

**CRITICAL ANALYSIS OF ENVIRONMENTAL IMPACT ASSESSMENT
AS A PREREQUISITE FOR DEVELOPMENTAL PROJECTS IN SOUTH
AFRICA**

by

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DECLARATION BY STUDENT

I, Kalembo Marble Bore hereby declare that, this mini-dissertation submitted to the University of Limpopo for the Degree of Masters of Laws in Development and Management Law, has not been previously submitted by me for a degree at this university or any other university, and that it is my work, and that all materials contained herein have been duly acknowledged.

MS. Kalembo Marble Bore

Signed on _____ day of _____ 20 ____ at _____

DEDICATION

To my mother Jerminah Kalembo, you are always a source of inspiration to me. I pray that God bless you with many healthier years to enable you to witness all your children and grandchildren's successes.

To my late father, Simon Mahlape Kalembo, I wish you were still alive to witness your lovely daughter's achievements. I will forever be grateful for the way you raised me to be ambitious, confident, so I can stand strong among the mountains. You remain engraved in my heart, I will always love you even in death. May your soul continue to Rest in Peace.

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To my friend Germina Ramolefo, thank you for being there for me when I needed a shoulder to lean on, and guidance, especially during the height of the pandemic lockdown, "Never above you, never below you, always beside you".

Special dedication to my niece Katlego Mabore Kalembo, when you grow up, my strongest wish is that you achieve more than I did. Always remember that with education and hard work anything is possible. I believe in your intelligence and capability; and continue to pray that you do well in life. As I write this now you are only 6 years old, and so this is for your future reference.

To ANCYL Milo Malatjie branch, thank you for the opportunity to exercise a leading role and preach access to high-quality education. Like our slogan says "Learn, Fight and Produce Comrades". We can learn and fight at the same time comrades.

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Let me end by quoting the world icon of all time *uTata* Nelson Mandela when he said "It always seems impossible until it's done".

Acronyms

EIA- Environmental Impact Assessment.

EMP-Environmental Management Plan.

ECA- Environmental Conservation Act.

NEMA- National Environmental Management Act.

MPRD- Mineral and Petroleum Resource Development Act.

NEM:WA- National Environmental Management Waste Act.

NEM:QA- National Environmental Management Quality Act.

UNFCCC- United National Framework Conservation on Climate Change.

UN-United Nation.

CC- Constitutional Court.

SCA- Supreme Court of Appeal.

Abstract

An Environmental Impact Assessment (EIA) is an environmental tool used to assess possible and expected adverse impact that might occur as a result of a proposed developmental project, in a vulnerable area and environment. All project developments must be socially, environmentally and economically sustainable. For any such projects to be sustainable, Environmental Impact Assessment must be conducted as a prerequisite for the development of the projects. This must be done in compliance with environmental legislation, to ensure that proposed developments benefit current and future generations, while at the same time protecting the environment. Environmental degradation must be minimized, where possible prevented for environmental protection, and sustainability.

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CHAPTER ONE BACKGROUND

1. INTRODUCTION

An Environmental Impact Assessment (EIA) is an environmental tool that is used to assess any possible and expected adverse impact that might occur as a result of developing a project in a vulnerable area and environment.¹ The EIA enables competent authorities to make informed decisions about giving proposed projects go ahead after such an assessment is conducted. The Environmental Impact Assessment of any area earmarked for a developmental project continues up to the last stage, where Environmental Authorization is determined, an Approval or Disapproval is issued. This indicates that the proposed development may go ahead or not. Scheepers² defines development “as a people-centered process of change depending for its ultimate success on the capacity of people to manage the process through a variety of critical steps and phases within the limits of an institutional and value framework that will guarantee meaningful and lasting improvement of quality of life for all in a peaceful, stable and well-governed environment”. This study is of a view that indeed development must be about the people and that any developmental project that affect the people must take place according to legal prescripts and framework to ensure sustainability that will improve their livelihood in a safe and healthy environment. This entails that development must put people first by considering the wellbeing of the people and improve livelihood by creating platforms through institutionalized frameworks that will foster development that is sustainable and beneficial to all.

As much as development is crucial, it needs to happen in an environmentally sustainable way. Mafunganyika argues that sustainable development makes it easy for the implementation of the developmental project while at the same time protecting the environment, by ensuring that competent authorities and project developers consider environmental issues when implementing proposed development projects.³ When the

¹ Department of Environmental Affairs, ‘20 Years of Environment Impact Assessment in South Africa’, <https://www.environment.gov.za/site/default/files/publications/EIAbook>.

²Theo Scheepers, ‘Practical Guide to Law and Development in South Africa.’ (Juta & CO 2000), p8.

³Dudzile Grace Mafunganyika, ‘The Right to Development versus Environmental Protection in South Africa,’ (Master’s Dissertation, University of Limpopo 2009).

EIA process was introduced in the 1960s, as a mechanism to deal with rapid development in a fast growing and changing world, more emphasis was placed on environmental considerations in the decision making on every proposed development that might potentially harm the environment.⁴ Development must ensure a balance of the social, environmental and economic factors⁵ to be considered sustainable as per section 2(3) of the National Environmental Management Act 107 of 1998 (NEMA). The Act aimed at providing a legal framework to ensuring that South Africa achieves sustainable development through environmental protection and inclusion of stakeholders in decision making.⁶ EIAs predict and manage the environmental consequences of development activities.⁷ At times EIA is perceived as an obstacle for development because of the length of the due process that must be followed and completed to the end, which often results in delays. The process includes first checking if the proposed project falls under the listed activities. This helps to determine whether EIA is needed or not. If needed, the developer would be required to hire the services of professional environmental consultants to carry out the whole EIA process. The process includes identifying potential environmental damage resulting from the proposed project, a thorough assessment of any possible environmental impact from various perspectives, and conducting public participation.

Once all these processes are completed to the end, the environmental practitioner may then submit the complete EIA report to the relevant competent authority, and apply for authorization. The competent authority then reviews all the work done to ensure compliance, before making the final decision to approve or disapprove the EIA report. These processes are necessary to ensure compliance, and to grant environmental authorization while ensuring that such development is sustainable. However for EIA to achieve its desired outcomes due processes must be followed to the end.⁸ One of the

⁴ Karma El-Fadl, and Mutasemel El-Fadel, 'Comparative Assessment of EIA systems in MEMA counties: challenges and prospects', (2004) 24 *Journal of Scientific Research*. 553-593. <https://www.zora.uzh.ch> accessed 18/05/2020.

⁵Cele Sinethemba Charity, 'Exploring post-authorisation follow-up and EIA effectiveness in South Africa: case studies from Kwazulu-Natal', (Unpublished Master' Dissertation, University of Kwazulu-Natal 2016).

⁶Section 2(3) of National Environment Management Act 107 of 1998.

⁷John O Kakonge, 'Environmental Impact Assessment and good governance: Issues and lessons from Africa', (1998) 18 *Environmental Impact Assessment Review*, 289-305.

⁸ Department of Planning, Monitoring & Evaluation, 'The National Evaluation Plan2016/2017', <https://www.dpme.gov.za> accessed 18/11/2020

reasons for implementing the EIA as per National Environmental Management Act is to counteract the problem of environmental degradation and mitigate it where necessary.⁹ Such mitigation would include amongst others, prohibiting commencement of the project until approval, implementation of an alternative solution, imposition of fines and/or criminal sanctions, enforcing regulation on the proposed project, to effect the government's orders.

2. RESEARCH METHODOLOGY

The research methodology utilized in this study is Qualitative research. The research relies mainly on library material, which includes textbooks, archived reports, legislation, regulations, charters, policies, journals, government gazette, amendments to the legislation, the Constitution of Republic of South Africa 1996, national and international instruments.

3. BACKGROUND TO THE STUDY

During the apartheid era, the South African environmental regime was regulated according to the Environment Conservation Act of 1989.¹⁰ The ECA proved to be less effective as it did not include a whole range of issues and activities that adversely affect the environment, and proposed mitigation that could help eliminate or minimize any such negative impact on the environment. ECA concentrated on the conservation of the environment, but excluded stakeholder's participation and it did not consider the social and economic factors. It did not align with sustainable development, and lacked the legal basis to enforce environmental protection.

During the 1980s and early 1990s, many countries globally started to have an interest in EIA, which formed part of environmental statutes that resulted in many countries such as South Africa in the 1990s and 2000s making EIA became a prerequisite for proposed development activities. It was only after the late 1990s that the EIA occupied center stage in all environmental affairs or related matters. In post the first democratic election in 1994, the South African government started to embark on programmes aimed at improving the

⁹*Ibid.*

¹⁰Environmental Conservation Act 73 of 1989.

livelihood of the majority of South African citizens.¹¹Such programmes were aimed at realizing socio-economic rights in line with development. The 1994 democratic elections ushered in positive changes such as the inclusion of the Bill of Rights in the new Constitution, to address environmental issues. In The Bill of Rights, section 24 provides environmental rights, which simply grant the citizens an environment that is protected and not harmful to their health and their wellbeing.

NEMA was promulgated in 1998 to give effect specifically to section 24(b) of the Constitution, which enables formulation of reasonable measures and legislative framework to protect the country's environment. NEMA is a South African legislative framework that governs the EIA regime, and regulates the implementation of the EIA process. The EIA is regarded as a systematic process that integrates the social, economic and environmental factors to achieve sustainable development. The EIA in South Africa is a key regulatory instrument designed to mitigate the impact of any new developments and activities that may hold the potential to negatively affect the right to a healthy environment that is not harmful to everyday well-being.¹² In 1997 South Africa introduced EIA as a mandatory procedure for a large range of projects, through the Environmental Conservation Act which has now been replaced by the NEMA.¹³

For example, Polokwane Municipality approved the General Plan for the township establishment of extension 29 commonly known as Emdo Pak in 1996.¹⁴ Emdo Park is a middle-class township that is predominantly black. Many black professionals or middle class blacks opted to reside in Emdo, for access to better infrastructure, improved service delivery, and closer proximity to places of employment and other facilities. Emdo Park is located 3km from Polokwane city. It is a township along the R567 road to Seshego and the Dendron road. Polokwane Waste Water Plant was constructed in the 1950s, designed

¹¹White Paper on Reconstruction and Development Programme (1994).

¹²Ibid

¹³Ibid

¹⁴Polokwane Municipality General Plan, 1996.

with a running capacity of 28 megalitres of effluent, but now has to deal with 60 megalitres per day.¹⁵ The Wastewater treatment plant is within a 2km radius of Emdo Park.

The plant now services Emdo Park plus residences within the vicinity. The challenges arose from continuous settlement development, necessitated by population growth from urban expansion. As a result, the overwhelmed plant now emits a strong unpleasant odor, which has seriously affected the health of residents of Emdo Park. In 2019 Polokwane Municipality appointed a service provider to conduct an assessment of the different processes at the plant. The major issue identified was the insufficient supply of the Oxygen required in the oxidation ditch caused the smell. Following the finding, the municipality undertook a project to upgrade the aeration system, to improve the process of Oxidation, which has resulted in a lot of improvement in the final treated water, and significantly reduced the presence of the unpleasant smell from the plant. With the increase in population in the city and urban edge, the water waste treatment plant remains overloaded. The municipality is presently working on the construction and upgrading of the bulk sewer lines, to collect excess wastewater from the current wastewater plant. This is being done to reduce the excess loading on the existing wastewater plant at Emdo Park, and to cater for future demands.

4. PROBLEM STATEMENT

South Africa is one of the most advanced economies in Africa, with extensive progressive policies, and legislation developed to deal with environmental protection and conservation.¹⁶ However, South Africa being a heavily industrialized economy, is inundated with various environmental problems. For example, in the Energy industries, Petrochemical companies like Sasol oil refinery, Eskom's power plants, have all been identified as major contributors to air pollution. In the mining industry many companies have been accused of polluting water resources. EIA has been around and practiced

¹⁵ Nelie Erasmus, 'City's Sewage Plant a Stinking Timebomb', (*Review online*, 29 July 2018). <https://reviewonline.co.za/26981/citys-sewage-plant-a-stinking-timebomb/>

¹⁶ Lorrett Feris, '*Sustainable Development in Practice*', Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Other 2007 (6) SA 4(CC) Constitutional Review 235.

since the 1980s, however at the time of inception it did not incorporate any legal obligations, or consequences for non-compliance. Despite South Africa's long history of environmental management, the degradation of the environment continues, causing irreparable damage to the environment and unsustainable development.¹⁷ This is a violation of section 24 of the Constitution, therefore an EIA process must be implemented to mitigate any adverse environmental impact from proposed developments.

Although legislations to protect the environment are in place, some perpetrators continuously attempt to circumvent the environmental laws, as evident in the landmark case between the *State v Stefan Frylinck and Mpofu Environmental Solutions*, an environmental assessment practitioner from a consulting firm Mpofu Environmental Solutions. Stefan Frylinck was charged with fraud, for concealing important information about sensitive environmental issues to Competent Authorities of the Department of Economic Development and Environmental Affairs (DEEA), in an effort to sway the EIA decision in favor of the client. He was later found guilty by the court of law for providing competent authority with misleading and incorrect information.¹⁸ EIA can be vital during the planning process, and if properly carried out, can minimize environmental degradation. EIA is of vital importance because the well-being of humans is closely connected to environmental sustainability, as a result, all forms of infrastructural development such as roads, mines, pipelines, hydroelectric dams, and establishments of residential areas have a huge impact on the surrounding environment and people's livelihoods. For example, the community of Emdo Park residential area, who live close to a water waste treatment plant, thus often have to put up with an awful waste smell from the plant, argues that had there been a proper Environmental Impact Assessment conducted before the residential development, the local authority would have been aware of the potential challenges of building residences in such close proximity to the water waste treatment plant.

