an impermeable layer is to be used it "would have to be provided not only below but on the sides as well."

[13] In a very brief response, Water Affairs and Forestry accepted the Geo3 report and, on the issue of underground water, required "[t]he proposed developer [to] ensure that no pollution of the groundwater . . . take[s] place. And [that it] must be monitored as set out in the report and in accordance [with] all the relevant Regulations as set out by the Dept of Water Affairs and Forestry." Nothing was said about the installation of an impermeable layer, which according to the scoping report was to be installed if Water Affairs and Forestry required this. However, it subsequently transpired that the Water Quality Management and Water Utilization divisions of Water Affairs and Forestry had neither received nor commented on the Geo3 report.

[14] The application was considered in the first instance by Mr Hlatshwayo, the Deputy-Director in the Department. On 9 January 2002 authorisation was granted over the objection of the applicant. A record of decision was issued, which contained the decision and conditions upon which authorisation was granted. This decision authorised the construction of a filling station, three fuel tanks, a convenience store, a canopy, ablution facilities and driveways providing access to and from the nearby streets. The record of decision was signed by Dr Batchelor, the Director of Environmental Management in the Department.

[15] One of the conditions of the authorisation was that the necessary permits or approvals must be obtained from other government departments such as Water Affairs and Forestry. The record of decision sets out "key factors" which presumably influenced the decision. It noted that the property had "been rezoned from 'special' to

'Business 1'" and that all identified and perceived impacts were satisfactorily dealt with in the scoping report.

[16] The applicant lodged an appeal against this decision. One of the grounds of appeal was that the need, desirability and sustainability of the proposed filling station had not been considered. It was alleged that this aspect was not addressed in the scoping report submitted by Globecon. It was also pointed out that the proposed filling station was within a radius of five kilometres from six other filling stations that adequately served the needs of the community. The applicant alleged that there had recently been a decline in the growth of fuel consumption in White River. The viability of existing filling stations would be affected and this had been exacerbated by the introduction of three new filling stations in the area.

[17] In support of its ground of appeal based on need and desirability, the applicant relied on the Gauteng Provincial Government Guidelines (Gauteng Guidelines)[15] which were developed by the Gauteng province to ensure that its responsibilities in respect of the protection of the environment are carried out in an efficient and considered manner. One of the general guidelines provides that new filling stations will generally not be approved where they will be "within three (3) kilometres of an existing filling station in urban, built-up or residential areas".[16] This limitation on the

[15] Gauteng Provincial Government, Agriculture, Conservation, Environmental and Land Affairs EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations (March 2002).

[16] Id at para 2.1.

distance between filling stations was influenced by international experience, views of interested persons and the legislative obligations under ECA and NEMA.[17]

[18] A further ground of appeal related to the inadequacy of the Geo3 report concerning measures to prevent fuel leaks. The applicants submitted a report by De Villiers and Cronje, a firm of consulting engineering geologists, which evaluated the Geo3 report and expressed the following opinion—

> "It is . . . highly probable that the residual granitic material at the level of the fuel tanks will have geo-mechanical properties that could be conducive to the spread of petro-chemical pollution into the underlying major aquiver should a leak occur in the fuel tanks. This could then contaminate the aquiver system beyond further utilization."

It concluded that—

> "It is therefore of the greatest importance that, in the absence of detail[ed] soil test results of all the sub-surface material at and below the level of the fuel tanks, the current and future value and intended utilization of the water from the aquiver be evaluated. (as well as the presence of any other water borehole situated on the same aquiver)."

[19] The appeal was considered and dismissed by Dr Batchelor. It is not clear how Dr Batchelor could have considered the appeal as he had signed the record of decision. No point was taken in this regard and nothing more need be said about this issue. The reasons for dismissal are very scanty, and they are recorded in a letter. In

[17] Id at para 1.

relation to need, desirability and sustainability of the proposed filling station the letter states that these matters had been considered by the local authority.

The review proceedings

[20] The applicant subsequently launched proceedings in the High Court, seeking an order reviewing and setting aside the decision to grant authorisation. The applicant alleged that its cause of action arose from section 36 of ECA,[18] alternatively the common law, alternatively the Promotion of Administrative Justice Act, 2000 (PAJA).[19]

[21] The decision to grant authorisation was attacked on eleven grounds. One of the grounds was the failure to take into consideration or to properly consider the requirements of need, desirability and sustainability in relation to the proposed filling station, and another, the failure to obtain the recommendations of Water Affairs and Forestry in view of the existence of the aquifer. As pointed out earlier, the only ground of review persisted with in this Court is the one relating to need, desirability and sustainability. It is therefore this ground only that need concern us.

[18] Section 36 of ECA provides:

> "(1) Notwithstanding the provisions of section 35, 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 after receiving the request.
>
> (2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

[19] Act 3 of 2000.

[22] Both Dr Batchelor and Mr Hlatshwayo deposed to affidavits explaining how they dealt with the application. Their evidence is substantially to the same effect. It amounts to this: need and desirability are factors that are considered by the local authority when it approves the rezoning of a property for the purposes of erecting a proposed development. As Mr Hlatshwayo put it, the requirements of need and desirability must be considered by the local authority whenever applicants apply for the rezoning of land under the Town-Planning and Townships Ordinance, 1986 (the Ordinance).[20] The Department does not reconsider these factors. It is sufficient for an applicant for authorisation to state that the property has been rezoned for the construction of the proposed development. And if there is no reason to doubt this, based on this statement, the Department will ". . . accept that need and desirability has indeed been considered by the Local Councils . . . ."

[23] Ms Muller, a town planner, who specialises in the lodging of applications for the rezoning of properties for filling stations, confirmed this practice. She accepted that environmental issues must be addressed, but added that it ". . . is not necessary nor desirable to duplicate functions between the Local Council and the different Departments of Agriculture, Conservation and Environment of the different provinces." In the instant case, she has no personal knowledge of the information that was placed before the town-planning authorities or of the decision that was made by the town-planning authorities in relation to need and desirability. In short, the

[20] Ordinance 15 of 1986.

environmental authorities did not themselves consider need and desirability nor did they check to consider whether it was in fact dealt with by the local authority.

[24] It is necessary to pause here to explain the phrase "need, desirability and sustainability". The parties referred to this phrase when they were referring to socio-economic considerations. This phrase does not appear in ECA or NEMA. However, the phrase "need and desirability" is used in Schedule 7 of the Regulations promulgated under the Ordinance.[21] It is one of the factors that the local authority is required to consider when approving the rezoning of a property. It is this factor which the environmental authorities contended must be considered by the local authority in the context of an application for authorisation under section 22(1) of ECA. Having regard to the provisions of ECA and NEMA, the proper reference must be to socio-economic considerations. Whether the phrase "need and desirability" in Schedule 7 bears the same meaning as socio-economic considerations in the context of ECA and NEMA is an issue that is dealt with later in this judgment.[22]

The decision of the High Court

[21] Schedule 7 of the Regulations made under the Ordinance contains a specimen application form to be completed by a person who wishes to apply for an amendment of a town-planning scheme in terms of section 56 of the Ordinance. Part C of Schedule 7 lists documents and reports that must be submitted together with the application. Item C requires the applicant to enclose a report which—

> "(a) explains the proposed maps, annexures and schedules, if any;
>
> (b) provides information on the geotechnical conditions and use of the land as well as traffic, including public transport, roads and parking facilities, where applicable;
>
> (c) contains a motivation for the need and desirability of the amendment proposed".

[22] At para [82].