Development projects must be formulated based on environmental soundness. This can assist in ameliorating potentially negative environmental impact or degradation. This

¹⁷ Pretorius Hester Magdalena, 'The quality of environmental impact reports in the North West Province, South Africa', (Masters Dissertation, University of North West, 2006).

¹⁸ Case no 14/1740/2010 North Gauteng Regional Court. see also *Chauke Vumbhoni, 'Critical analysis of the law on the duty of care to the environment in South Africa: Challenges and Prospects'*.

study looks at the importance of conducting EIA as a prerequisite for developmental projects in South Africa, and the need for the government to ensure that compliance is achieved throughout South Africa.

5. AIM OF THE STUDY

The aim is to examine the effectiveness and efficiency of the existing law in ensuring that before any project is undertaken, the necessary EIA is carried out before authorisation can be issued for the commencement of the project.

6. OBJECTIVE OF THE STUDY

The objective of this research is to ensure that before any developmental project is carried out, all laws on EIA are diligently complied with and adhered to in order assess the impact that the project will have on the environment. If the findings show that the development would ravage the environment, then a decision has to be made to decline authorisation, and immediately stop commencement of the project.

7. LITERATURE REVIEW

One of the key measures of ensuring that development is sustainable in South Africa is through the application of EIA to any proposed developmental projects, as per NEMA. EIA is specifically targeted toward planned future development activities. It assists environmental practitioners in investigations of any development activities that might potentially cause environmental degradation, or be detrimental to the receiving environment. In addition, to ensure that if need be precautionary measures are put in place to mitigate the situation.¹⁹ EIA as Noble²⁰ noted that the underlying concept of EIA is quite simple, being to identify, assess any possible degradation, and find ways to minimize the potential possible impact of such proposed action on the environment, and

¹⁹Tumai Murombo, 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment, *EIA, Law and Sustainable Development*, (2008) 11, *Potchestroom Electronic Law Journal* 108-112. www.scielo.org.php?script=sci_arttext&pid=s1727-37812008000300006 accessed 24/08.2020.

²⁰ Bram F Noble, '*Introduction to Environmental Impact Assessment: A Guide to Principles and Practice*' (3rd eds, Oxford University Press 2015) 321.

the livelihood of the people. Glasson et al²¹ also noted that EIA can assess the potential environmental effects a proposed development project might have, and ensures that they are mitigated in advance before they can cause harm or be detrimental.

In the landmark case, *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and others*, the applicant Earthlife Africa Johannesburg raised concerns about the environmental impact of the decision to build a 1200mw coal near Lephalale in the Limpopo Province. Department of Environmental Affairs gave Thabametsi environment authorization to build a power station without adequately considering the impact of climate changes on the project. The court held that it was important that consideration be given to the impact the development project would have if it operated until the year 2026. The court held that Earth life Africa Johannesburg was correct in stating that the Minister should have given due consideration to the power station's impact on climate change, before making the decision to authorize it. The review authorized by the Minister effectively ignored climate change, and therefore the court held the decision to be legally invalid.²² The implementation of EIA makes it possible to investigate, assess and evaluate consequences likely to arise from a developmental project, which can extensively affect the quality of human health and the environment. This is important for strategic planning, it gives the opportunity to manage any adverse effects, thus protecting the environment as implementation of development proceeds. To this end, EIA provides a mechanism for evaluating the feasibility of development proposals, and for indicating alternatives. EIA has the potential to lead to reformulation and reconsideration of certain development proposals, based on the emphasis placed upon mitigation of any particularly harmful effects likely to arise.²³ *In Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*,²⁴ *Bp South Africa (PTY)*, the case deals with violation of section 28(1), which imposes a duty on all persons found to have caused, or may cause significant environmental degradation to take reasonable measures to avoid such degradation or pay the cost.

²¹ John Glasson, Riki Therivel and Andrew Chadwick, *'Introduction to Environmental Impact Assessment' (4th eds, Routledge 2012)*.

²² 2005(3) SA 156(C).

²³ Al-Kailand MaramMosleh, *'Evaluation of Environmental Management and Impact of Development in Aqaba' (Masters Dissertation, University of London 2008)*.

²⁴2019 (2) SA 881 (GP).

Uzani instituted a private prosecution through section 33 of NEMA, against Bp, for constructing and/or upgrading fuel retail filling stations and facilities, which form part of listed activities which require impact assessment and the necessary regulatory approvals. BP made an *ex post facto* application after the commencement of the project. It was found that BP commenced listed activities related to upgrades of filling stations without environmental authorization as required by NEMA. BP Southern Africa (Pty) Ltd was found guilty despite having applied for an *ex post facto* authorization.²⁵ Understanding the future consequences of human action requires consideration of two key aspects, which are the nature of development, and the nature of the receiving environment where the development will take place, this will bear the brunt of the consequences. EIA must never be seen as a barrier for developmental projects. However, it must be seen as a vital tool designed to foster sustainable developmental projects.

A very well-executed and implemented EIA process has the capability of detecting potential harm and benefits that any proposed development project may have on the environment, which can contribute to having sustainable development.²⁶ Development activities must not only be seen by prominent developers to be sustainable, but must also be viewed positively by those communities at the receiving end, that such proposed developments are indeed sustainable. While development brings positive change to the quality of life of any given community, such development must be sustainable and enjoyed by all. This implies that any development that takes place in the environment must be sustainable development geared to benefit the current and protect future generations. The balancing of social, environmental, and economic needs of a nation, are important and form part of the environmental law regime in South Africa, aimed at reducing environmental degradation, as it's the main aim of NEMA, to achieve sustainable development in South Africa.

²⁵Ibid

²⁶Mosaferi et al., 'Environmental impact assessment of Hadishar industrial Town: a case study', *Journal of Civil and environmental Engineering*, 42(2): 97-103.

8. DEFINITION OF KEY CONCEPTS

Environmental Impact Assessment (EIA)

Environmental Impact Assessment is defined as a process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of proposed projects and physical activities before major decisions and other relevant effects of proposed projects and physical activities before major decisions and communication being made.²⁷

Environmental Authorization

According to NEMA, environmental authorization means “the authority by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorization contemplated in a specific environment management Act.”²⁸

Development

In terms of the NEMA development means “the building, erection, construction or establishment of a facility, structure or infrastructure, including associated earthworks or borrow pits, that is necessary for the undertaking of a listed or specified activity, but excludes any modification, alteration or expansion of such a facility, structure or infrastructure, including associated earthworks or borrow pits, and excluding the redevelopment of the same facility in the same location”.²⁹

Developmental Projects

Projects that bring about positive change aimed at improving the life and livelihood of those who will be affected by such projects.

Developers

Developers can either be a natural or a juristic person who initiates or proposes development, which brings about positive change to the livelihood of ordinary people.

²⁷ Barry Sadler, 'Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance, International Study of the Effectiveness of Environmental Assessment' (1996) *Canadian Environmental Assessment Agency*.

²⁸ Environmental Management Amendment Section 1(f) of Act 62 of 2008.

²⁹ Environmental Impact Assessment Regulation 3 of 2014.

Sustainable development

Sustainable development according to NEMA means "the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generation".³⁰

Odour

Odour is a distinctive smell, especially an unpleasant one.³¹

Environment

Environment means the surroundings within which humans exist and that are made up of, a. the land, water and atmosphere of the earth; b. micro-organism, plants and animal life; c. any part of the combination of (i) and (ii) and the interrelationships among and between them and d. the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.³²

9. DEVELOPMENTAL PROJECTS AND THE CONCEPT OF DEVELOPMENT

9.1. Developmental Projects

Development project means a project aimed at bringing a positive impact to the livelihood of people and improves infrastructures such as construction, buildings, land redevelopment, transportation facilities and other facilities. Developmental projects are developmental and aimed at bringing positive change and an improved standard of living. EIAs are mostly applied to developmental projects that have an adverse impact, or can be detrimental to the environment. With that being said, it implies that EIA is a prerequisite for developmental projects. Developmental projects may contain a single transformative plan aimed at addressing distinct problems. The goal of developmental projects is to help

³⁰Ibid.

³¹ South African Oxford Secondary School Dictionary, Oxford University Press.

³²Ibid.

improve people's livelihood and contribute significantly to a community's socio-economic development.

It is imperative to involve all relevant stakeholders or beneficiaries of any proposed development projects in the early stages of Environmental Impact Assessment, before the project is implemented to avoid future irreversible problems.³³ The concept of public participants is aimed at ensuring that those who are affected by the intended developmental projects are involved in the planning and implementation phases of those projects from the onset. In this regard EIA is vital for the success of development projects as it aims at addressing any complaints and issues by including public participation, in identifying those activities which may be detrimental to the environment and thus make provision to mitigate them. EIA is designed to predict at an early stage any adverse effects of a proposed development, on the receiving environment, to enable the developer to find a way of minimizing the negative impact, thus realign the projects to suit the local environment, and also offer options to the decision-makers.³⁴ The need to conduct EIA prior to starting any developmental projects derives from the fact that normally proposed development projects inevitably cause environmental degradation, which always ends up affecting the livelihood of those communities depending on it.

Developmental projects are mostly aimed at improving the quality of life, provide better infrastructure and living conditions of all people, as well as to benefit present and future generations. The primary objective of carrying out an EIA is to assess the environmental consequences of all proposed activities. Therefore, this is an essential tool in the bid to reduce and prevent pollution, and ecological degradation. As such, competent authorities must ensure that it is enforced.³⁵ In *Government of South Africa & other v Grootboom & other*,³⁶ the court emphasized that all the rights in the Bill of rights were important and mutually supporting. When it comes to socio-economic rights, the State must ensure the

³³Rodolfo Sile, 'Fundamentals of Project Management for Development Organizations', (2eds Paola Diaz 2010).

³⁴ Barry Sadler, 'Environmental Assessment and Development Policymaking', In Goodland, R Edmundson V. (eds). Environmental Assessment and Development, World Bank, Washington DC, 3-19.

³⁵Romola Adeola and Frans Viljoen, 'Climate Change Development Project and Internal Displacement in Africa', *Journal African Law*, Published on line by (Cambridge University Press 2018), <http://www.cambridge.org/core/journal-or-africa-law/article/abs/climate-change-development-projects-and-internal-displacement-inafrica/> accessed by 21/12/2020

³⁶2001 (1) SA 46 (CC) para 45.

progressive realization of those rights related to developmental activities, as laid out in the Bill of Rights. Competent authorities and developers must ensure that in the implementation of development projects, all related developmental activities are socially and economically sustainable, while ensuring environmental protection. NEMA is an environmental framework in which development projects are established in a sustainable manner, taking into account their possible adverse impact on the environment.³⁷ In order to understand developmental projects, one also needs to understand what development is.

9.2. Concept of Development

Development is a people-centered process aimed at bringing a positive change in the livelihood of communities, through improved standard of living, and better quality of life for all the people, in a peaceful, stable and well-governed environment.³⁸ Today the concept of development is more vital as it takes into account the issue of environmental protection.³⁹ According to The World Commission on Environment and Development, development and environment are inexorably interlinked, development cannot take place upon a degraded environment and the environment cannot be protected where development leaves out the protection of the environment.⁴⁰

9.2.1. Traditional View of development

In terms of this view, development brings about economic growth which should benefit the people, through projects such as infrastructural development, industrialization of the economy, the building of health facilities, schools, roads, and provision of water and electricity.⁴¹ However this view is restrictive, as it focuses more on the betterment of material well-being, regardless of other supervening factors. Factors such as the environmental and social implications of a project are not at the core of this view.

³⁷Elmene Bray, 'Towards Sustainable Development: Are we on the Right Track?' (1998) 5 *SA JELP* 1-20.

³⁹Ruth Gordon & Sylvester, 'Deconstructing development', (2004) 22 *Wisconsin International Law Journal*, 1-98, 53.

⁴⁰Brund *Report of the World Commission on Environment and Development*.

⁴¹Daniel Bradlow, 'Differing Conceptions of Development and the Content of International Development', (2005) 21 *SAJHR* 47.

9.2.2. Modern view of Development

Bradlow states that “when conducting developmental projects the harmful nature of such projects and the ability of the environment to sustain human societies must be carefully considered”.⁴² This implies that any activity that might be detrimental effect to receiving environment and stakeholders must be seriously taken into consideration if need be mitigated. The modern view of development describes the development as an economically, politically, socially and environmentally integrated process. The modern view is included in section 2(3) of the NEMA, it provides that development must be socially, environmentally and economically sustainable. The modern view of development demands a more participatory form of decision-making than the traditional view.⁴³

9.3. Sustainable Development

South Africa is amongst the few developing countries that have taken up the issue of sustainable development, and ensured that developmental projects utilize and adhere to the concept of sustainable development. In 1987, the World Commission on Environment and Development (WCED), in its report defined sustainable development as; development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.⁴⁴ In terms of NEMA, sustainable development is defined as the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves the present and future generation.⁴⁵ Sustainable development has evolved as a result of rapid transformation and industrialization of key sectors of the economy. Social, environmental and economic factors are hand in glove, thus one cannot be compromised for the other, to achieve sustainable development.⁴⁶ According to the South African Constitution, promoting economic or social development should not be detrimental to

⁴²Ibid 67-68.

⁴³National Environmental Management Act 107 of 1998.

⁴⁴Brundland Commission, '*Our Common Future*' (Report of the World Commission on Environment and Development, *United nation General Assembly A/42/427 1987*).

⁴⁵Section 1 of 107 of 1998.

⁴⁶Cele Sinethemba Charity, '*Exploring Post-Authorization Follow-up and EIA Effectiveness in South Africa; Case study from Kwazulu Natal, (unpublished Master's Dissertation, University of Kwazulu-Natal 2016)*).

preserving the environment, ecological sustainable development should be secured.⁴⁷ In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*, the court held that the concept of sustainable development is the fundamental building block on which environmental legal norms have been fashioned as reflected in section 24(b)(ii) of the Constitution. The High Court Judge Claasen said that “strict economic principles will no longer be the sole determining factor when considering development”. The study is of the view that indeed economic principles cannot be the only determining factor when considering development. Social, political and environmental factors must also be taken into consideration when considering development.

Even though development may be economically justifiable, it must be balanced against its potential adverse impact on the environment, considering the various elements of sustainable development, and the prevalent socio-economic ills, by making the right to a healthy environment constitutionally protected and justiciable. South Africa has embarked on a journey toward integrating all surrounding factors when a development project is contemplated.⁴⁸ This case prohibited the undertaking of environmentally detrimental activities without the written authorization of competent authority, as intended in section 22 of Environmental Conservation Act 73 of 1989. Neglecting the use of sustainable methods of development, inevitably results in severe and more frequent consequences that will negatively affect our environment and human health.⁴⁹

Section 2 of NEMA's first two principles indicates that, sustainable development is the environmental management imperative, which must be applied or encouraged when making any decision that involves development activities, especially those which affect the people. There is a clear obligation placed upon organs of states when it comes to environmental management. It is clearly stated in section 2(2) that environmental

⁴⁷Judy Boshoff, 'The Role that EIAs Play in Promoting Sustainability in South Africa', (2015), Aurecon. <http://www.ee.co/za/article/aurecon-102-05-the-role-that-eias-are-presently-playing-and-can-potentially-play-in-promoting-sustainability-in-South-Africa.html>. [Accessed 05/07/2020].

⁴⁸ 2004 (5) SA 124(W).

⁴⁹ Bob Giddings, Bill Hopwood and Geoff O'Brien, 'Environment, economy and Society: Fitting them together into Sustainable Development', 2002 *Sustainable Development*.

management must place people and their needs at the forefront of its concerns, and serve their physical, psychological, developmental, cultural and social interests equitably.⁵⁰

9.4. Law and development

Law has the function of coordinating and planning as well as achieving required behavior, which is why it is possible to use the law to bring change in any society. To date, a law that promotes development as a process is considered as a proper law.⁵¹ Law is vital to development as it creates incentives for people to behave in a growth-enhancing manner. Thus law can harness individual interest to serve the greater public good, include people to do good by doing well.⁵² Today, the issue of sustainable development is given high priority as new projects are established.

10. THE SIGNIFICANCE OF THE STUDY

This study is of particular importance because it will promote and advance the need by government institutions to conduct a proper EIA before authorizing any development that has an impact on the environment and the people. It aims at ensuring that those who are responsible for conducting EIA, do so effectively and efficiently, and if need be, come up with alternative measures to prevent environmental degradation, in the event such a development is given a go ahead. The study seeks to encourage the need to enforce EIA as a prerequisite for developmental projects, by all spheres of Government.

11. OUTLINE OF CHAPTERS

Chapter 1

The introduction, background of the study, problem statement, aim and objective of the study, the methodology including the significance of the study are included in this chapter.

⁵⁰ Section 2(2)-(4) of Act 107 of 1998.

⁵¹Sundhya Pahuja, 'Decolonizing International Law: Development, Economic Growth and the Politics of Universality' (*PhD thesis, University of London, 2009*).

⁵²Thomas Ulen, 'The Role of law in economic growth and development,' (Prepared for the Bonn Law & Economics Workshop 27 April 2010, Cambridge 172-220).

Chapter 2

Explaining the contents and context of Environmental Impact Assessment.

Chapter 3

Analysis of the constitution and legislation fostering environmental protection.

Chapter 4

Analysis of international instruments for the protection of the environment.

Chapter 5

The role of the environmental assessment practitioners in the implementation of the EIA.

Chapter 6

Examining how other jurisdictions are implementing EIA.

Chapter 7

Conclusion and Recommendations

CHAPTER TWO

EXPLAINING THE CONTENTS AND CONTEXT OF ENVIRONMENTAL IMPACT ASSESSMENT

2.1 ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

Environmental Impact Assessment (EIA) is an evaluation tool designed to assess any possible and expected adverse impact that might occur as a result of a given proposed developmental project.⁵³ This assessment allows competent authorities to evaluate, analyze and make an informed decision as to whether the proposed project should be authorized to go ahead after consideration of all vital factors. EIA as a prerequisite for developmental projects is usually conducted or implemented at the initial stages of the project, before the project is allowed to commence. The EIA is often viewed as a key obstacle or barrier to development, due to its rigorous processes that must be followed to the end, which is often viewed as costly and time-consuming.⁵⁴ Hence some developers tend not to follow the EIA due processes, or simply proceed with their developmental projects without proper environmental authorization, thus leading to environmental degradation. Often developers complain about the issue of time.

They complain that EIA processes are time-consuming hence become more inclined not to follow the EIA processes to the latter. The government has since taken measures to reduce the time frame it takes to complete the EIA process under the current regime. The competent authority such as the Department of Environmental Affairs,⁵⁵ after thorough examination and consideration of all presented information and assessment, must grant or deny authorization⁵⁶ for the proposed development project, to protect the environment.⁵⁷ Some developers are still often caught attempting to circumvent the law, and later admit their guilt, and then give an undertaking to fix the problem, or do better

⁵³Department of Environmental Affairs, '20 Years of Environment Impact Assessment in South Africa' (2018) www.environment.gov.za accessed on 18/05/2020.

⁵⁵Section 24 of Act 107 of 1998.

⁵⁶Transparency International Australia. <http://www.transparency.org.au/publications/South-Africa-Mining-licence-process-map/> accessed 28/12 2020

⁵⁷Ibid

work next time.⁵⁸ Environmental impact assessment practitioners and official authorities responsible for EIA often connive with developers in an attempt to circumvent the law by lying about the work at hand in favor of the developer. *In the case of State v Frylinck and Mporu Environmental Solution cc*, in this matter, Stefan Frylinck, an adult male who works as an environmental consultant was charged with fraud, as indicated in the provision of section 103 of CPA, Act 51 of 1977 and in count 2 with c/s 81(1)(a) of the Environmental Impact Assessment Regulations of 2006. The environmental assessment practitioner was found guilty of providing a competent authority misleading and incorrect information, submitted in terms of the Environmental Impact Assessment Regulations, 2006 published under the National Environmental Management Act, 1998.⁵⁹ Short cuts are often taken in favor of developers. The investigative process outlined in the relevant legislation, and for the purposes for which an EIA must be produced, is intended to aid or equip authorizing officials with vital information, that will enable them to decide whether a particular activity should be permitted or not.

If a person undertakes an activity for which a permit is required without obtaining permission, the person acts unlawfully. For such conduct, there may be civil remedies, but a criminal prosecution might also be initiated.⁶⁰ All things considered, EIA must still be viewed as an important prerequisite for developmental projects in the state, not as a barrier for development. These developmental projects, according to the EIA must contribute to sustainable development; for the benefit of present and future generations. In *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*,⁶¹ the court held that the principle of sustainable development must be applied by environmental authorities, when they consider applications for authorization for environmental impact assessment for listed activities.

⁵⁸ Siphso Kings, 'Pastor Bushiri Keeps Illegal Church a Secret, Applies to Build a Kilometre Away', (Mail & Guardian, 24 January 2017). <https://mg.co.za/article/2017-01-24-pastor-bushiri-keeps-illegal-church-a-secret-applies-to-build-a-kilometre-away/>.

⁵⁹ Centre for Environmental Rights, 'Advancing Environmental Rights in South Arica' <http://www.cer.org.za/virtual-library/judgments/magistrates-courts/s-v-stefan-frylinck>.

⁶⁰ 2002 (1) SA 393 (ECD).

⁶¹ 2007(10) BCLR 1059 (CC).

An EIA requires amongst other things, the publication of an EIA report, detailing the likely significant impact of a proposed development.⁶² The EIA is then submitted for a final decision by the relevant competent authority, which either grants or refuses authorization to the applicant, in line with promoting sustainable development.⁶³ Sustainable development is a key criterion in decision-making by a competent authority in terms section 24(O) of NEMA. It is a legislative requirement that when deciding about the environment, the principle of sustainable development must always be considered. Importantly, EIA is not limited to the examination and mitigation of negative impacts, but also takes into account positive benefits that developmental projects bring to the receiving environment, which may have previously been negatively impacted, for example development or establishment of a residential area on land previously utilized as an informal dumping site. It can explore and examine the possible positive impact of a development projects, and further suggest possible ways of improving the project to an ideal status. In this case it would be regarded as a multifaceted decision-making tool.⁶⁴

2.1.1 HISTORICAL EVOLUTION OF ENVIRONMENTAL IMPACT ASSESSMENT

The development and recognition of EIA processes date as far back as the 1960s, when dissatisfaction about the ongoing degradation to the environment was recognized in the United States of America (USA). EIA in the USA was first governed by the National Environment Policy Act of 1969. The implementation of the National Environment Policy Act of 1969 laid down a foundation for similar EIA legislation in other countries such as Canada and other European countries such as France, New Zealand and West Germany, following the example set by USA. California was one of the first states to introduce an

⁶² Kumar, D.P., Reddy, T.B., &Gelaye, K.T. 2017 International Journal of Research-Granthaalayah, <http://www.doi.org/10.29121/granthaalayah.v5.i5.2017.1858>.

⁶³ Norman Lee and Clive George, *Environmental Assessment in Developing and Traditional Countries: Principles, Methods and Practice*, (New York Wiley 2000). Also see, Mbhele, P. M. 2009. The quality of EIA reports for housing developments in the Nkangala district of the Mpumalanga province, South Africa. Mini-dissertation submitted in partial fulfillment of the requirements for the degree of Maters in Environmental Management at the North-West University, Potchefstroom.

effective (NEPA) in 1970.⁶⁵ While other countries employed different methods in applying EIA procedures, countries like Australia (1974), Colombia (1974), Thailand (1974), France (1976), Ireland (1976) and the Netherlands (1979), did so by enacting legislation that requires some form of environmental impact assessment⁶⁶ such as Environmental Protection Act in the Netherlands, Nature Protection Act in France in 1976, Environmental Protection Law in China in 1979, and the National Environment Quality Act in Thailand which was passed in 1975.⁶⁷

In the 1970s environmental issues were the center of discussion, many countries embarked on creating legislation, policies and institutions to enable the effective implementation of environmental laws, and regulations such as EIA programs. During the 1980s more countries developed and implemented EIA programs as their environmental framework, aimed at addressing environmental issues.⁶⁸ Over the years, EIAs have evolved, and have been lawfully enforced by many countries, including South Africa, as an environmental assessment and management tool for planning development projects.⁶⁹ Multi-lateral development banks such as World Bank, which provides loans and finance to developing countries for development projects have adopted and developed EIA systems. The World Bank's "Environmental Policy and Procedures" adopted in 1984 encourages that environmental issues be considered at the initial or planning stages of any proposed projects, to enable the developers to address any shortcoming at early stages of the project.⁷⁰

⁶⁵ Christopher Wood, *Environmental Impact Assessment: A comparative Review* (2 eds England Longman 2003).

⁶⁶ Report of the World Commission on Environment and Development, 'Our Common Future, Transmitted to the United Nation General Assembly as an Annex to Document A/42/427 (1987)'.

⁶⁷ Current Environmental Impact Assessment System (1995), Study Group for Environmental Impact Assessment System.

⁶⁸ Institute of Economics, 'Development and Environment Series 6, Environmental Law in Developing Countries, Southeast and East Asia, (1994) 1-10.

<https://wecache.googleusercontent.com/serch?q=cache:wxpmatuxk:http://www.env.go.sp/earth/coep/document/10-eias/10-eiae-z.pdf&cd=16&hl=en&ct=chk&gl=za>

⁶⁹ Mbhele Precious, 'The quality of EIA reports for housing developments in the Nkangala district of the Mpumalanga province', (Masters-dissertation, North West-University 2009).

⁷⁰ Environment Agency of Japan, 'Environmental Impact Assessment for International Cooperation: furthering the Understanding of Environmental Impact Assessment Systems for Experts Engaged in International Cooperation Activities' http://env.go.jp/earth/cooop/coop/document/eia_e/10-eiae.pdf accessed 22/12/2020.

Since 1990 the world has seen a significant increase in EIA legislation of environmental activities, in over 55 developing countries. During the apartheid era, the South African environmental regime was regulated according to the Environment Conservation Act of 1989.⁷¹ The Act was not too effective because it omitted to cover a whole range of issues and activities that adversely affect the environment and mitigation that could help in mitigating such adverse effects on the environment. The Environmental Conservation lacked the legal component. During the 1980s and early 1990s, many countries showed an interest in EIA, which formed part of environmental statutes that resulted in EIA being a standard prerequisite for proposed development activities. After the fall of the apartheid government, the right to a healthy environment was incorporated in Chapter 2 of the Constitution of South Africa, which is the Bill of Rights.⁷² In 1992 EIA was recognized at the United Nations Conference on Environment and Development, held in Rio de Janeiro. However, the recognition of the EIA process in developing countries, especially in Africa started much later and at a slower pace than developed countries, but extended substantially after the Rio Earth Summit in 1992.⁷³

Post the 1994 democratic election, the new Constitution became the supreme law of the country, and replacing the previous apartheid parliamentary supremacy. That new Constitution provided for environmental rights in the Bill of Rights section 24 of the Constitution. EIA's were first introduced in South Africa in 1989, through the proclamation of regulations by the Environment Conservation Act, Act No 73 of 1989 (ECA) (South Africa, 1989). In 1998, South Africa enacted the National Environmental Management Act 107 of 1998 which repealed the ECA, as it incorporated principles of integrated environmental management and hence improved the objectives of the EIA process. The ECA was more aligned to conservation, than promoting the integration of sustainable development principles, in line with the national environmental management principle as

⁷¹Environmental Conservation Act 73 of 1989.