[25] The High Court upheld the submission of the environmental authorities that the question of need, desirability and sustainability are matters that must be considered by the local authority when an application for rezoning is made and that it is unnecessary for the environmental authorities to consider these factors. It held that the practice of leaving the consideration of need and desirability to the local authority is consistent with the principle of intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.[23] Having found that there was no merit in the other grounds either, the High Court dismissed the application with costs, but granted the applicant leave to appeal to the Supreme Court of Appeal.

The decision of the Supreme Court of Appeal

[26] The Supreme Court of Appeal accepted that socio-economic considerations are a relevant consideration when making decisions under section 22 of ECA. Indeed, it accepted that the environment may ". . . be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict . . . ".[24] However, it found that there was no evidence to suggest that there was a possibility of this happening.

[27] Like the High Court, the Supreme Court of Appeal upheld the practice of the environmental authorities of leaving the consideration of need, desirability and sustainability to the local authority. It reasoned that the local authority has an obligation to consider need, desirability and sustainability when making a rezoning

[23] This is apparently a reference to section 2(4)(l) of NEMA which provides:

> "There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment."

[24] Above n 1 at para 17.

decision. The responsibility of the environmental authorities is to apply its mind to the question whether need and desirability had been addressed by the local authority. This they can do by having regard to the fact that rezoning had taken place and accepting that need and desirability was therefore considered by the local authority during the rezoning stage unless the rezoning decision is challenged, reasoned the Supreme Court of Appeal.

[28] It accordingly concluded that having regard to the local authority's obligation, when considering an application for rezoning to consider need, desirability and sustainability, the environmental authorities had applied their mind to socio-economic considerations. In reaching its conclusion, the Supreme Court of Appeal had regard to the fact that the rezoning decision was not subject to attack and that there was no evidence that circumstances had subsequently changed.

[29] Having found that there was no merit in the other grounds of review, the Supreme Court of Appeal dismissed the appeal with costs. Hence the present application for leave.

Issues presented

[30] In this Court, the applicant contended that the environmental authorities themselves were obliged to consider the socio-economic impact of constructing the proposed filling station. The applicant submitted that this obligation is wider than the requirement to assess the need and desirability of the proposed filling station under the

Ordinance. This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one. This in turn required the environmental authorities to assess the demand or necessity and desirability, not feasibility, of the proposed filling station with a view to fulfilling the needs of the targeted community, and its impact on the sustainability of existing filling stations. The applicant relied upon the provisions of section 24(b)(iii) of the Constitution,[25] as well as sections 2(4)(a),[26] 2(3), 2(4)(g), 2(4)(i),[27] 23[28] and 24[29] of NEMA.

[31] The environmental authorities accepted that the socio-economic impact of the proposed filling station had to be considered. However, they contended that, consistently with the practice that is followed in Mpumalanga, need and desirability of the proposed filling station was considered by the local authority when it considered the rezoning of the property. They submitted that it was therefore not necessary for them to reconsider these factors. In support of this contention they relied upon section 56 of the Ordinance[30] read with Schedule 7 of the Regulations[31] promulgated under

[25] This provision is set out in full in para [43].

[26] This provision is set out in full in n 67 below.

[27] Sections 2(3), 2(4)(g) and 2(4)(i) are set out in full in para [63].

[28] This provision is set out in full in para [64].

[29] This provision is set out in full in para [65].

[30] Section 56 of the Ordinance provides:

> "(1) An owner of land who wishes to have a provision of a town-planning scheme relating to his land amended may, in such a manner as may be prescribed, apply in writing to the authorised local authority, and at the same time—
>
> (a) he shall pay to the local authority such fees as may be levied by that local authority; and

(b) he shall give notice of the application—

(i) by publishing once a week for 2 consecutive weeks a notice in such form and such manner as may be prescribed;

(ii) by posting a notice in such form as may be prescribed in a conspicuous place on his land, and he shall maintain such notice for a period of at least 14 days from the date of the first publication of the notice contemplated in subparagraph (i): Provided that the local authority may, in its discretion, grant exemption from compliance with the provisions of this subparagraph.

(2) The authorised local authority may, in its discretion, give further notice of the application—

(a) by posting a notice in such form as may be prescribed in a conspicuous place on its notice board, and in such a case it shall maintain such notice for a period of at least 14 days from the date of the first publication of the notice contemplated in subsection (1)(b)(i);

(b) in any other manner.

(3) The applicant shall submit proof to the satisfaction of the authorised local authority that he has complied with the provisions of subsection (1).

(4) On receipt of an application in terms of subsection (1) the authorised local authority shall, subject to the provisions of subsection (5), forward—

(a) a copy thereof to—

(i) The Transvaal Roads Department, where the land concerned or any portion thereof is situated outside an 'urban area' as defined in section 1 of the Advertising on Roads and Ribbon Development Act, 1940;

(ii) the National Transport Commission, where the land concerned or any portion thereof is situated within a 'building restriction area' as defined in section 1 of the National Roads Act, 1971;

(iii) the Director-General: Constitutional Development and Planning, where the application contemplates either the subdivision of land zoned for industrial purposes or the zoning of land for industrial purposes;

(iv) every local authority or body providing any engineering service contemplated in Chapter V to the land concerned or to the local authority contemplated in subsection (1); and

(v) any other department or division of the Transvaal Provincial Administration, any other state department which or any other person who, in the opinion of the local authority, may be interested in the application; and

(b) a copy of every objection lodged and all representations made in respect of the application to the applicant, and the applicant shall, within a period of 28 days from the date of receipt of the copy, forward his reply thereto to the local authority.

(5) An applicant may, in the stead of the authorised local authority and with its consent, forward a copy of the application to any person or body contemplated in subsection (4)(a) and submit proof to the satisfaction of the local authority that he has done so.

(6) Every person to whom or body to which a copy of the application has been forwarded in terms of subsection (4)(a) or (5) may, within a period of 60 days from the date on which the copy was forwarded to him or it, or such further period as the authorised local authority may allow, comment in writing thereon.

the Ordinance.[32] The environmental authorities submitted that rezoning forms part and parcel of the process of an application for authorisation in terms of section 22 of ECA.

[32] The applicant took issue with the submission that rezoning is part and parcel of the application for authorisation in terms of section 22 of ECA. The applicant submitted that the two processes are distinct and separate. The local authority considers an application for rezoning from a town-planning perspective. It focuses, in particular, on what land uses it will allow on a particular piece of land and is constrained by the applicable law to consider whether there is a need for the proposed land use and whether it is desirable. By contrast, the environmental authorities are required to consider the impact of the proposed development on the environment and socio-economic conditions.

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(7) Where objections have been lodged or representations have been made in respect of the application, the authorised local authority shall, subject to the provisions of section 131, hear the objections or representations.

(8) After the provisions of subsection (7) have been complied with, the authorised local authority shall consider the application with due regard to every objection lodged and all representations made, and may for that purpose—

(a) carry out an inspection or institute any investigation;

(b) request any person to furnish such information,

as it may deem expedient.

(9) Having considered the application in terms of subsection (8) the authorised local authority may—

(a) approve the application subject to such amendment which it may, after consultation with the applicant, deem fit or refuse it;

(b) postpone a decision on the application, either wholly or in part.

(10) The authorised local authority shall without delay and in writing notify the applicant, an objector or any person who has made representations, of its decision taken by virtue of the provisions of subsection (9)."

[31] Above n 21.

[32] In terms of Schedule 7 of the Regulations promulgated under the Ordinance, an application for amendment of town-planning scheme must be accompanied by "a motivation for need and desirability." Item C 3(c).

[33] The applicant also drew attention to the fact that the rezoning relied upon by the environmental authorities had taken place approximately eight years prior to the application for authorisation in terms of section 22 of ECA. It submitted that since the rezoning application was approved, there had been significant changes in the environment, including the construction of three new filling stations in the area.

[34] It is therefore common cause that in considering an application for authorisation under section 22 of ECA, the environmental authorities were obliged to consider the socio-economic impact of the proposed filling station. The environmental authorities, however, equate the need and desirability requirement under the Ordinance with the requirement to consider the social, economic and environmental impact of a proposed filling station. The questions which fall to be considered in this application are therefore, firstly, the nature and scope of the obligation to consider the social, economic and environmental impact of a proposed development; second, whether the environmental authorities complied with that obligation; and, if the environmental authorities did not comply with that obligation, the appropriate relief.

[35] Before addressing these issues, it is necessary to consider two preliminary matters. The first is the proper cause of action in this application. The other is whether the application raises a constitutional matter, and if so, whether it is in the interests of justice to grant leave to appeal.

The proper cause of action

[36] In the founding affidavit, the applicant alleged that the review proceedings were being brought under section 36 of ECA,[33] alternatively the common law, alternatively PAJA. Neither the Supreme Court of Appeal nor the High Court considered the proper cause of action. They approached the matter on the footing that there was an overlap in the grounds of review under the common law, ECA and PAJA. It is apparent that the decision of this Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* was not drawn to the attention of the courts below.[34] By the time the matter reached this Court, however, the applicant had made up its mind; it relied on PAJA, in particular, on subsections 6(2)(b), 6(2)(e)(iii) and 6(2)(i).[35] It is necessary to address this issue and put in context the provisions of section 36 of ECA which make provision for a person aggrieved by a decision made under ECA to approach a high court for review.

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[33] See para [20].

[34] 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[35] Section 6(2) provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> . . .
>
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> . . .
>
> (e) the action was taken—
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> . . .
>
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
>
> . . .
>
> (i) if the action is otherwise unconstitutional or unlawful."

[37] In *Bato Star* this Court held that "[t]he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past."[36] Section 36 of ECA does no more than to provide for the review of decisions of environmental authorities. The grounds upon which decisions under ECA may be reviewed are those set out in PAJA. The clear purpose of PAJA is to codify the grounds of review of administrative action. The fact that section 36 of ECA allows a person whose interests are affected by a decision of an administrative body under ECA to approach the High Court for review, does not detract from this. The provisions of section 36 must therefore be read in conjunction with PAJA which sets out the grounds on which administrative action may now be reviewed.

[38] It is not in dispute that the decision by the environmental authorities to grant authorisation under section 22 of ECA is administrative action within the meaning of PAJA. It is a decision which was taken by an organ of state in the performance of a public function in terms of ECA. The environmental authorities did not contend otherwise. The applicant seeks to review the decision of the environmental authorities on three grounds. Firstly, the environmental authorities failed to comply with a mandatory material procedure or condition prescribed by ECA (subsection 6(2)(b)). Secondly, in granting the authorisation, the environmental authorities took into account irrelevant considerations and failed to consider relevant considerations (subsection 6(2)(e)(iii)). Thirdly, the decision by the environmental authorities is otherwise unconstitutional and therefore unlawful (subsection 6(2)(i)).

[36] Above n 34 at para 25.

[39] There is a significant overlap in these grounds. In the course of oral argument it became clear that the main ground of attack was that the environmental authorities failed to consider the impact of the proposed filling station on socio-economic conditions, a matter which they were required to consider. The central question in this application therefore is whether the environmental authorities failed to take into consideration matters that they were required to consider prior to granting the authorisation under section 22(1) of ECA.

Does the application raise a constitutional issue?

[40] Section 24 of the Constitution guarantees to everyone the right to a healthy environment and contemplates that legislation will be enacted for the protection of the environment.[37] ECA and NEMA are legislation which give effect to this provision of the Constitution. The question to be considered in this application is the proper interpretation of the relevant provisions of ECA and NEMA and, in particular, the nature of the obligations imposed by these provisions on the environmental authorities. The proper interpretation of these provisions raises a constitutional issue. So, too, does the application of PAJA. It follows therefore that the present application raises a constitutional issue.

Is it in the interests of justice to grant leave to appeal?

[37] The text of section 24 is set out in full in para [43].

[41] This case raises an important question concerning the obligation of state organs when making decisions that may have a substantial impact on the environment. In particular, it concerns the nature and scope of the obligation to consider socio-economic conditions. The need to protect the environment cannot be gainsaid. So, too, is the need for social and economic development. How these two compelling needs interact, their impact on decisions affecting the environment and the obligations of environmental authorities in this regard, are important constitutional questions. In these circumstances, it is therefore in the interests of justice that leave to appeal be granted to consider these issues.

[42] In order to put the issues involved in this case in context and to evaluate the cogency of the constitutional challenge, it is necessary to understand both the constitutional and the legislative frameworks for the protection and management of the environment.

The relevant constitutional provision

[43] The Constitution deals with the environment in section 24 and proclaims the right of everyone—

> "(a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Sustainable development

[44] What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings.[38] This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.[39] But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed—

> "[E]nvironmental stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect

[38] *Declaration on the Right to Development* adopted by General Assembly Resolution 41/128 of 4 December 1986, http://www.un.org/documents/ga/res/41/a41r128.htm, accessed on 4 June 2007. Article 1 asserts that "[t]he right to development is an inalienable human right". The Preamble describes development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population".

[39] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

> the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind."[40]

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

The concept of sustainable development in international law

[46] Sustainable development is an evolving concept of international law. Broadly speaking its evolution can be traced to the 1972 Stockholm Conference. That Conference stressed the relationship between development and the protection of the environment, in particular, the need "to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their

[40] Report of the World Commission on Environment and Development: *Our Common Future* (Brundtland Report), http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm, link: General Assembly 42nd Session: Report of the World Commission on Environment and Development, accessed on 4 June 2007. Chapter 1 at para 42.

population".[41] The principles which were proclaimed at this conference provide a setting for the development of the concept of sustainable development.[42] Since then the concept of sustainable development has received considerable endorsement by the international community.[43] Indeed in 2002 people from over 180 countries gathered in our country for the Johannesburg World Summit on Sustainable Development (WSSD) to reaffirm that sustainable development is a world priority.[44]

[47] But it was the report of the World Commission on Environment and Development (the Brundtland Report)[45] which "coined" the term "sustainable development".[46] The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[47] It described sustainable development as—

> "[i]n essence . . . a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations".[48]

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[41] Principle 13 of the *Declaration of the United Nations Conference on the Human Environment*, held in Stockholm 1972, http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503, accessed on 4 June 2007.

[42] Separate Opinion of Vice-President Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 I.L.M. 162 (1998).

[43] Id.

[44] Segger and Weeramantry (eds) *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff, Leiden 2005) 561.

[45] Above n 40.

[46] Sands *Principles of International Environmental Law* 2 ed (Cambridge University Press, Cambridge 2003) 252.

[47] Above n 40, Chapter 2 at para 1.

[48] Id at para 15.

[48] This report argued for a merger of environmental and economic considerations in decision-making[49] and urged the proposition that "the goals of economic and social development must be defined in terms of sustainability".[50] It called for a new approach to development - "a type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to resources."[51] The concept of sustainable development, according to the report, "provides a framework for the integration of environment[al] policies and development strategies".[52]

[49] The 1992 Rio Conference made the concept of sustainable development a central feature of its Declaration.[53] The Rio Declaration is especially important because it reflects a real consensus in the international community on some core principles of environmental protection and sustainable development.[54] It developed general principles on sustainable development and provided a framework for the development of the law of sustainable development.[55]

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[49] Id at paras 72-80.