⁷²Zarina Patel, 'Of questionable value: The role of practitioners in building sustainable cities' (2006) 37 *Geoforum* Issues 7 682-694.

⁷³Norman Lee, 'Reviewing the quality of environmental assessments: Environmental Assessment in Developing Transitional Countries' 2000 *New York Wiley* 137-148.

outlined in chapter 2 of NEMA into the making of all decisions, which may have a significant impact on the environment.

The primary aim of integrated environmental management is to encompass sustainable development principles, to ensure that there is an intelligent and sensible use of resources by both present and future generations.⁷⁴

2.1.2 ENVIRONMENTAL IMPACT ASSESSMENT IN SOUTH AFRICA

EIAs have been conducted and recognized in South Africa for quite some time now, even in circumstances where there was no legal basis to enforce adherence to environmental laws and regulations, and punishing non-adherence.⁷⁵ This because the EIA procedure was not mandatory, thus only carried out on a voluntary basis.⁷⁶ However, with time things changed, and it became mandatory in 1997, with the aim of protecting the environment while at the same time achieving sustainable development. This ensured that concerns arising from development projects could be taken into account, identified, given due consideration, and addressed adequately.⁷⁷ Kidd and Retief described four stages of EIA evolution in this country, which took place between 1976 and 1989, when the first regulated EIA process was introduced.⁷⁸ Immediately after the advent of democracy in South Africa (1994), environmental matters increasingly received the attention they deserved. Some international trends were incorporated in the new constitution of the country, which provided a new status for the new environmental laws, formulated to deal with the radical transformation of the law, and inclusion of stakeholders in decision-making processes.⁷⁹ As a result, discussions around environmental protection increased, and thus found its way into the Constitution under the chapter 2, Bill of Rights, other legislation such as NEMA and various frameworks.

⁷⁴Linderque Cornelius, *'Integrated Environmental Management (IEM) in South Africa: A Critical Assessment'* (Masters Dissertation, North West University 2003).

⁷⁵Hoster Magdilina Pretorius, *'The quality of environmental impact reports in the North West Province, South Africa'* (Master's Dissertation 2006).

⁷⁶Kruger Renees, *'A critical analysis of EIA reports for filling stations in South Africa'*, (Masters Dissertation North-West University 2012).

⁷⁷Fuggie and Rabi, 'Environmental management in South Africa' *2019 Journal of South Africa*.

⁷⁸Michael Kidd and Francois Retief, *'Environmental Assessment, in Environment, in Environmental Management in South Africa'* (1st eds Juta 2009) 974.

⁷⁹Merle Sowman and Brown, 'Mainstreaming environmental sustainability into South Africa's Integrated Development Planning Process', *Journal of Environmental Planning and Management*, 695-712.

In September 1997 EIA regulations were announced in South Africa in terms of the Environmental Conservation Act 73 of 1989. Before the introduction of the EIA regime as a mandatory procedure, it was carried out voluntarily.⁸⁰ Polokwane Municipality approved its General Plan for township establishment in 1996, before EIA was mandatory, otherwise the local authority would have become aware of the challenges of establishing a residential area in such close proximity to a waste treatment plant. Developmental projects that took place without proper EIA more often caused environmental degradation. EIA became mandatory in September 1997, with the promulgation of EIA Regulations as stated in section 21, 22 and 26 of the Environmental Conservation Act 73 of 1989, and since 2006 under the National Environmental Act, Act 107 of 1998. In 1998, South Africa enacted the National Environmental Management Act, which repealed the ECA as its incorporated principles of integrated environmental management, and hence improved the objectives of the EIA process.⁸¹

NEMA was promulgated as comprehensive environmental management legislation with EIA regulations. Since then, several tools form part of the NEMA legal framework, such as Environmental Management programmes, environmental risk assessment, spatial development tools, environmental management, and environmental impact assessment, as identified in section 24(5)(b).⁸² The EIA process in South Africa is currently governed and regulated by the National Environmental Management Act No 107 of 1998, which is the act that breathed life to EIA. NEMA laid down the foundation for other regulations and statutes that seek to address environmental issues. The main custodian of the act is the Department of Environment Affairs (DEA). National Environmental Management Act (NEMA) was promulgated to give to section 24 of the Constitution, and provide a legal framework for environmental protection. NEMA is regarded as a primary statute that deals with environmental affairs in South Africa, and hence other environmental statutes and

⁸⁰Adrew Duthie, 'A review of provincial environmental impact assessment administrative capacity in South Africa', *Impact Assessment and Project Appraisal*.

⁸¹Wood, 'Pastiche or pastiche? Environmental Impact Assessment in South Africa', (1999) *South Africa Geographical Journal* 81(1), 52-59.

⁸² Department of Economic Affairs and Tourism (DEAT), 'Overview of *Integrated Environmental Management, Integrated Environment Management, Information Serie's*.

regulations derive their powers from it.⁸³ It is also the first umbrella national legislation that endeavors to establish an integrated environmental management framework.

EIA is applied to all types of development, and effectively assesses upfront any impact a particular project may have on the environment. It applies to all sectors, sections, and segments of the society⁸⁴ irrespective of whether the development in question originates from private, government or civil society entities.

2.1.3 EIA PROCESS

Application- At this first stage, the developer through environmental consultant submits an application for EIA to the relevant competent authority, such as the Department of Environmental Affairs.

Screening- The developmental project is assessed to check if an EIA is required or not. Official EIA regulations include guidelines which contain listed development activities, specifying which activities require EIA, and which do not. Those that do not require EIA would be given the go ahead to proceed with implementation of their developmental project, and those that require EIA would be required to comply with all EIA processes to the letter.

Scoping- This stage focuses more on the plan, on how the EIA process will be conducted, the work to be undertaken on the proposed developmental project. At this stage, the environmental consultant who will carry out the work is identified, as well as key personnel who will be involved with the project. This step involves a detailed outline of how the developers plan to develop the Environmental Impact Environment Assessment.⁸⁵ At this stage other stakeholders who may have an interest in the proposed development, get the opportunity to participate, in the decision making, have their views and contributions

⁸³Elmene Bray, 'Co-operative governance in the context of National Affairs Environment Management Act 107 OF 1998. *South Africa Journal of Environmental and Policy Vol 6 No 1.*

⁸⁴ *Ibid.*

⁸⁵Kolhoff, Runhaar, and Driessen, 'The Contribution of Capacities and Context to EIA System Performance and Effectiveness in Developing Countries: Towards a Better Understanding' *Impact Assessment and Project Appraisal* 27(4), 271-282.

incorporated in the project, to avoid future problems. Then a scoping report will be produced for the attention of the competent authority.

Impact assessment- During this stage, environmental activities which may have a detrimental impact on the environment, are identified. At this point an assessment is done to establish whether the EIA is adequate or not. If it is adequate a full environmental impact assessment will be conducted on the proposed project activities that might cause environmental degradation.⁸⁶

Mitigation- At this stage, measures are implemented to protect the environment, prevent, adjust, minimize and counterbalance environmental degradation that might occur as a result of the proposed development project.⁸⁷ This stage requires a close look at proposed actions aimed at mitigating the impact from the development activities.

Reporting- After conducting the EIA process, feedback on the assessment has to be presented in a written report, submitted to the competent authority, to enable them to make an informed decision about the development project.

Reviewing- The submitted report is reviewed by the competent authority for a decision on the acceptability or rejection of the EIA report.⁸⁸

Decision- The competent authority makes the final decision about authorization of the development project. This decision will be guided by the report submitted by the environmental consultants, and reviewed by the competent authority.

Follow-up – Frequent follow-up is required to ensure that the project developers comply with development activities requirements and mitigation actions, as stipulated in their approved EIA assessment report. This stage entails monitoring the granted Environmental Authorization's conditions. Follow-up ensures that control measures are in place and monitored rigorously.

⁸⁶ Eva Hansen and Gram Wood, 'Understanding EIA scoping in practice: A pragmatist interpretation of effectiveness', (2016) 58, *Environmental Impact Assessment Review* 1-11.

⁸⁷ Ross Marshall and Jos Arts and Angus Morrison-Saunders, 'International principles for best practice EIA following-up' *Impact Assessment and Project Appraisal* 23(3), 175-181.

⁸⁸Pacifia Achieng Ogola, 'Environmental Impact Assessment General Procedures', (2007) *KenGen* 2-17.

2.1.4 ENVIRONMENTAL AUTHORIZATION

Section 24 of NEMA states that, to give effect to the general objective of integrated management laid down in section 23, the potential consequences or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorization.⁸⁹ The aforementioned objectives⁹⁰ as laid out in the National Environmental Management Act of 1998 are as follows:-

- “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
- Ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them
- Ensure adequate and appropriate opportunity for public participation in decision-making which has a significant effect on the environment, and
- Identify and employ the mode of environmental management best suited to ensuring that a particular activity is pursued in accordance to principles of environmental management”.

It should be pointed out that environmental authorization cannot be issued without due EIA processes and compliance by the developers. Hence according to section 24(f) of NEMA, which states that no person may undertake a development project listed in the EIA regulation, without environmental authorization.⁹¹ Environmental authorizations are

⁸⁹Section 24(1) of Act 107 of 1998.

⁹⁰S 23(2) of NEMA. The general objective of integrated environmental management is to: -

- (a) 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
- (b) Identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risk and consequences and alternatives and options for mitigation of activities, with a view of minimizing negative impacts, maximizing benefits and promoting compliance with the principles of the environment set out in section 2.

⁹¹Section 24(f) Of Act 107 of 1998.

issued before commencement of the project developments, to ensure that destructive activities that could negatively impact the environment are identified during the EIA process, and hence prevented and/or minimized at both project construction and operational phases.

*In Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*⁹², Bp case deals with violation of section 28(1), which imposes a duty on every person who causes or may have caused significant environmental degradation, to take reasonable measures. Uzani instituted a private prosecution through section 33 of NEMA, against Bp, for constructing and/or upgrading fuel retail filling stations and facilities, activities which are listed as requiring Environmental Impact Assessment, and legislated regulatory approval. BP made an *ex post facto* application after the commencement of the project. It was found that BP had undertaken listed activities related to upgrades of filling stations, without environmental authorization as required by NEMA. BP Southern Africa (Pty) Ltd was found guilty despite having applied for an *ex post facto* authorization.

This was a leading case that successfully set precedent and relayed on private prosecution under section 33 of NEMA, which states that an individual can institute a private prosecution, in the public interest, or the interest of the environment. The EIA outlines conditions which the developer must comply with, to protect the environment, and promote sustainable development, as stated in terms of Section 24 of the National Environmental Management Act (NEMA), Act 107 of 1998. Without a valid environmental authorization, developers cannot legally commence with their developmental projects, an effort to conserve and protect the environment against degradation arising from developmental projects.

⁹²Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd.

CHAPTER THREE

ANALYSIS OF CONSTITUTION AND LEGISLATION FOSTERING ENVIRONMENTAL PROTECTION

3.1. The Constitution of the Republic of South Africa, 1996

The Constitution is the primary legal source for all environmental protection issues and stipulates that any law that is inconsistent with the Constitution is invalid and cannot be enforced. All legislation must be interpreted in line with the Constitution.⁹³ The government's commitment to addressing the imbalances of the past, and fostering the transformation of apartheid legislation, is evidenced by the inclusion of an environmental protection clause in chapter 2 of the Constitution section 24 which provides that: -

“Everyone has the right-

- a) to an environment that is not harmful to their health or wellbeing, 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”.⁹⁴

The Constitution is the supreme law of the land, and all laws of the country are governed by it. Section 24 identifies the need to strive towards environmental excellence, thus putting necessary measures in place to ensure that environment is protected and sustainable, using tools such as NEMA which is aimed at creating a legal framework, to control certain human activities, which may have detrimental effects on the environment⁹⁵. Section 24 extends beyond just the protection of the natural environment, it also seeks to

⁹³Paul Henderson '*environmental law of South Africa*', (2005)1.

⁹⁴Section 24 of the Constitution of the Republic of South Africa, 1996.

⁹⁵Ile Jordaan, '*Environmental Impact Assessment follow-up in South Africa: Critical analysis of predictions and compliance for the Mooi River Mall*' (Masters Dissertation, North West University 2010).

protect the economic, human and social aspects of the overall environment, as well as introduce the principle of sustainable development. The principles are amongst others: -

1. "The principle applies throughout the Republic to the actions of all organ of state that may significantly affect the environment and-
 - (a) Shall apply alongside all other appropriate and relevant consideration, including the State's responsibility to respect, protect and fulfill the social and economic rights in Chapter 2 of the Constitution and particular needs of categories of persons disadvantaged by unfair discrimination
 - (b) Serves as the general framework within which environmental management and implementation must be formulated
 - (c) Service as principles by reference to which a conciliator appointed under this Act must make recommendations
2. 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".