[50] Id at para 2.

[51] Above n 40 at Chapter 1 para 47.

[52] Id at para 48.

[53] The United Nations Conference on Environment and Development was held in Rio de Janeiro, Brazil on 3-14 June 1992, http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, accessed on 4 June 2007. This Conference adopted among other instruments, the Rio Declaration on Environment and Development (the Rio Declaration).

[54] Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, Oxford 1999) 4.

[55] In this sense, the Rio Declaration provides a benchmark for measuring future developments and a basis for defining sustainable development.

[50] At the heart of the Rio Declaration are Principles 3 and 4. Principle 3 provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The idea that development and environmental protection must be reconciled is central to the concept of sustainable development.[56] At the core of this Principle is the principle of integration of environmental protection and socio-economic development.

[51] Commentators on international law have understandably refrained from attempting to define the concept of sustainable development. Instead they have identified the evolving elements of the concept of sustainable development.[57] These include the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-

[56] Above n 54 at 26.

[57] Above n 46 at 266. Sands identifies five recurring elements which appear to comprise the legal concept of sustainable development as reflected in international agreements. These are:

- "the need to take into consideration the needs of present and future generations;
- the acceptance, on environmental protection grounds, of limits placed upon the use and exploitation of natural resources;
- the role of equitable principles in the allocation of rights and obligations;
- the need to integrate all aspects of environment and development; and
- the need to interpret and apply rules of international law in an integrated and systemic manner."

generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.[58]

[52] The principle of integration of environmental protection and development reflects a—

> ". . . commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations."[59]

This is an important aspect of sustainable development because "its formal application requires the collection and dissemination of environmental information, and the conduct of environmental impact assessments." (Footnote omitted.)[60] The practical significance of the integration of the environmental and developmental considerations is that environmental considerations will now increasingly be a feature of economic and development policy.[61]

[53] The principle of integration of environmental protection and socio-economic development is therefore fundamental to the concept of sustainable development.[62] Indeed economic development, social development and the protection of the

[58] Above n 54 at 8-16.

[59] Above n 46 at 263.

[60] Id.

[61] Id at 264.

[62] Above n 44 at 564; above n 46 at 263.

environment are now considered pillars of sustainable development. As recognised in the WSSD, States have assumed—

> " . . . a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels."[63]

[54] The concept of sustainable development has received approval in a judgment of the International Court of Justice. This much appears from the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* where the Court held—

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[64]

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[63] United Nations Department of Economic and Social Affairs - Division for Sustainable Development *Johannesburg Declaration on Sustainable Development* 2002 para 5, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm, accessed on 4 June 2007.

[64] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 I.L.M. 162 (1998) 200 at para 140. In a Separate Opinion, Vice-President Weeramantry held that the concept of sustainable development is part of international customary law. See Separate Opinion at 207.

[55] The integration of economic development, social development and environmental protection implies the need to reconcile and accommodate these three pillars of sustainable development. Sustainable development provides a framework for reconciling socio-economic development and environmental protection. This role of the concept of sustainable development as a mediating principle in reconciling environmental and developmental considerations was recognised by Vice-President Weeramantry in a separate opinion in *Gabčíkovo-Nagymaros*, when he said—

> "The Court must hold the balance even between the environmental considerations and the development considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development."[65]

[56] It is in the light of these developments in the international law of environment and sustainable development that the concept of sustainable development must be construed and understood in our law.

The concept of sustainable development in our law

[57] As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.

[65] Above n 42 at 204.

[58] Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.

[59] NEMA, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations".[66] This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive.[67]

[66] Section 1(1)(xxix).

[67] Section 2(4)(a) of NEMA provides:

> "Sustainable development requires the consideration of all relevant factors including the following:

[60] One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management − *batho pele*.[68] It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be "considered, assessed and evaluated" and that any decision made "must be appropriate in the light of such consideration and assessment".[69] This is underscored by the requirement that decisions must take into account the interests, needs and values of all interested and affected persons.

[61] Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social

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(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

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

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."

[68] Section 2(2).

[69] Section 2(4)(i).

development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development.

[62] To sum up therefore NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility.[70] It follows therefore that the parties correctly accepted that the Department was obliged to consider the impact of the proposed filling station on socio-economic conditions. It is within this context that the nature and scope of the obligation to consider socio-economic factors, in particular, whether it includes the obligation to assess the cumulative impact of the proposed filling station and existing ones, and the impact of the proposed filling station on existing ones. But first what are the relevant provisions of NEMA?

The relevant provisions of NEMA

[70] This principle was considered in the following cases: *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 140E-151H; *Turnstone Trading CC v Director General Environmental Management, Department of Agriculture, Conservation & Development*, case no 3104/04 (T), 11 March 2005, unreported, at paras 17-19; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at para 15.

[63] The provisions of NEMA which are relevant to this case and which were relied upon by the applicant are those that contain the national environmental management principles, the general objectives of integrated environmental management and those that deal with the implementation of these principles and objectives. The national environmental management principles that are relevant in this case are those contained in sections 2(2), 2(3), 2(4)(g) and 2(4)(i). The principles contained in these provisions, require that:

(a) "Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably."[71]

(b) "Development must be socially, environmentally and economically sustainable."[72]

(c) "Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge."[73]

(d) "The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment."[74]

[64] Section 23 which sets out the general objectives of integrated environmental management, proclaims as one of those objectives, the objective to—

[71] Section 2(2).

[72] Section 2(3).

[73] Section 2(4)(g).

[74] Section 2(4)(i).

> "identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2 . . . ."[75]

[65] Section 24,[76] which deals with the implementation of the general objectives of integrated environmental management, provides that—

> "In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on—
>
> (a) the environment;
>
> (b) socio-economic conditions; and
>
> (c) the cultural heritage,
>
> of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing the implementation of an activity."[77]

[66] The principles of NEMA that have been relied upon by the applicant must be understood in the context of the role of these principles in decisions affecting the environment, the general objectives of integration of environmental management and the procedures for the implementation of the NEMA principles.

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[75] Section 23(2)(b).

[76] In dealing with NEMA in this case it is important to bear in mind that this statute has, since its enactment in 1998, been amended. Section 24(1) was amended in 2004 to delete the reference to social, economic and cultural impacts. However, in section 23(2)(b) the general objectives of integrated environmental management were not amended. This provision proclaims that one of the general objectives of integrated environmental management is "to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage". The provisions of NEMA that are relevant to this case are those that were in force at the time when the application for authorisation was made.

[77] Section 24(1) of NEMA.

[67] NEMA principles "apply . . . to the actions of all organs of state that may significantly affect the environment".[78] They provide not only the general framework within which environmental management and implementation decisions must be formulated,[79] but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment.[80] Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment.[81] It is therefore plain that these principles must be observed as they are of considerable importance to the protection and management of the environment.

[68] Apart from these principles, NEMA contemplates the integration of environmental management activities and to this extent it outlines the general objectives of integrated environmental management. Section 23 of NEMA sets out these general objectives. These include the objectives to promote the integration of the national environmental management principles into decisions that may significantly affect the environment;[82] and to identify, predict and evaluate actual and potential impact on the environment, socio-economic conditions and cultural

[78] Section 2(1).

[79] Section 2(1)(b).

[80] Section 2(1)(c).

[81] Section 2(1)(e).

[82] Section 23(2)(a) provides:

> "The general objective of integrated environmental management is to promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment".

heritage.[83] Their apparent purpose is to minimise the negative impact on the environment and socio-economic conditions and to promote compliance with the principles of environmental management.[84]

[69] The general objectives of integrated environmental management are furthered by section 24 which deals with the implementation procedures. These require, among other things, that the potential impact on the environment, socio-economic conditions and cultural heritage of activities that require authorisation under section 22(1) of ECA and which may significantly affect the environment "must be considered, investigated and assessed prior to their implementation and reported upon to the organ of state charged by law with authorising . . . the implementation of an activity".[85] To underscore the importance of this requirement, subsection 24(7) requires that any investigation "must, as a minimum" investigate the potential impact, including the cumulative effects of the proposed development on the environment, socio-economic conditions and cultural heritage.[86] The provisions of section 24(7) must of course be

[83] Section 23(2)(b) provides:

> "The general objective of integrated environmental management is to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2".

[84] Id.

[85] See para [65].

[86] Section 24(7) provides:

> "Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure the following:
>
> (a) Investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;
>
> (b) investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions

read and understood in the light of the regulations that the Minister is empowered to make concerning the scope and the contents of reports that must be submitted for authorisation required by section 22(1) of ECA.

[70] Against this background, I now turn to consider the nature and the scope of the obligation to consider socio-economic conditions.

The nature and the scope of the obligation to consider socio-economic conditions

[71] The nature and the scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined 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, as

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and cultural heritage, and assessment of the significance of that potential impact;

(c) investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing the activity;

(d) public information and participation, independent review and conflict resolution in all phases of the investigation and assessment of impacts;

(e) reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;

(f) investigation and formulation of arrangements for the monitoring and management of impacts, and the assessment of the effectiveness of such arrangements after their implementation;

(g) co-ordination and co-operation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;

(h) that the findings and recommendations flowing from such investigation, and the general objectives of integrated environmental management laid down in this Act and the principles of environmental management set out section 2 are taken into account in any decision made by an organ of state in relation to the proposed policy, programme, plan or project; and

(i) that environmental attributes identified in the compilation of information and maps as contemplated in subsection (2)(e) are considered."

it must be, 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. But that is not all; if the proposed filling station leads to the closure of some or all of the existing filling stations, this has consequences for the environment. Filling stations have a limited end use. The underground fuel tanks and other infrastructure may have to be removed and land may have to be rehabilitated.

[72] Apart from this, the proliferation of filling stations in close proximity to one another may increase the pre-existing risk of adverse impact on the environment. The risk that comes to mind is the contamination of underground water, soil, visual intrusion and light. An additional filling station may significantly increase this risk and increase environmental stress. Mindful of this possibility, NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed.[87] The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions therefore includes the consideration of the impact of the proposed development not only in combination with the existing developments, but also its impact on existing ones.

[87] Section 24(7)(b).

[73] This approach to the scope of the obligation to consider socio-economic conditions is consistent with the concept of sustainable development under our legislation. In this regard it is necessary to refer to some of the principles of NEMA to illustrate the point.

[74] First, NEMA requires all developments to be socially, economically and environmentally sustainable. Unsustainable developments are in themselves detrimental to the environment. This is particularly true of developments contemplated in section 21 of ECA, that is, developments that may have substantial detrimental impact on the environment, such as a filling station. The proliferation of filling stations poses a potential threat to the environment. This threat arises from the limited end-use of filling stations upon their closure.[88] The proliferation of filling stations may ultimately lead to the closure of one or some of the existing filling stations. The filling station infrastructure that lies in the ground may have an adverse impact on the environment. As observed by the Supreme Court of Appeal, "[t]he environment may well be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict . . . ."[89] The inherent danger in the proliferation of

[88] The background to the Gauteng Guidelines alludes to the limited end-use of filling stations:

> "Property zoned for filling stations has limited end-use after closure. According to Gautrans' view, the property cannot have direct access to roads at the filling station access points should it be used for another purpose. Given the vast number of applications that the department received to date, it means that Gauteng would in future be sitting with 'graveyard' sites due to the legacy of the petroleum industry. The department thus has to be guided by all types of developments presently to ensure that Gauteng's environment does not exceed a level beyond which its non-renewable resources are jeopardised. Furthermore, remediation costs are high. The reuse of existing sites must therefore be considered."

[89] Above n 1 at para 17.

filling stations has led some governments to impose restrictions not only on where filling stations may be constructed, but also on the distance between filling stations.[90]

[75] Second, NEMA requires that environmental authorities place people and their needs at the forefront of their concern so that environmental management can serve their developmental, cultural and social interests.[91] The continued existence of development is essential to the needs of the population, whose needs a development must serve. This can be achieved if a development is sustainable. The collapse of a development may have an adverse impact on socio-economic interests such as the loss of employment. The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both section 24 of the Constitution and the principles of environmental management contained in NEMA.[92]

[90] The Gauteng Guidelines, for example, require a distance of three kilometres in urban areas and a 25 kilometre distance for rural areas. The imposition of distance or limitation criteria was based on a review of international approaches. The Guidelines indicate, for example, that in Dublin, guidelines have been published which indicate that new petrol stations will generally not be permitted on national roads or adjoining residential areas and will only be considered in rural areas if they are in the immediate environs of rural villages; in Singapore, existing filling stations located within one kilometre of an interchange are considered to be inappropriately located; in Germany, filling stations should only be erected on rural roads where there is a clear need and there should be 25 kilometres between filling stations; and in Denmark, drivers requiring high octane petrol will have access to a filling station within 30 kilometres.

[91] Section 2(2).

[92] Section 24(b) of the Constitution requires the environment to be protected "for the benefit of present and future generations . . . ." Section 1(1)(xxix) of NEMA defines sustainable development to mean 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."

[76] It is, therefore, not enough to focus on the needs of the developer while the needs of the society are neglected. One of the purposes of the public participation provision of NEMA is to afford people the opportunity to express their views on the desirability of a filling station that will impact on socio-economic conditions affecting them.[93] Indeed, if a development is to serve the developmental needs of the people, the impact of new developments on existing ones is a legitimate concern.

[77] Third, NEMA requires the consideration, assessment and evaluation of the social, economic and environmental impact of proposed activities. This requires the assessment of the socio-economic benefits and disadvantages of proposed activities.[94] This clearly enjoins the environmental authorities to consider and assess the impact of a proposed activity on existing socio-economic conditions which must of necessity include existing developments. Any doubt on this score is removed by section 24(7)(b), which requires an "investigation of the potential impact, including cumulative effects, of the activity and its alternatives on . . . socio-economic conditions . . . and assessment of the significance of that potential impact . . . ."[95] Subsection 23(2)(b) is to the same effect. One of the objectives of integrated environmental management is to identify the actual and potential impact on the environment and socio-economic conditions in order to minimise negative impacts.

[93] Section 2(4)(f) of NEMA provides:

> "The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."

[94] Section 2(4)(i).

[95] Section 24(7)(b).

ECA, too, contemplates that the environmental impact report will include "an estimation of the nature and extent of the effect of the activity . . . on the social and economic interests."[96]

[78] What must be stressed here is that the objective of considering the impact of a proposed development on existing ones is not to stamp out competition; it is to ensure the economic, social and environmental sustainability of all developments, both proposed and existing ones. Environmental concerns do not commence and end once the proposed development is approved. It is a continuing concern. The environmental legislation imposes a continuing, and thus necessarily evolving, obligation to ensure the sustainability of the development and to protect the environment. As the International Court of Justice observed—

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."[97]

[79] There are two points that must be stressed here. First, the Constitution, ECA and NEMA do not protect the existing developments at the expense of future developments. What section 24 requires, and what NEMA gives effect to, is that socio-economic development must be justifiable in the light of the need to protect the environment. The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer

[96] Section 26(a) of ECA.