Development must be socially, environmentally and economically sustainable. It is worth noting that, environmental rights are equivalent or important to just any other human rights. The legal basis for the allocation of powers to the different levels of government is provided by the constitution. Schedule 4 gives both the national and provincial spheres of government the concurrent competency for implementing the environmental rights of the citizens of South Africa, and controlling pollution. Schedule 4 sets out concurrent provincial and local government functions, which include air pollution and waste management.⁹⁶ The density and significance of providing environmental assessments in South Africa, is to realize what is at the heart of the environmental policy and law, with the purpose of giving realization to a healthy environment as people's basic right. Development projects cannot be given environmental authorization without going through the EIA process, and subsequently the Environmental Authorization.

⁹⁶Constitution of the Republic of South Africa 1996.

3.2. Environmental Conservation Act 73 of 1989

The main purpose of this act is to provide for the effective protection and controlled utilization of the environment and related matters incidental thereto. Environmental Conservation Act, Act no.73 of 1989, was adopted, and as such, it extended the power to identify activities with a detrimental effect on the environment, and issuing authorization to the Minister of Environmental Affairs. The act further extended the level for which an environmental impact report would be required to make regulations regarding the environmental report. The environmental Conservation Act was later replaced by NEMA which was promulgated in 1998. EIA has been operating on a mandatory basis in South Africa under the Environment Conservation Act. Meaning, for developers to commence with their development projects, it is mandatory for them to undertake EIA processes to prevent environmental degradation.

3.3. White Paper on Environmental Management

The White Paper on Environmental Management in South Africa, published in 1997 was aimed at ensuring the realization of the commitments included in Principle 17 of the Rio summit held in 1992.⁹⁷ Principle 17 acknowledges and is committed to ensuring the utilisation of Environmental Impact Assessment in different countries including South Africa. In an attempt to ensure compliance, the environmental management policy was established, to ensure environmental rights are observed, as provided for in the constitution. The lack of robust environmental legislation at the time inspired the establishment of environmental policies such as the "White Paper on Environmental Management Policy", as provided for in the constitution.⁹⁸

3.4. National Environment Management Act 107 of 1998

NEMA is the primary statute promulgated with intent to give effect to section 24 of the constitution. NEMA also aims "to provide for certain aspects of administration and enforcement of other environmental management laws" such as specific environmental

⁹⁷ *Ibid.*

⁹⁸ Schoeman B Elizabeth, 'Public participation before and during the EIA process: Transnet Case Study', (Masters Dissertation University of North West).

management laws and other sectoral laws. It also provides for other related matters. EIA regime is now regulated in terms of NEMA, which empowers the national Ministry responsible for Environmental Affairs or the Member of the Executive Council responsible for environmental affairs provincially, to identify prohibited development projects from being implemented without Environmental Authorization. NEMA aims to "provide for co-operative, environmental governance by establishing principle for decision making on matters affecting the environment, institutions that will promote co-operative governance and procedures for coordinating environmental functions exercised by organs of state".⁹⁹ NEMA has an extensive record of standards on issues about the environment, and that when taking a decision that affects the environment the principle of sustainable development must be considered or taken into consideration. NEMA promotes co-operative governance among different levels of government management. It allows for the enforcement of environmental laws by competent authorities. NEMA is considered to be the cornerstone of all environmental legislation.¹⁰⁰ The original text of section 24, which was used by the court in *Fuel Retailers* has headed "implantation" and worded as follows:

"To give effect to the general objectives for integrated environmental management laid down in this chapter, the potential impact on –

- (a) the environment
- (b) socio-economic conditions, and
- (c) cultural heritage

of activities that require authorization or permission by law and which may significantly affect the environment, must be considered, investigated and assessed before their implementation and reported to the organ of state charged by law with authorizing, permitting or otherwise allowing the implementation of activity."¹⁰¹

⁹⁹Ibid.

¹⁰⁰Jan Glazewski, *Environmental Law in South Africa*, (2ndeds Butterworth 2005) 253.

¹⁰¹Section 24(1) of Act 107 of 1998.

3.5. Environmental Impact Assessment Regulations No 385 of 2010

Environmental Impact Assessment Regulations No. 385 of 2010 became effective on 3 July 2006. The EIA Regulations provided under section 24 of NEMA, are intended to integrate and facilitate environmental impact management with development activities or processes, in line with sustainable development objectives. It classified activities into 3 listed activities. Activity 1 and 3 are minor developmental projects that need basic assessment, and listed activity 2, which requires comprehensive assessment that includes scoping. Provide. The regulations made EIAs mandatory for the first time in South Africa in 1997. They provide a method for the investigation, assessment, and communication on the potential impact of listed activities. The purpose of the EIA Regulations is therefore, to ensure that activities, for which environmental authorization is required, are adequately assessed, to avoid authorization of those activities which may be detrimental to the environment. And if authorized precautionary measures be put in place to prevent environmental degradation, while those which are suitable for authorization get approved so that developmental projects can go ahead with implementation for the benefit of the people.¹⁰²

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

The NEMWA was enacted to regulate waste management to protect health and the environment by providing reasonable measures for prevention of pollution and ecological degradation and for securing ecologically sustainable development.¹⁰³ Waste management is one of the critical elements of sustainable development, primarily because sound waste management practices contribute to sustainability.¹⁰⁴ According to the Department of Environmental Affairs (2006), “Waste Management is one of the critical elements of sustainable development primarily because sound management practice contributes to sustainability”. NEMA applies to NEMWA thus the contents outlined under section 2 NEMA also apply.

¹⁰²Act 107 of 1998.

¹⁰³ National Environment Management Waste Act 59 of 2008.

¹⁰⁴ Michael Kidd, *Environmental Law* (2ndeds Juta 2011).

These principles include prevention, and to a certain extent where necessary minimization, and rectification of pollution and degradation of the environment, which is done to ensure environmental protection at all material time.¹⁰⁵ According to the polluter-pays principle those who pollute the environment bear the responsibility to remedy any pollution which might result of their activities, to prevent degradation of the environment, or pay for the damage caused. Before carrying out any hazardous waste activities, such as waste removal and transportation, disposal of medical waste and collection, or construction of a water waste treatment plant, it is mandatory to conduct EIA processes. Firstly, it is important to check if the proposed developmental project falls within the listed activities, whether such a project requires basic assessment, or does not have any severe impact on the environment, or it falls under listed activities that which need full EIA. EIA must be conducted on the proposed project to check the impact on pollution of the air, land, on the surface or underground to prevent degradation thus protect the environment. Once the EIA process has been followed to the end, a waste management license can be granted or denied.

Department of Environmental Affairs, the provincial department of environment and local municipality are the custodians of the act, and therefore responsible for its implementation. Schedule one of NEM: WA contains the listed development activities, under two categories A and B. Category A activities are equivalent to those which require a basic assessment process under the Environmental Impact Assessment Regulations under NEMA, includes Storage and transfer of waste, recycling and recovery of waste, treatment of waste, disposal of waste on land, storage, treatment, and processing of animal waste and expansion or decommissioning of facilities and associated structures and infrastructure. Category B activities focus mainly on hazardous waste and are equivalent to those requiring an environmental impact assessment process under the environmental impact assessment regulations.¹⁰⁶

¹⁰⁵Department of Environmental Affairs, *'A user-friendly guide to the National Environmental Management and Waste Act, 2009(Act 59 of 2008)*, 2012.

¹⁰⁶ Warren Beech, Nicholas Veltman, & Hogan Lovells, *'Environmental law and practice in South Africa: overview'* 2017 <https://uk.practicallaw.thomsonreuters.com> accessed on 01/06/2021.

When carrying out hazardous waste activities permission should first be obtained from the Minister of the Department of Environmental Affairs, who is a competent authority at the national level, and the provincial Department of Environmental Affairs.

3.7. National Environmental Management Air Quality Act 39 of 2004

The National Environment Management Air Quality Act was enacted to manage and prevent pollution. The Act aimed at improving the law governing air quality to preserve the environment, in a sustainable manner through prevention of pollution and ecological degradation while promoting justifiable economic and social development, for the benefit of present and future generations.¹⁰⁷ As part of fulfilling its Constitutional obligations under section 24, a general duty is placed on the state through Section 3 of NEM:AQA to protect and enhance the quality of air.

No person can proceed with undertaking any developmental project that forms part of listed activities, which may have a significant detrimental effect on the environment, without conducting an EIA, and obtaining an Air Emission License. EIA must be carried out to check if emission rates may pollute the air, and if so what mitigating measures can be put in place to prevent environmental degradation, to enforce environmental protection. No persons or organizations are exempt when planning to embark on a developmental project which forms part of listed activities, without undertaking EIA and obtaining an Air Emission license.

3.8. National Environmental Management Bio-Diversity Act 10 of 2004

The National Environmental Management Biodiversity Act aimed at ensuring conservation of South Africa's biodiversity. This is done by prescribing a range of biodiversity planning mechanisms.

The purpose of the act: -

- a) "The protection of species and ecosystems that warrant national protection
- b) The sustainable use of indigenous biological resources

¹⁰⁷ National Environmental Management Air Quality Act 39 of 2004.

- c) Management and conservation of South Africa's biodiversity and its components
- d) The Fair and equitable sharing of benefits arising from bioprospecting including indigenous biological resource and
- e) The establishment of a South African National Biodiversity".¹⁰⁸

3.9. The Mineral and Petroleum Resource Development Act 28 of 2002

Before the democratic government of South Africa and the formulation of Mineral and Petroleum Resource Development Act 28, minerals were privately owned by the elite, often called white supremacy communities. As part of addressing the past imbalances, and putting forward transformative legislation, the government established the Mineral and Petroleum Resource Development Act of 2002. The Act aimed to address the imbalance of the past, ensure that the state becomes the custodian of all the mineral and petroleum resources found within the Republic, and not the elite. This was in line with acceptable international practice, which gives the state as custodian, the right to exploit those mineral resources as is necessary. The exploitation of these minerals must benefit the people of the state, by creating sustainable economic growth, which reflects the hard work of the people, employment opportunities, and the advancement of the social and economic welfare of the whole country.

MPRDA makes provisions for equitable access to mineral resources, with a particular focus on the historically disadvantaged, to spread the benefits from the exploitation of these minerals equitably, while ensuring this is done through sustainable development of South Africa's mineral and petroleum resources.¹⁰⁹ This is in line with section 37(2) of MPRDA, which states that "any prospecting or mining operation must be conducted under generally accepted principles of sustainable development by integrating social, economic and environmental factors, into the planning and implantation of prospecting and mining projects to ensure that exploitation of mineral resources serves present and future generations." When conducting the developmental projects involved with mining activities, it's mandatory to conduct EIA before commencing any of the mining-related activities.

¹⁰⁸ National Environmental Management Biodiversity Act 10 of 2004.

¹⁰⁹Mineral and Petroleum Resources Development Act 28 of 2002.

No mining rights will be granted without an Environmental Impact Assessment, especially if the mining activity is bound to cause air pollution, dust, land degradation, ecological degradation and damage to the environment, and without environmental authorization of the proposed development project. EIA is considered the key indicator of the environmental impact any proposed mining venture will have on the environment, and surrounding mining community's ability to make informed decisions. This is in line with section 5 of MPRDA, which states that "no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental to any area without an environmental authorization". Conducting mining activities without prior approval is prohibited, and can result in criminal charges being brought against the perpetrator. The mining community must be involved in, or take part in stakeholder participation, during the initial stages of project planning or proposal.

In terms of section 38A, environmental authorization by the Minister of Environments shall be a condition before the issuing of a permit, or granting of rights in terms of this Act. Section 38 of the MPRD further places a responsibility on the parties granted the permit to exploit the natural resources, to adhere to the objectives of integrated environmental management, which as laid out in the NEMA, manage the environmental impact of the resource exploitation, by following their approved environmental management plan, and take responsibility for any environmental degradation caused by their activities, and resolve such environmental problem. The main aim of EIA is to ensure that environmental damage resulting from mining activities is kept at minimum and prevented if possible.

3.10. National Water Act, 36 of 1998

The act aims to ensure that the nation's water resources are preserved, protected, used and managed sustainably for the benefit of every citizen. Water is a basic need that is universally recognized, thus giving expression to meet that basic need which is universally recognized, for present and future generations, is not the only goal of this act, but also promoting equitable access to water, efficient, effective and sustainable use of water and facilitation of social and economic development programmes. At all times it is of vital importance that water be used sparingly. Section 19 of the Act further makes

provision for pollution and environmental degradation.¹¹⁰ The Act prohibits developmental projects which pollute the water, and are carried out without obtaining the necessary water authorization. Before authorization or a license is granted, approved EIA will be required as a prerequisite for any such authorization or licensing.

3.11. Municipal System Act 32 of 2000

The Municipal System Act¹¹¹ focuses on the internal systems and administration of municipalities. The Act requires that not only the Constitution, but other national-level acts such as NEMA, be incorporated into strategic planning at the municipal level. Under the Act, every municipal council must adopt a single, inclusive and strategic plan for the development of the municipality which amongst others: -

- "Integrates and co-ordinates plans and takes into account proposals for the development of the municipality, and
- Align the resources and capacity of the municipality with the implementation of the plan".

Core principles, framework and procedures, that enable municipalities to uplift their communities socially and economically, and guarantee affordable universal access to basic services, are provided for by the municipal System Act. Section 4(2) of the Act states that, "in exercising its executive and legislative authority the municipality must promote a safe and healthy environment".¹¹² To encourage and ensure a healthy and safe environment, the municipality would have to apply all the environmental laws and regulations aimed at protecting and preserving the environment, for the benefit of the present and future generations.