[97] Above n 64 at para 140.

decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions.

[80] Second, the objective of this exercise, as NEMA makes it plain, is both to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit. Were it to be otherwise, the earth would become a graveyard for commercially failed developments. And this in itself poses a potential threat to the environment. One of the environmental risks associated with filling stations is the impact of a proposed filling station on the feasibility of filling stations in close proximity. The assessment of such impact is necessary in order to minimise the harmful effect of the proliferation of filling stations on the environment. The requirement to consider the impact of a proposed development on socio-economic conditions, including the impact on existing developments addresses this concern.

[81] Finally NEMA requires "a risk averse and cautious approach" to be applied by decision-makers.[98] This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary

[98] Section 2(4)(a)(vii).

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. An increase in the risk of contamination of underground water and soil, and visual intrusion and light, for example, are some of the significant cumulative impacts that could result from the proliferation of filling stations. Subsection 24(7)(b) specifically requires the investigation of the potential impact, including cumulative effects, of the proposed development on the environment and socio-economic conditions, and the assessment of the significance of that potential impact.[99]

[82] What was required of the environmental authorities therefore was to consider the impact on the environment of the proliferation of filling stations as well as the impact of the proposed filling station on existing ones. This conclusion makes it plain 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 Ordinance. It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.

[83] What remains to be considered now is whether the environmental authorities complied with this obligation.

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[99] Section 24(7)(b) of NEMA provides:

> "Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure . . . investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact".

Did the environmental authorities comply with their obligations under NEMA?

[84] It is common cause that the environmental authorities themselves did not consider need and desirability. They took the view that these were matters that must be "proven, argued and considered by the Local Council" when an application for rezoning is made in terms of section 56 of the Ordinance. As Dr Batchelor put it, these " . . . are town-planning factors which are taken into consideration by the Local Councils whenever they are confronted with an application for the change of land use either in terms of Section 56 of the . . . Ordinance . . . or an application in terms of the Development Facilitation Act of 1995."

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

[86] The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption. They misconstrued the nature of their obligations under NEMA and as a consequence failed to apply their minds to the socio-economic impact of the proposed filling station, a matter which they were required to consider. This fact alone is sufficient to warrant the setting aside of the decision.

[87] But there are further considerations which militate against the decision of the environmental authorities. 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 see it, is to apply their mind to the question of whether the 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.

[88] By their own admission therefore the environmental authorities did not consider need and desirability. Instead they relied upon the fact that (a) the property was rezoned for the construction of a filling station; (b) a motivation for need and desirability would have been submitted for the purposes of rezoning; and (c) the town-

planning authorities must have considered the motivation prior to approving the rezoning scheme. Neither of environmental authorities claims to have seen the motivation, let alone read its contents. They left the consideration of this vital aspect of their environmental obligation entirely to the local authority. This in my view is manifestly not a proper discharge of their statutory duty. This approach to their obligations, in effect, amounts to unlawful delegation of their duties to the local authority. This they cannot do.

[89] It is clear that the environmental authorities misconstrued what was required of them by NEMA. They considered that they did not have to take into account socio-economic considerations as required by NEMA. NEMA required the environmental authorities to consider the impact of the proposed filling station on socio-economic conditions and thereafter to make a decision that is appropriate in the light of such a consideration. The mandatory nature and the materiality of the requirement is manifest. The conclusion that the environmental authorities failed to comply with a mandatory and material condition for the granting of authorisation is therefore inescapable. As a result, their decision falls to be reviewed under section 6(2)(b) of PAJA as they did not comply with a mandatory and material condition set by NEMA.

[90] Here NEMA specifically enjoins the environmental authorities to consider, assess and evaluate the social and economic impact of the proposed filling station, including its cumulative effect on the environment as well as its impact on existing filling stations and thereafter to make a decision that is appropriate in the light of such

assessment. This requirement was included in NEMA to guide the environmental authorities in making a decision that may affect the environment. In these circumstances, failure by the environmental authorities to comply with this requirement did not just have "formal rather than substantive significance", as my colleague, Sachs J, suggests in his dissenting judgment.[100] In my view, it is a failure which goes to the very function that the environmental authorities were required by statute to perform; the environmental authorities failed to perform the very function which they were required by law to perform.

[91] What must be stressed here is that the question on review is not whether there is evidence that an additional filling station posed undue threat to the environment. The question is whether the environmental authorities considered and evaluated the social and economic impact of the proposed filling station on existing ones and how an additional filling station would affect the environment. Indeed it is difficult to fathom how the environmental authorities could have assessed the threat of overtrading to the environment if they did not apply their minds to this question at all. They could have established such threats if they had applied their mind to this question. They did not do so. Their decision cannot therefore stand.

[92] It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials. If that

[100] Sachs J at para [119].

is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute. It is impermissible for them to seek to avoid this consequence by delegating their obligations to the town-planning authorities. What is of grave concern here is that the environmental authorities did not even have sight of the motivation placed before the local authority relating to need and desirability, let alone read it. Section 24(1) of NEMA makes it clear that the potential impact on socio-economic conditions must be considered by "the organ of state charged by law with authorising, permitting or otherwise allowing the implementation of [a proposed] activity."

[93] Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved. Yet in other situations, it offers a principle that will facilitate the achievement of the balance. The principle that enables the environmental authorities to balance developmental needs and environmental concerns is the principle of sustainable development.

[94] There are further difficulties for the environmental authorities in relying on the prior rezoning. The record discloses that the environmental authorities had in mind the rezoning "from 'special' to 'Business 1'". This occurred sometime in 1996 or thereabout. It is however clear from the application for this rezoning that at the time,

the property in question had already been rezoned "special" for the purposes of a filling station and hotel. If this is true, then the rezoning for the purposes of constructing a filling station had been approved earlier than 1996. In other words the town-planning authorities had already considered the need and desirability of the filling station by 1996. If this is so, then there would have been no need for the town-planning authorities to consider its need and desirability in the 1996 rezoning "from 'special' to 'Business 1'". If this is so, then certain difficulties arise.

[95] The first is that reliance by the environmental authorities on the 1996 rezoning as being the occasion when the need and desirability of the proposed filling station was considered by the local authority may be misplaced, as need and desirability had been considered by then. Second, the rezoning for the purposes of a filling station was probably approved sometime in 1995, that is some six years prior to the application for authorisation and some eight years prior to the granting of authorisation under section 22(1) of ECA. Thirdly, the rezoning had taken place prior to NEMA coming into operation, a statute which establishes the principles which apply to all decisions of state organs that may affect the environment.

[96] In these circumstances, even if the environmental authorities were entitled to rely on the prior rezoning, I am of the view that it was incumbent on the environmental authorities to consider the matter afresh in the light of the provisions of NEMA. During the intervening period, a significant change in the environment could have taken place. Indeed the record indicates that further filling stations were

constructed in that period. It is significant to note that item 10(2)(i) of GN R1183 of 5 September 1997, contemplates that a decision granting authorisation in terms of section 22(1) of ECA will be valid for a limited period. This is a recognition that changes may occur in the environment after the authorisation is granted. Indeed the authorisation granted by the environmental authorities in this case is valid for two years from the date of its granting.

[97] In any event, there is no suggestion that either the town-planning authorities, or the environmental authorities applied their minds to the impact of the proposed filling station on socio-economic conditions. The scoping report was concerned primarily with the financial feasibility of the proposed filling station. In fact, it said nothing about the impact of the proposed filling station on the existing ones. In all the circumstances of this case, the environmental authorities took a narrow view of their obligations and misconstrued their obligations. As a consequence of this, the environmental authorities failed to apply their minds to the impact of the proposed filling station on socio-economic conditions.

[98] Before concluding this judgment, there are two matters that should be mentioned in relation to the duty of environmental authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the environmental authorities. The environmental authorities and Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle required these authorities to insist on

adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.

[99] In these circumstances one would have expected that the environmental authorities and Water Affairs and Forestry would conduct a thorough investigation into the possible impact of the installation of petrol tanks in the vicinity of the borehole, in particular, in the light of the existence of other filling stations in the vicinity. The environmental authorities did not consider the cumulative effect of the proliferation of filling stations on the aquifer. The Geohydrology division of Water Affairs and Forestry was content with simply stating that the developer must ensure that there is no pollution of water and that there must be monitoring as proposed in the report and in accordance with the regulations. Neither the Water Quality Management nor the Water Utilization divisions of the Water Affairs and Forestry commented on the reports as they did not receive them. They became aware of the development after both the record of decision and the appeal from it had been issued.

[100] The other matter relates to the attitude of the environmental authorities to the objection of the applicant to the construction of the proposed filling station. In the Supreme Court of Appeal they argued that the applicant's opposition to the application for authorisation was motivated by the desire to stifle competition which

was "thinly disguised as a desire to protect the environment".[101] In this regard, they pointed to the fact that the main deponent on behalf of the applicant, Mr Le Roux, owns other filling stations in the area. The Supreme Court of Appeal found that "there appears to be some merit in the contention."[102] Whatever, the merits of the criticism may be, a matter on which it is not necessary to express an opinion, an environmental authority whose duty it is to protect the environment should welcome every opportunity to consider and assess issues that may adversely affect the environment.

[101] Similarly, the duty of a court of law when the decision of an environmental authority is brought on review is to evaluate the soundness or otherwise of the objections raised. In doing so, the court must apply the applicable legal principles. If upon a proper application of the legal principles, the objections are valid, the court has no option but to uphold the objections. That is the duty that is imposed on a court by the Constitution, which is to uphold the Constitution and the law which they ". . . must apply impartially and without fear, favour or prejudice." Neither the identity of the litigant who raises the objection nor the motive is relevant.

[102] The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and

[101] Above n 1 at para 13.

[102] Id.

future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.[103]

[103] On that occasion members of the judiciary across the globe made the following statement—

> "We affirm our commitment to the pledge made by world leaders in the Millennium Declaration adopted by the United Nations General Assembly in September 2000 'to spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'".[104]

In addition, they affirmed—

> ". . . that an independent Judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law".[105]

[104] One of these principles expresses—

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[103] United Nations Environment Programme – Division of Policy Development and Law, *Global Judges Symposium on Sustainable Development and the Role of Law* - The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002, http://www.unep.org/dpdl/symposium/Principles.htm, accessed on 4 June 2007.

[104] Id.

[105] Id.

> "A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process . . . "[106]

Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.

Conclusion

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

The relief

[106] The appropriate relief in this case is to send the matter back to the environmental authorities for them to consider the matter afresh in a manner that is consistent with this judgment.

[106] Id.

Costs

[107] Then there is the question of costs. This is a case, in my view, in which the costs should follow the result. However, I do not think that the Trust and its trustees must be saddled with costs. It is true that they opposed the matter – but this was to safeguard their interests. The contest, at the end of the day, was between the applicant and the first, second and third respondents. It is these respondents who should pay the cost of the applicant while the remaining respondents who opposed the matter will have to look after their own costs. The costs payable by the first, second and third respondents must include those that are consequent upon the employment of two counsel.

Order

[108] In the event I make the following order:

(a) The application for leave to appeal is granted.

(b) The appeal is upheld.

(c) The order of the Supreme Court of Appeal is set aside.

(d) The order of the High Court is set aside.

(e) The decision of the first, second and third respondents granting authorisation for the construction of the filling station to be located on a portion of portion 1, Erf 216, Kingsview extension 1, White River, Mpumalanga, under section 22(1) of the Environment Conservation Act 73 of 1989 is reviewed and set aside.

(f) The matter is remitted to the first, second and third respondents for them to consider afresh the application for authorisation for the construction of the filling station to be located on a portion of portion 1, Erf 216, Kingsview extension 1, White River, Mpumalanga, under section 22(1) of the Environment Conservation Act 73 of 1989.

(g) The first, second and third respondents are ordered to pay the applicant's costs including the costs incurred in the courts below, which includes the costs consequent upon the employment of two counsel.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Nkabinde J, O'Regan J, Skweyiya J, and Van der Westhuizen J concur in the judgment of Ngcobo J.

SACHS J:

[109] It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights[1] comes not from concerned

[1] Section 24 provides as follows:

"Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

ecologists but from an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.

[110] The brief dissent which follows is accordingly not based on factors related to the motivation of the applicant, but rather on how I believe the relevant law should be applied to the facts of this case. In this respect I would like to associate myself with the eloquent and comprehensive manner in which Ngcobo J highlights the importance of environmental law for our society and establishes the legal setting in which this matter is to be determined. I also support the way in which he alerts the Department of Water Affairs and Forestry to its legislative responsibilities in this area. I agree with his conclusion that it was not appropriate for the authorities simply to rely on an earlier zoning decision by the Council. They should indeed have looked at the matter more broadly and in a more up-to-date manner. Where I part ways with his judgment is in regard to the materiality of that failure.

[111] Section 6(2) of the Promotion of Administrative Justice Act[2] authorises—

> "[a] court or tribunal . . . to judicially review an administrative action if—
>
> . . .

> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[2] Act 3 of 2000.

(b) a mandatory *and material* procedure or condition prescribed by an empowering provision was not complied with". (My emphasis.)

As Hoexter observes:

> "It would of course be delightfully simple if the failure to comply with mandatory provisions inevitably resulted in invalidity while ignoring directory provisions never had this consequence, but the reality is not so clear-cut. From our case law one sees that some requirements classified as 'mandatory' need not, in fact, be strictly complied with, but that 'substantial' or 'adequate' compliance may be sufficient. The reference in the PAJA to a 'material' procedure or condition may indeed be read as recognising this."[3] (Footnote omitted.)

She goes on (correctly in my opinion) to support an approach which she believes sensibly links the question of compliance to the purpose of the provision,[4] and quotes from *Maharaj and Others v Rampersad* where Van Winsen AJA stated the following:

> "The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with [the] injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction *the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance.*"[5] (Her emphasis.)

[3] Hoexter *Administrative Law in South Africa* (Juta & Co Ltd, Cape Town 2007) at 262.

[4] Id at 263.

[5] 1964 (4) SA 638 (A) at 646C-E.

She notes with apparent approval the suggestion that this approach shows a trend away from the strictly legalistic to the substantive.[6]

[112] It seems to me that while the majority judgment did not find it necessary to evaluate the facts because a mandatory procedure was not complied with, if the evidence before the Court suggests that the failure was not of a material nature, it should not lead to the decision being set aside. In my view the facts in the present matter as available from the record do not establish that having a competitor to the filling stations owned by an Executive Member of the applicant[7] posed any measurable threat to the environment that needed to be considered. On the contrary, the facts reveal that all the ordinary environmental controls were in place and that any potential deleterious effect of possible over-trading was speculative and remote, in a word, makeweight.