¹¹⁰ National Water Act No 36 of 1998.

¹¹¹ Municipal System Act 32 of 2000.

¹¹² Section 4(2) of Act 32 of 2000.

CHAPTER FOUR

ANALYSIS OF INTERNATIONAL INSTRUMENTS FOR PROTECTION OF THE ENVIRONMENT

4.1. 1972 Stockholm Declaration of the United Nations Conference on Human Environment

The introduction of development to environmental issues emerged, and was established at the United Nations (UN) Conference held in Stockholm in 1972, on the Human Environment. Recognizing this relationship has resulted in the realization that environmental issues are not localized but international. The conference resulted in ongoing deliberations, and concerns for economic progression and environmental degradation. This realization has led to an increased understanding of the human impact on the environment.¹¹³ Principle 21 of the Stockholm declaration states that, "under the Charter of the United Nations and principles of international law, the sovereign right to exploit their resource according to their environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other states and areas beyond the limits of natural jurisdiction".

This is evidence by the number of environmental legislation South Africa has adopted. Environmental Impact Assessment was not discussed in depth in Stockholm, however, the concept of sustainable development was discussed and accepted.¹¹⁴ The Declaration reflects the main fundamentals of development, that sustainable progression, including the significance of safeguarding space to improve social-economic progress. It is the government's responsibility to ensure that developmental projects are carefully planned, to counteract any environmental problems, and that such developments benefit present and future generation. EIA is the latest environmental management tool currently utilized to ensure sustainable development, most of the international environmental agreements were established in the 1970s and early 1980s.

¹¹³Ifeanyi Anago, 'Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience', (2002) *Journal of Sustainability Research* 1-3.

¹¹⁴United Nation Economic Commission for Africa, 'Review of the Application of Environmental Impact Assessment in Selected African Countries', (2005).

The declaration laid the foundation for an environmental tool such as EIA to be formulated, to encourage developmental projects to be sustainable while preventing environmental degradation by providing steps and mitigation to avoid any degradation that might occur as a result of such project. Stockholm Declaration made it possible to use EIA as one of the environmental management measures to prevent environmental degradation.

4.2. The 1991 Convention on Environmental Impact Assessment in a Transboundary Context

The convention aimed at preventing, reducing and controlling major adverse environmental impact from proposed activities.¹¹⁵ The Convention laid out the duties of parties to ensure that they thoroughly assessed the environmental impact to circumvent environmental degradation. It also laid down the common responsibilities of the state, to inform and consult each other on matters of common interest, which had adverse environmental impact across boundaries. For example, the construction of the Beitbridge over the Limpopo River between South African and Zimbabwean border, both countries needed to be consulted, and the risks analyzed. Additionally, a transboundary approach for conducting an EIA reduces confusion and disagreements between participants, thus improving cooperation among states, and local entities, and ensuring an informed and active public participation.

4.3. Convention on Biological Diversity (CBD), Rio de Janeiro 1992

The Convention of Biological Diversity is a binding treaty that binds member states. It was opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992. In signing the Convention, the parties acknowledged the imperative to consider biodiversity at all levels of decision-making. The Convention provided a strong basis through Article 14, for implementing environmental assessment techniques.¹¹⁶ Article 14.1, of the Constitution

¹¹⁵Convention on Environmental Impact Assessment in a Transboundary Context 1991.

¹¹⁶Andrea Bagri & Frank Vorhies, 'Biodiversity Impact Assessment, (1997) draft discussion paper for SBSTTA3 Montreal, Canada 1-35. <http://economics.iucn.org>.

on Biological Diversity states that each contracting party shall as far as possible, and as appropriate, introduce procedures requiring an EIA of its proposed projects that are likely to have significant effects on biodiversity to avoid, or minimize such effects. It also requires that arrangements be made to ensure that the environmental consequences of its programs and policies, which are likely to have significant adverse impact on biodiversity, are taken into account.

4.4. The Rio Declaration on Environment and Development 1992

Twenty years after Stockholm, the UN held a Conference on Environment and Development in Rio de Janeiro, Brazil. EIA was fully discussed and accepted at the conference in Rio de Janeiro. A multilateral corporate organization such as World Bank has adopted and developed EIA, and this has since received attention in all sectors. South Africa has also since enacted regulatory frameworks such as NEMA, in line with the declaration, to assess the environmental impact of activities likely to have a significant adverse effect on the environment.¹¹⁷ The Rio Declaration of 1992 breathed life into the issue of sustainable development, and laid down several principles to counteract the increased environmental degradation due to the rapid world industrialization.

The main aim of the declaration was to preserve the environment while at the same time ensuring continued sustainable development. For development to be conducted sustainably, environmental tools such as Environmental Impact Assessment come into play, with the aim of allowing development to take place whilst protecting the environment, by enforcing adherence to regulations, guides and the law. This is evidenced by the principle developed at the UN Rio de Janeiro Environmental conference, which encouraged adherence. The conference also focused on the importance of involving all stakeholders, including the public, when making decisions about development projects. The following are amongst relevant fundamental principles, which encourage environmental protection through Environmental Impact Assessment:

¹¹⁷Department of Environmental Affairs and Tourism, '*Integrated Environmental Management, Information Series*'.

Polluter-pays principle-whoever causes damage or pollutes the environment has to bear the responsibility of paying the cost equivalent to such environmental damage.

Public participation- in every project all affected stakeholders must be involved in the decision-making process.

Generational equity- all generations must have equal opportunity to enjoy both development and their environment, hence the notion that development must benefit present and future generations.

Precautionary principle- that in every developmental project precautionary measures must be taken, to prevent degradation of the environment.

United Nations Framework Conservation on Climate Change (UNFCCC)

Is an international treaty adopted on 09 May 1992, and opened for signature at the Earth Summit in Rio de Janeiro from 3 to 14 June 1992. This was in response to ongoing devastating climate change that is affecting world biodiversity. South Africa ratified the treaty in 1997. There are now 195 member states on the UNFCC Convention. This was aimed at ensuring that developmental projects have no contribution toward climate change, that any climate change must be a natural occurrence and not be caused by human activity. UNFCC place a member state that countries must take reasonable measure negative impact on climate change by minimizing greenhouse gas emissions.¹¹⁸

South Africa has since committed to reducing greenhouse gas emissions, by taking reasonable measures through environmental legislation like NEMA and EIA. In South Africa today, development activities that are part of the listed activities which can cause serious environmental degradation, like greenhouse gas, air pollution, water pollution, must be subjected to EIA, to check the level of impact to the receiving environment, and if necessary ensure mitigation measures are implemented, to counteract the negative impact on the environment. The world needs a clean environment for human, animal, and plant survival. Climate change in South Africa is considered a very serious

¹¹⁸United Nation Framework Convention on Climate Change 1992.

environmental issue. All developments with a potential to impact climate change must undergo EIA and get environmental authorization before they are implemented.

4.5. Kyoto Protocol on climate change, 1997

All member states who since ratified the Kyoto protocol are bound by it, and therefore must ensure that as individual states they take appropriate measures to reduce greenhouse gas emissions, as per the agreement contained in the treaty. Countries must be committed to the reduction of greenhouse gas emissions according to their national target as per the treaty. South Africa is party to the convention and since ratified it.¹¹⁹ Kyoto protocol places a requirement on contracting parties, to take into account, and minimize greenhouse gas emissions. In South Africa, NEMA and EIA are applied to all developmental projects that may potentially cause greenhouse emissions, as a counteracting measure to minimize their negative impact on the environment, especially the atmosphere. During the EIA follow-up stage, the project is monitored to ensure compliance with all requirements, as stated in the EIA report, and that necessary mitigation measures are implemented as per the agreement or report. This means that monitoring and evaluation of the proposed project will be ongoing. The following are important guiding principles to member states: -

Article 2.3 parties included in Annex I shall strive to implement policies and measures to minimize adverse effects, including the adverse of climate change, effects on international trade and social environmental and economic impacts on other Parties, especially developing country Parties.

Article 12.5 Emission reductions emanating from each development activity shall be certified by operational entities to be designated by the consultation of the parties serving as the meeting of the parties to this Protocol.

¹¹⁹ UNFCCC Status of Ratification of the Kyoto protocol 2017.

Article 13.4(a) assess, based on all information made available the overall effects of the measures taken according to this Protocol, environmental, economic and social effects.¹²⁰

4.6. Earth summit 2002, Johannesburg Summit

The summit was held in Johannesburg which is known as a City of Gold, the economic hub of Gauteng Province, South Africa, in September 2002. Sustainable development formed part of the core discussions at the summit. Commitments were made to better protect the world's biodiversity and ecosystems. Since the summit, South Africa has improved its commitment to ensuring that developmental projects not only take environmental issues into consideration, by protecting the environment, but that they are also sustainable. Measures have already been put in place in South Africa through existing legislation such as NEMA and EIA, to ensure that such environmental protection and sustainable development are achieved.

4.7. African Convention on the Conservation of Nature and Natural Resource 1968

The object of the treaty is "to encourage conservation, utilization and development of soil, water, flora, and fauna for the present and future welfare of mankind, from an economic, nutritional, scientific, educational, cultural and aesthetic point of view".

The contracting States shall take all necessary measures for the protection of flora and ensure best utilization and development. To this end the Contracting States shall:

- (a) "adopt scientifically-based conservation, utilization and management plans of forests and rangeland, taking into account the social and economic needs of the States concerned, the importance of the vegetation cover for the maintenance of the water balance of an area, the productivity of soils and the habitat requirements of the fauna;
- (b) observe section (a) above by paying particular attention to controlling bush fires, forest exploitation, land clearing for cultivation, and over-grazing by domestic and wild animals;

¹²⁰ Vong Sok, Bryan J. Boruff & Angus Morrison-Saunders, '*Addressing climate change through environmental impact assessment: international perspectives from a survey of IAIA members*', (2012) *Published online Page 317-325*.

(c) Set aside areas for forest reserve and carry out forestation programmes where necessary”.

CHAPTER FIVE

THE ROLE OF ENVIRONMENTAL ASSESSMENT PRACTITIONERS IN THE IMPLEMENTATION OF THE EIA

Environmental assessment practitioners are qualified practitioners and assessors, professionally trained to work and inform on environmental issues,¹²¹ like conducting Environmental Impact Assessments, environmental audits, stakeholder engagements, assessing the impact of environmental degradation on the receiving environment, and society at large. This includes conducting a basic assessment process on small projects, which do not necessarily have a severe impact on the environment, and a full environmental assessment on large projects with potential to be detrimental to the environment. Environmental Impact Assessment Practitioners must act independently of developers.¹²² This means that they cannot be biased, or have a vested interest in any particular project being authorized or refused, as this would compromise the independence of their work. They must have appropriate professional expertise, knowledge, educational background, and skills in conducting environmental impact assessments. Environmental assessment practitioners are required to adhere to the rules and regulations of their professional body, the Environmental Assessment Practitioners of South Africa, by acting ethically when utilizing their skill and knowledge.¹²³ Environmental Impact Assessment practitioners normally undertake to conduct the EIA process with the intention of identifying activities that might negatively impact the environment, and come up with appropriate measures to counteract any such environmental problems, thus get environmental authorization for the given developmental projects.

¹²¹ Rule Book of the Environmental Assessment Practitioners Association of South Africa, 'Advancing Environmental Assessment Practice in South Africa, (2016) 1-11.

¹²² Phillip Rosenthal, Type of Environmental Consultant.
<https://rosenthalenvironment.co.za/environmentalconsultants/>

¹²³ Endangered Wildlife Trust, 'A guide to the Environmental Impact Assessment (EIA) process'.
<http://www.eia.org.za/role-players/who-we-are/>

5.1. Role of organs of state as the competent authority in the implementation of EIA

Competent authorities are responsible for making decisions on applications for Environmental Authorization under EIA Regulation. Developmental activities that may result in substantial degradation of the environment must be identified, eliminated, minimized, prevented, and those which require environmental authorization must adhere to, and follow the EIA process to the end. Commencement with any identified activities from proposed developmental projects, before obtaining authorization from the relevant competent authority, is strictly prohibited, and can result in harsh punishment to encourage compliance. In terms of section 24(2) of NEMA, the national Minister responsible for environment affairs, or relevant MEC responsible for environmental affairs at the provincial level, has to pinpoint activities that cannot be implemented without authorization.¹²⁴ A detailed report on the impact of the proposed development on the environment must be furnished to the relevant competent authority, to enable informed decision making. The environmental expert therefore decides on whether to grant or refuse environmental authorization. The approval or refusal may be in whole or in part. An application may also be approved with conditions that clearly stipulate that the applicant would still be required to comply with certain provisions for the smooth running of the project.¹²⁵

Where various authorities are responsible for the final decision-making, or environmental authorization for different aspects of the same project, they must be well-coordinated, and concurrent approvals or authorization be issued, to foster efficient development while at the same time encouraging environmental protection. NEMA principles also encourage and reinforce intergovernmental coordination in environmental matters. Therefore, all competent authorities responsible for issuing authorization after the completion of EIA processes, may exercise their powers concurrently, by issuing separate specific authorization or joint environmental authorization.¹²⁶

¹²⁴Section 24 of Act 107 of 1998.

¹²⁵ Western Cape Government Environmental Affairs and Development Planning, 'Environmental Impact Assessment (EIA): An Introduction', (2015) 10-24.
<https://www.Westerncape.gov.za/eadp/files/atoms/files/EIA-2015.pdf>.

¹²⁶ Section 24L (1) of Act 107 of 1998.