[113] As I analyse the evidence, the procedural default could have had little bearing on the overall nature of an enquiry framed by the principles and objectives of the National Environmental Management Act (NEMA).[8] Running right through the preamble and guiding principles of NEMA is the overarching theme of environmental

[6] Hoexter above n 3 at 263 quoting Van Dijkhorst J in *Ex Parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T); [1996] 2 All SA 342 (T) at 1138D/E-E. See too Olivier JA in *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA); [2002] 2 All SA 482 (SCA) at para 13. The importance of avoiding a narrowly textual and legalistic approach was underlined by this Court in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at para 25.

[7] The Executive Member owns two filling stations in the White River area and had an interest in a third at the time of instituting proceedings in the High Court.

[8] Act 107 of 1998.

protection and its relation to social and economic development.[9] This theme is

[9] See in particular the long title and preamble. The long title makes it clear that NEMA was adopted "[t]o provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment". The preamble reads as follows:

> ". . .
>
> WHEREAS . . . sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;
>
> everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> prevent pollution and ecological degradation;
>
> promote conservation; and
>
> secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;
>
> . . .
>
> AND WHEREAS it is desirable—
>
> that the law develops a framework for integrating good environmental management into all development activities;
>
> . . .
>
> that the law should establish principles guiding the exercise of functions affecting the environment;
>
> . . . ."

Section 1(1)(xxix) defines "sustainable development" 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".

Section 2, which establishes national environmental management principles, provides that—

> "(1) The principles set out in this section . . .
>
> . . .
>
> (b) serve as the general framework within which environmental management and implementation plans must be formulated;
>
> (c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
>
> . . . ."

The section further provides that—

> "(3) Development must be socially, environmentally and economically sustainable.
>
> (4) (a) Sustainable development requires the consideration of all relevant factors including the following:
>
> (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
>
> (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

repeated again and again. Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection.[10] It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be

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(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

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

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

(b) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option."

The "best practicable environmental option" is defined in section 1(1)(iii) as "the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term".

[10] See Segger and Weeramantry (eds) *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers, Leiden 2005) at 2 where it is stated that—

> "It [sustainable development] identifies an imperative to meet the development needs of the present and future equitably, and to simultaneously meet environmental needs. Sustainable development provides a 'conceptual bridge' between the right to social and economic development, and the need to protect the environment. Accommodation, reconciliation and integration are emphasised."

At 561 it is stated that "[f]or sustainable development to be realised, there must be better accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection."

weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms.[11] Economic sustainability is thus not part of a check-list that has to be ticked off as a separate item in the sustainable development enquiry. Rather, it is an element that takes on significance to the extent that it implicates the environment. When economic development potentially threatens the environment it becomes relevant to NEMA. Only then does it become a material ingredient to be put in the scales of a NEMA evaluation.

[114] In the present matter the evidence does not indicate that opening a new filling station would pose or suggest any undue threat to the environment. On the contrary, the relevant environmental authorities made a finding to the effect that environmental criteria were met. First the High Court and then the Supreme Court of Appeal rejected challenges made to this finding, and in this Court the applicant chose not to continue with its earlier attacks on it. Furthermore, the feasibility study indicated that the project appeared to be economically sustainable. As the Supreme Court of Appeal pointed out, any suggestion of a future graveyard of disused filling stations was purely hypothetical. I might add that though the precautionary principle is an important one,

[11] Id at 8:

> "Social, environmental and economic developments can overlap, or even conflict. When they do, they are not sustainable. As witnessed in recent years, public protests and global tensions, popular struggles against the privatization of essential services, against new rules for trade and investment liberalization, against decisions of international financial institutions, are centered on this concern. Economic laws and policies which do not take social and environmental elements into account are unlikely to be successful in a democratic society. Similarly, environmental laws that ignore social and economic realities, and social laws that violate environmental or economic principles, can waste valuable political and material resources, also leading to failure. The need for a balanced integration of socio-economic development and environment priorities and norms permeates international law and policy on sustainable development."

particularly in relation to a potentially hazardous product such as petrol, it has little application where the threat to the environment is remote and any possible damage would be containable. We must accordingly proceed on the assumption that the normal question of sustainable development does not arise, that is, that this case does not require us to decide whether on balance the gains made in socio-economic development by opening up a new enterprise could appropriately permit a certain degree of negative impact on the environment.[12]

[115] What the applicant's argument ultimately boiled down to was that the risk of overtrading was real and that this was an economic factor that should have been taken into account when the question of sustainable development was being considered. Absent some consequent threat to the environment, however, the question of possible overtrading is not one which I believe the decision-makers in this matter were called upon to consider.

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[12] See Birnie and Boyle (eds) *International Law & the Environment* 2 ed (Oxford University Press Inc, New York 2002) at 86:

> "Sustainable development contains both substantive and procedural elements. . . . They include the sustainable utilization of natural resources; the integration of environmental protection and economic development; the right to development; the pursuit of equitable allocation of resources both within the present generation and between present and future generations (intra- and inter-generational equity), and the internalization of environmental costs through application of the 'polluter pays' principle."

See also *People United for Better Living in Calcutta — Public and Another v State of West Bengal and Others* 1993 AIR Calcutta 215, quoted in Segger and Weeramantry above n 10 at 50, where Benerjee J stated:

> "While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development but no environment, which would result in total devastation, though, however, may not be felt in presenti but at some future point of time, but then it would be too late in the day, however, to control and improve the environment."

In the present matter the opening of a new filling station would in reality suggest economic development providing employment for several persons at no apparent environmental cost. Any potential social cost as a result of competition is purely speculative.

[116] In my view, commercial sustainability only becomes a relevant factor under NEMA when it touches on actual or potential threats to the environment. Thus, if there were a genuine risk that the introduction of a new industry would be ruinous to traditional forms of livelihood, thereby dramatically changing the character of the neighbourhood, that could be a significant socio-economic environmental factor. Similarly, if there were a real prospect of the landscape ending up as a disfigured and polluted graveyard replete with abandoned petrol tanks not easily removed, that would certainly require attention.

[117] Conversely, if some damage to the environment were to be established, the economic sustainability of a proposed economic enterprise could be highly relevant as a countervailing factor in favour of a finding that on balance the development is sustainable. Thus, an enterprise that promised long-term employment and major social upliftment at relatively small cost to the environment, with damage reduced to the minimum, could well be compatible with NEMA. On the other hand to allow a fly-by-night undertaking either to spoil a pristine environment, or to use up scarce resources, or to introduce undue health hazards, will probably be in conflict with NEMA.

[118] But there is no evidence, above the level of speculation, that the arrival of a new kid on the block doing the same business in the same way in competition with existing filling stations would give rise to the risk of unacceptable degradation either to the physical environment or to the socio-cultural environment. I am therefore not

persuaded that the principles of sustainable development are engaged in this matter at all. The objective of NEMA, after all, is to preserve the environment for present and future generations, and not to maintain the profitability of incumbent entrepreneurs.

[119] For these reasons, I would not set aside the determination of the decision-makers. In substance the decision-makers considered the factors to which NEMA required them to pay attention. Though the Fuel Retailers Association raised an objection that had technical merit, the failure by the decision-makers was innocuous as far as the environment was concerned and had formal rather than substantive significance. In my view the High Court and the Supreme Court of Appeal got it right in dismissing the applicant's challenge to the decision authorising the new filling station. I would accordingly refuse the appeal and uphold the decision of the Supreme Court of Appeal.

For the Applicant:	Advocate MC Erasmus SC and Advocate J De Beer instructed by Swanepoel and Partners Inc.
For the First to Sixth Respondents:	Advocate J Du Plessis and Advocate SP Mothle instructed by the State Attorney, Pretoria.
For the Eighth to Twelfth Respondents:	Advocate MM Rip SC and Advocate CM Rip instructed by De Swart Vögel and Mahlafonya.