The purpose of EIA regulations is therefore, to ensure that the impact of developmental activities, for which environmental authorization is necessary, is properly assessed, and any activities that may potentially cause harm to the environment are mitigated, minimized or avoided, before authorization can be effected, and those which are suitable for authorization are approved. It must be duly noted that the EIA process enables the organ of state to fulfill its obligation when making environmental decisions which may significantly negatively affect the environment. It is imperative to wait until the EIA processes have been concluded before making such decisions.¹²⁷

5.2. The role of the National Sphere of government in the implementation of EIA

Compliance with the procedure laid down by the Minister in terms of section 24(4) of NEMA does not absolve any person from complying with any other statutory requirement, to obtain authorization from any organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of activities in question.¹²⁸ The relevant personnel of states exercise concurrent powers when dealing with developmental activities that might need approval or authorization from several departments. Department of Environmental Affairs is the custodian of NEMA and many other environmental legislations.

The role of the Department of Environmental Affairs in the implementation of EIA

The division of the Environmental Affairs is the main custodian of NEMA, and other environmental laws and regulations such as EIA. It is responsible for protecting and conserving the environment, while balancing socio-economic development, to ensure the livelihood of all the country's citizens is at the same time improved. The department provides the legal basis for enforcement and compliance with environmental laws. This is vital to safeguard nature and preserve it for present and future generations. It is the main competent authority in terms of section 24(C) (2) is the Minister of Environmental Affairs.

¹²⁷ National Environmental Management Act, 1998 publication of implementation guidelines for comment, Notice 654 of 2010.

¹²⁸Section 24(7) of Act 107 of 1998.

This Department conducts and monitors EIA processes, and issues Environmental Authorizations and licenses.

The role of the Department of water and sanitation in the implementation of EIA

Department of Water and Sanitation's legislative mandate seeks to ensure that the country's water resources are conserved, used efficiently and adequately supplied to all citizens of the country.¹²⁹

The department has the vital mandate of delivering quality clean water, and preventing wastage of water, as this is a scarce commodity. The department is responsible for issuing water use licenses, promoting effective and efficient water resource management, and enforcing water regulations. All environmental information generated by the EIA process of any proposed developmental projects, must be submitted to the department for consideration, or review prior to issuing of a water license or authorization. The competent authority determines whether water availability represents a significant issue, from an environmental point of view. Any developmental activity that is likely to significantly affect a watercourse or water resource, directly or indirectly, requires a water use license. The competent authority can either issue or deny water use licenses.¹³⁰

The role of the Department of Mineral Resource in the implementation of EIA

Department of Mineral Resource is a competent authority according to NEMA, in so far as listed activities that deal with mining-related developments are concerns. This department grants mining and prospecting rights, approves environmental management plans or monitoring, compliance and enforcement. In this regard, the Minister of Mineral Resource is the relevant authority for all activities related to mining, exploration, extraction, or primary processing of mineral or petroleum resources and other ancillary activities. In terms of section 24(O)(2) of NEMA, the Minister responsible for mineral resources, or the MEC responsible must consult with every State department that

¹²⁹ South Africa Yearbook 2014/2015.

¹³⁰General notice 654 of 2010.

administers a law relating to a matter affecting an application for environmental authorization and mining rights.¹³¹

The department is the custodian of Mineral Petroleum Resource Development Act No 28 of 2002. In 1998, the White Paper on a Minerals and Mining Policy for South Africa¹³² which preceded the MPRDA, declared that, the long-term objective was for all mineral rights to vest in the state, for the benefit, and on behalf of all the people of South Africa. The application for a mining license must be subjected to an EIA process, as specified in the EIA Regulations, promulgated in terms of NEMA. In terms of section 53 of MPRD, the approval of the Minister of the Department of Mineral Resource is thus required for any land surface use. For development to obtain environmental authorization, such development proposal must have gone through Environmental Impact Assessment processes, as a prerequisite for obtaining authorization.

The role of the Department of Rural Development and Land Reform in the implementation of EIA

The most effective strategy and tool of the apartheid regime was racial and territorial segregation. Land ownership and spatial planning were based on race and reflected strong patterns of the political and economic conditions of the apartheid era. Racially based policies were the cause, and promoted insecurity, inequality, landlessness, and poverty amongst the majority of black people, and the cause of inefficient land administration and land use.¹³³ Land reform was formulated to deal with the imbalances and injustices of the past. Department of Rural Development and Land Reform as listed by NEMA, exercises both functions which may affect the environment, largely address the issue of land reform, to ensure that historically disadvantaged groups have equal access to the land, and management of the environment, which have been categorized as those components dealing with Land Development Facilitation, Spatial Planning and State Land Management.

¹³¹ Section 24(O)(2) of Act 107 of 1998.

¹³² GN 2359 in GG 19344 of 20 October 1998.

¹³³ Land Policy White Paper, 1997.

The role of the Department of Agriculture in the implementation of EIA

The Department of Agriculture is the competent authority for granting the subdivision of agricultural land. Section 4 of the Subdivision of Agricultural Land Act prohibits any subdivision of agricultural land without first obtaining consent from the Department. A change of land use for the development of agricultural lands needs to be applied for, and approved by the Department of Agriculture.

5.3. The role of the Provincial Sphere of government in the implementation of EIA

In terms of Regulation No R1184, the National Minister of Environmental Affairs and Tourism designates provincial proficient experts with the power to issue authorization, in terms of EIA regulations. The proficient authorities are accountable for administering EIA in South Africa at the Provincial level, the MEC is responsible for environmental affairs. In terms of section 6 of NEMA, MEC may make regulations in terms of subsection (5), only in respect of listed activities and specified activities, or areas in respect of which the MEC is the competent authority.¹³⁴ In this regard, the MEC for Economic Development, Environment and Tourism is responsible for administering of the EIA in Limpopo Province. Most provinces have enacted laws setting out the level of influence that municipalities may practice. If the municipalities enact a by-law that is out of their scope of work or boundaries as reckoned by the law, the by-law is therefore unacceptable.

5.4. The role of the Local Sphere of government in the implementation of EIA

Municipalities are not competent authorities, and therefore cannot approve or disprove EIA reports. However, they still have a specific responsibility to ensure sustainable development. The implementation of environmental laws is vital for the state, as it guides, encourages, and provides positive effects to the principles of sustainable development.¹³⁵ In terms of the Spatial Planning and Land Use Management Act 16 Of 2013, where an activity requires concurrent authorization, the relevant organs of states are empowered

¹³⁴Section 24(6) of Act 107 of 1998.

¹³⁵P Pillay, *The Implementation of Co-operative Environment Governance through Chapter 3 of the National Environmental Management Act 107 of 1998*, 2003, Conference proceedings: Co-operative governance in Southern Africa Centurian, PASA 253-260.

to issue out joint/integrated authorization, or individual authorization on specific activities aligned to their respective departments.¹³⁶ The municipality must be empowered to conduct environmental matters within its jurisdiction. Each province must endorse the enabling laws, setting out the powers that municipalities can apply. If a municipality enacts a by-law that goes outside of the power reckoned in the enabling law, that by-law is deemed unacceptable. For example, Polokwane Municipality has its by-law which it can enforce within its area of jurisdiction. Municipalities are required to govern the local affairs of their community under the Constitution, and subject to Provincial and national legislation.¹³⁷ To enforce compliance, the Municipality Structures Act¹³⁸, was enacted to force compliance on municipalities, in terms of the enforcement of environmental law.

On the other hand the Municipal System Act,¹³⁹ establishes the enabling framework for municipalities to comply with their legal duty to enforce environmental law. If a municipality takes a decision or fails to make a decision, which results in the degradation of the environment, any individual can approach the court, alleging a violation by the municipality of their environmental right. A municipality, in turn, would be able to pass on the alleged violation of the environmental right, where another State entity failed to perform its duty or function, which resulted in harm to the environment. In the case of *Beaufort West Municipality v McIntyre*¹⁴⁰, the court stressed that “where there is an environmental disturbance, the municipalities must make it a point that they direct the person to remedy the situation where possible”.

Section 16 of the NEMA Provincial government should give support to municipalities in terms of the Environmental Implementation Plan and the NEMA principles.¹⁴¹

¹³⁶Section 30 of Act 16 of 2013.

¹³⁷Section 151(3) of the Constitution of the Republic of South Africa, 1996.

¹³⁸Act 117 of 1998.

¹³⁹Act 32 of 2000.

¹⁴⁰ *Beaufort West Municipality v McIntyre*

¹⁴¹Section 16 Spatial Planning and Land use Management of Act 107 of 1998.

5.5. The role being played by the judiciary in ensuring the implementation of environmental law in particular EIA

A growing trend by affected communities, non-governmental organizations, and interest groups, to pursue criminal cases against companies, developers, competent authorities for environmental degradation, has seen the courts playing a major role in the implementation and development of environmental law, especially the Environmental Impact Assessment regulations.

The courts play a major role in fostering the implementation of environmental law, and ensuring that section 24 of the constitution is adhered to and effected. The courts have been active in providing clarity to the provision of environmental laws that seek to safeguard nature and prevent environmental degradation. *State v Frylinck and others*, Frylinck was an environmental assessment practitioner, employed by Mpofo Environmental Solutions cc, as appointed by the Department of Public Works, to conduct a BAR, for the proposed development of the Pan African Parliament buildings at Randjiesfontein 405JR, Midrand, Gauteng.

Frylinck provided information to the DEA as part of the Environmental Impact Assessment, which specifically indicated that there was no wetland on the site. DEA relied on his professional, honest opinion to grant authorization to the proposed developmental project. DEA stopped building of the complex when it was later revealed that construction was causing severe damage to the wetland on the site. Accused 1 was Mr. Stefan Frylinck, an adult male, and accused 2 a legal entity, a closed corporation. The two accused were charged with fraud, read with the provisions of section 103 of CPA, Act 51/1977, and contravening section 81(1)(a) of the Environmental Impact Assessment Regulations of 2006. In the judgment, the court found out that the behavior of the defendant verified deliberate neglect of the required standard of conduct of the specialist, to determine if there was a wetland on the site. Frylinck admitted that he knew that to determine the existence or otherwise of a wetland, wetland delineation had to be conducted. The court further stated that, by not appointing a wetland specialist, or consulting with such a specialist, the accused acted negligent in the execution of his mandate, and what was reasonably expected of him, based on his knowledge and skill.

The court found both accused guilty of providing incorrect and misleading information as provided under section 81(1) of the Environmental Impact Assessment Act of 2006 to DEA and accused 1 acquitted of fraud and environmental assessment practitioner was found guilty of providing incorrect or misleading information in a document submitted in terms of the NEMA, EIA Regulation. Environmental Impact Assessment practitioners and official authorities responsible for EIA sometimes attempt to circumvent the law by lying about the work on the site in favor of the developer. The complaint is that EIA processes tend to be time-consuming, thus the difficulty to follow the processes to the letter. Environmental Impact Assessment Practitioners are required to be highly knowledgeable, have expertise and specialist skills before handling EIA processes. In *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*, pursuant to being granted leave by Judge President Mlambo, Uzani Environment Advocacy (CC) instituted a private prosecution against BP Southern Africa (Pty) Ltd, out of Gauteng Division. BP Southern African (Pty) Ltd herein referred to as BP was the accused in this matter.

The accused was charged with contravening section 22(1) read with section 21(1) and 29(4) of the ECA and item 19(C) of Schedule 1 and Schedule 2 of Government Notice R1182 of 5 September 1997. In that, the accused wrongfully and unlawfully undertook, or caused undertaking of an activity identified as one which could have a substantially detrimental effect on the environment, with the construction and/or upgrading of the filling/service stations, without any written authorization by the Minister for Environmental Affairs, or a competent authority or a local authority, or an officer designated by the Minister. In their defense, BP argued that the prerequisites for instituting a private prosecution contemplated in NEMA had not been met, and that prosecution was not in the public interest, nor aimed at protecting the environment, and that private prosecution did not contemplate the fact that BP had submitted a section 24G application for rectification of the so-called "*unlawfully commenced*" activities in terms of section 24G of NEMA, during a period in which amnesty was available.

The court stated that NEMA specifically enjoins the environmental authority 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

station 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. Failure by the environmental authorities to comply with this requirement did not just have formal rather than substantive significance. It is a failure which goes to the very function that the environmental authorities failed to perform the very function which they were required by the law to perform.

In this matter, BP Southern Africa (Pty) Ltd was found guilty of contravening the provisions of the Environment Conservation Act, 1989 (ECA) and the National Environmental Management Act, 1998 (NEMA) which require fuel retailers to obtain environmental authorization before commencing any construction of filling, which may trigger certain listed activities. Undertaking a listed activity without environmental authorization is an offense in terms of 24F of NEMA, which stated that no person may commence an activity listed or specified, in terms of section 24(2)(a) or (b) unless the competent authority or the Minister or Mineral and Energy, as the case may be, has granted environmental authorization for the activity.¹⁴² This is the first successful private prosecution under section 33 of NEMA. People whose environmental rights have been negatively affected have the right to recourse. They can approach the court for recourse. Uzani sought to privately prosecute BP for its unlawful commencement with listed activities, without the requisite environmental authorizations. Uzani had to rely on section 33 of NEMA, which allows any person acting in the public interest, or in the interest of the protection of the environment, to bring legal action against who contravenes a provision or duty in environmental legislation, which duty is concerned with the protection of the environment. This is evidenced in this case. This case further illustrates that developers cannot continue with developmental projects without obtaining the relevant environmental authorization prior to commencing with the proposed developmental plan. Proceeding with their developmental project without proper environmental authorization, thus leads to environmental degradation and is strictly prohibited. This case showed the importance

¹⁴² Section 24(2)(a) Act 107 of 1998.

of undergoing the process of EIA, and obtaining the necessary environmental authorization. This case set precedence.

Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and others, in the Fuel Retailers case, the applicant, Fuel Retailers Association opposed an approval that was issued by the Mpumalanga provincial environmental authorities for the establishment of a filling station in White River in Mpumalanga, an environmental impact assessment report was submitted to Mpumalanga Department of Agriculture, Conservation and Environment. The competent authority granted authorization for the installation of three underground fuel tanks each with the capacity of 21500 liters for octane leaded and unleaded petrol, respectively, and the third for diesel, the erection of a convenience store, a four-post canopy, ablution facilities and a driveway onto the premises. The application for environmental authorization was supported by a scoping report prepared by Globecom.

Fuel Retailer appealed to MEC of DACE and later sought a High Court review of the decision by the Mpumalanga environmental authority to grant an authorization under section 22 of the ECA for the development of a petrol filling station in White River, Mpumalanga. The legal question was whether there was a duty on environmental authorities when making decisions about the construction of filling stations, to consider the environmental impact as well as socio-economic factors. The Pretoria High Court dismissed the application. Later the appellant approached the Supreme Court of appeal, which upheld the practice of environmental authorities, leaving the consideration of need, desirability and sustainability to the local authority, on the basis that this authority has to consider these aspects in rezoning application.¹⁴³

The applicant applied for leave to appeal against the decision of the Supreme Court of Appeal concerning the nature and scope of the obligations of environmental authorities when they make decisions that have a substantial detrimental impact on the

¹⁴³2007 (2) SA 163 (SCA) para 27.

environment.¹⁴⁴ The appellant abandoned all the other grounds of review and pursued the failure of the MEC to consider the need, desirability and sustainability of the filling station. The Constitutional Court stated that need, desirability and sustainability were terms used by parties when referring to socio-economic considerations. Need, desirability and sustainability did not appear in either the ECA or NEMA.

It was used in schedule 7 of the Regulations promulgated under the Town-Planning and Township Ordinance. The Constitutional Court explained that in light of the provisions of NEMA and the ECA, proper reference must be given to socio-economic considerations. Judge Ngcobo reasoned that unsustainable development is in itself detrimental to the environment, if the development such as a filling station may have a substantial impact on the environment. He further held that the authorities misconstrued the nature of their obligation, and as a consequence failed to comply with a compulsory and material condition prescribed by the law, for granting authorization to establish a filling station. The Constitutional Court granted the application for leave to appeal and upheld the appeal to the Courtside.

The decision of the environmental authorities ordered to reconsider the application by Inama Trust, in light of the judgment. In addition, the Court ordered the environmental authorities to pay the cost of the application. Sustainable development is defined by Constitutional Court as *“the integration of social, economic and environmental factors into planning, implementation and decision making for the benefit of present and future generations”*. This description integrates two of the globally acknowledged elements of the concept of sustainable development, which are the principle of sustainable integration of environmental protection with socio-economic development, and the principle of intergenerational and intergenerational equity.

Sustainable development originated from the Stockholm Declaration held in Stockholm in June 1972. The principles aimed to connect the right to environmental protection, and growth, to ensure that development is sustainable for the benefit of present and future generations. For example, the filling station infrastructure which lies underground may

¹⁴⁴ 2007 (2) SA 163 (SCA).

harm the environment, hence the need to subject the development to all EIA processes to the letter, and obtain the relevant environmental authorization. In granting environmental authorization, the competent authority must go through the application thoroughly, to ensure compliance before granting such environmental authorization.

CHAPTER SIX

EXAMINING HOW OTHER JURISDICTIONS ARE IMPLEMENTING EIA

6.1 Implementation of EIA in the UK

EIA was first formulated in the USA, as an assessment tool to prevent environmental degradation, using the 1969 National Environmental Protection Act.¹⁴⁵ The United Kingdom has developed and implemented the European Economic Community's Directive as a tool to deal with environmental degradation of the proposed environment.¹⁴⁶ Member states are at liberty to incorporate environmental impact assessment into their existing environmental laws and procedures, to govern developmental projects. As a result, the United Kingdom adopted the EIA as an ongoing concern to deal with environmental protection as stipulated in the Directive. The EU Directive has since been developed through the Town and Country Planning (Environmental Impact Assessment) Regulations, which also apply to projects serving national defense purposes in Northern Ireland and Scotland.

This Directive is a key regulatory framework that governs and ensures that the environment is protected from ongoing protection from proposed developmental activities. Since the directive came into effect, it has been altered and amended quite often.¹⁴⁷ In the UK, EIA regulations have not been applied to all development that form part of listed activities, and require EIA before they are undertaken. It was only applied to major development, this assisted the UK in terms of establishing massive industrial, and infrastructural development, that is sustainable and not endangering the environment because such big projects will via the EIA. Developers or their environmental consultants must first determine which environmental status or regulation will have to be applied to their developmental projects, and how their project will impact the environment. Many EIA

¹⁴⁵Brechfa Forest Connection, 'Special Report- The State of Environmental Impact Assessment Practice in the UK IEMA' (2011).<http://infrastructure.planningspectorate.gov.za> accessed on 19/05/2021.

¹⁴⁶European Community Directive No 85/337 (OJNOL175/40 1985 5).

¹⁴⁷GHK, 'Collection of information and data to support the Impact Assessment study of the review of the EIA Directive' 2010 http://ec.europa.eu/environment/eia/pdf/collection_data.pdf access on 09/10/2020.

activities are undertaken within the land use planning regime. UK uses case-by-case analysis to determine whether listed activities might require EIA.

This case by case assessment is termed screening, and is regularly undertaken by local authorities and other consenting bodies.¹⁴⁸

6.2 Implementation of EIA in the Netherlands

The Netherlands is one of the countries that use the European Council Directive. This directive required that EIA be undertaken, before official authorization of development projects which have a significant negative impact on the environment can take place. European directive gave effect to Environmental Management Act, which is the statutory framework that governs environmental protection in the Netherlands.

Dutch regulations aim to ensure that environmental consideration is taken into account when making the decision that concerns listed activities that are detrimental to the environment.¹⁴⁹ Just like in South Africa environmental assessment regime's goal is to ensure that EIA is considered in decision making that concerns the environment, to ensure that such development is sustainable and to avoid environmental degradation. In addition to this statutory procedure, a list of activities that either need a basic assessment, or a full assessment of which an EIA is required, is provided before an authorization decision can be made. EIA can be linked-to licenses and permits under the Environmental Management Act, 1994, to local land use plans, to the waste policies in provincial environmental management plans, and other sectoral decisions, as well as to policy decisions for activities for which EIA is required at the project level.

In South Africa, developers need to comply with the EIA process on listed activities before environmental authorization can be granted. EIA is carried out for every project in the Netherlands that is detrimental and that meets the requirement of EIA. The competent authority must determine whether EIA is required. In the Netherlands, the judiciary plays an

¹⁴⁸Regulation 3 of the EIA Regulations, 'Prohibition on granting planning permission or subsequent consent without consideration of environmental information'.

¹⁴⁹ Ibid.

important role in enforcing adherence to the Dutch EIA regulations by fostering environmental compliance and protection.

Concerned citizens and (environmental) pressure groups often institute legal proceedings against developmental activities which in their eyes, should have been subject to an EIA, which would have been avoided if there had been stakeholder involvement in the initial planning stages of the project.¹⁵⁰

The preparation of the environmental report is normally outsourced to registered environmental consultants such as qualified environmental practitioners who are well trained to do the job. The competent authority uses the EIA report or outcomes to make and justify its decision. Stakeholders have the opportunity to participate in the EIA processes during two stages including the scoping stage and during the presentation of the assessment outcome. In SA EIA processes include a public participation process which affords affected stakeholders the opportunity to give input and be part of decision making. This normally happens during the scoping stage.

6.3 Implementation of EIA in Botswana

Botswana is one of South Africa's neighboring countries, which is also affected by any development or under development that might take place in South Africa. The first EIA in Botswana was done in 1985.¹⁵¹ Like South Africa, the pressure increased on the Botswana government as a neighboring country, due to the socio-economic activities taking place in the country, bringing development and employment such as mining activities. Due to these developmental activities in Botswana, there was a need to protect the environment while at the same time encouraging and implementing development. These socio-economic activities led the Botswana Parliament into adopting environmental policies aimed at conserving the environment, the Natural Resource Conservation and Development Act in 1990.¹⁵² The object of the Act was to provide for

¹⁵⁰ Netherlands Commission for EIA, 'Environmental Impact Assessment in the Netherlands: Views from the Commission for EIS', 2002.

¹⁵¹David Aniku, '*Environmental assessment (EA) as a planning tool for sustainable development: The case of Botswana*' 2011.

¹⁵²Ibid

the establishment and strengthening of EIA in the decision-making process, and to ensure that the environmental implications of policies, programs and projects are evaluated before approval.

Botswana's Department of Environmental Affairs is the custodian of EIA regulations and any other environmental legislation, and is also the competent Authority. Just like in South Africa the Department of Environmental Affairs is the custodian of environmental laws, and also one of the main competent authorities. In Botswana, EIA is used to assess the effect of proposed developments on the environment. In terms of section 6(5) of Environmental Assessment Act 2011, competent authority upon receipt of an application to obtain authorization for a proposed activity at its discretion, request the developer to submit an environmental management plan.¹⁵³

The purpose of the environmental management plan is described in the EIA Regulations. Section 9(1) further states that where the competent authority determines that the proposed activity is likely to have a significant adverse environmental impact, it shall require that such activity undergo an Environmental Impact Assessment, or a strategic environmental assessment, the costs of which shall be borne by the developer.¹⁵⁴ According to section 7(2)(b), the EIA practitioner conducts a public hearing with affected people or interested communities, to explain the nature of the activity and its effects.¹⁵⁵ In South Africa, part of the EIA processes is to ensure that there is public participation by all affected relevant stakeholders, to give their input on the proposed developmental projects. This is done to allow stakeholders and to participate in the decision-making, to avoid future complaints that might arise after the project is already underway in the implementation stages.

¹⁵³ Section 6(5) of Environmental Assessment Act 10 of 2011.

¹⁵⁴Section 9(1) Act 10 of 2011.

¹⁵⁵ Section 7(2)(b) Act 10 of 2011.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATION

7.1. Conclusion

This research concludes that Environmental Impact Assessment is a prerequisite for developmental projects, in that it protects the environment and ensures that developmental projects are sustainable. It provides the opportunity to take early corrective action that developmental projects might require to protect and manage the environment. Development proposals that undergo the EIA process, and environmental authorization, often lead to sustainable development that is geared for the benefit of present and future generations. The important role of EIA in improving development is often underestimated. Developers and environmental practitioners, often view EIA as unfavorable, time-consuming, causing delays in completion of the developmental projects, and overall too expensive for the projects. EIA should not be seen as a barrier to growth and development, but instead, a necessary prerequisite for developmental projects which are aimed at changing livelihoods, improving the standard of living and protecting the environment, things that form part of the human right.

The procedure of Environmental Impact Assessment implements the principle of integration, which lies at the core of the concept of sustainable development, by providing a process through which potential social, economic and environmental impact of development activities can be scrutinized and planned for. South Africa has a progressive legal framework for environmental management, for instance, NEMA, which was enacted to ensure sustainable development, and that developers and government authorities take cognizance of the importance of Environmental Impact Assessment, and give people the opportunity to participate in every decision-making process. South Africa's EIA system possesses many features of a sophisticated EIA system easily comparable to one from a developed country.¹⁵⁶ Therefore, there is a great opportunity to improve the standard of South Africa's EIA practice, and be at the forefront of sustainable development in

¹⁵⁶ Christopher Wood, 'Environmental Impact Assessment in Development Countries: A comparative review', 1996 *The Town Planning*.

Africa.¹⁵⁷ The need for government to amend, or develop existing legislative mechanisms to protect the environment is often highlighted in the face of development proposals with potential to cause environmental damage.

EIA as a prerequisite for developmental projects obviously influences developmental proposals, to ensure that they work for the developer, community and the environment. It must be highlighted that those who because environmental damage must pay for the infringement. Competent authorities must screen proposals of developmental projects adequately, and thoroughly consider and evaluate the comments on the EIA reports, before carefully reaching an informed decision.

7.2. Recommendations

Every developmental project that falls within the listed activities, in terms of NEMA, and Environmental Regulations, must undergo compulsory Environmental Impact Assessment as a prerequisite for the continuation of such developmental projects. Because EIA is a prerequisite for developmental projects, there is a need for EIA practitioners to sign a code of good ethics, before they start working on any project, to ensure that they do their work diligently, and in good faith. The onus is on EIA practitioners to develop efficient approaches in maintaining communication with communities, and all relevant stakeholders, to allow concerns to be brought forward, and transparent sharing of EIA information, to avoid future complaints and protests during implementation stages.

It is further recommended that developers employ professional and registered environmental practitioners, and also the government needs to employ practitioners or employees who are fully conversant with environmental laws, international environmental instruments, have the skills, and the necessary expertise to carry the work through as expected of them. Government officials responsible for decision-making must have the necessary expectancy, and know-how, and must have ethical values. There is a need to improve on the assessment, monitoring, and implementation of the EIA system, mainly

¹⁵⁷Aletta Johanna Van Heerden, 'A comparative analysis of EIA report quality before and after 2006 in South Africa' (Master's Dissertation, North West University 2010).

cut down or avoid unnecessary delays which normally discourage practitioners from adhering to EIA processes, because it is time-consuming.

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