

Overview of the National Environmental Management Act 107 of 1998

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**Overview of the National Environmental Management Act 107 of
1998.**

by

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Masters in Development and Management Law(LLMDEV) has not previously been submitted by me for degree purposes at this or any other university, that it is my own work in design and execution, and that all material contained therein has been duly acknowledged.

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I thank God almighty for being with me ,guiding me and blessing me with this wonderful tool of life.

DEDICATION

This dissertation is dedicated to my late father John Deliza Khumalo, my late grand parents Mamphela and Tshibogo Mogola. It is also dedicated to my mother Catherine Kwetepe Khumalo, my two brothers Ndala ‘Dala’ Khumalo, Bigboy ‘Brika’ Khumalo and my three sisters Dinah ‘Lady D’ Khumalo, Yvonne ‘Bobo’ Khumalo and Sannie ‘Masanza’ Khumalo.

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Chapter 1

1. INTRODUCTION

1.1 GENERAL

This paper deals with management of the environment, which is governed by the National Environmental Management Act¹, (NEMA) an Act that was assented to on 19th day of November 1998, was published for general information on 27 November 1998² and came to force on the 29 January 1999.

The purpose of NEMA is to provide for co-operative environmental governance by establishing principles for decision making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organ of state, and to provide for matters connected therewith.³

NEMA has been amended several times since it came into force in 1999. The first amendment was the Environmental Management Amendment Act⁴, which came into force on 1 May 2005 and regulates amongst other things the appointment and powers of the environmental management inspectors and is aimed at facilitating the enforcement of NEMA. Another amendment was the National Environmental Management Amendment Act⁵ which came into force on 7 January 2005 and which allows anyone who unlawfully commenced an activity identified under section 21 of the Environment Conservation Act⁶ to apply under section 24(g) of NEMA for authorization of that activity. The most recent amendment is National Environmental Law Amendment Act⁷ which came into force on the 1st day of May 2009 which allows NEMA to apply retrospectively.

¹ Act 107 of 1998.

² Government Gazette. No 19519 of 27 November 1998.

³ NEMA.

⁴ Act 46 of 2003.

⁵ Act 8 of 2004.

⁶ Act 73 of 1989.

⁷ Act 14 of 2009.

NEMA grew out of Consultative National Environmental policy process⁸(CONNEPP). CONNEPP was a broadly consultative process in South Africa. At the time of promulgation, NEMA enjoyed widespread public support because it reflected the environmental needs and concerns of the people.⁹

NEMA provides the overarching legislative framework for environmental governance in South Africa. The point of departure is that NEMA is a set of national environmental management principles that inform any subsequent environmental legislation, implementation of that legislation as well as formulation and implementation of environmental management plans at all levels of government.

NEMA is regarded as landmark statute in environmental affairs in South Africa.¹⁰ It is not only a pioneering work done in terms of the democratic and negotiated policy and legislative processes, but is also the firm “umbrella” national legislation which endeavours to establish an integrated environmental framework that in time will transform and co-ordinate most of the currently diverse and fragmented sectors of the environment. It places the environment squarely within the process of constitutionally recognized environmental principles and practices.¹¹

1.2 Statement of the problem

The issue is that the promulgation of NEMA environmental laws in South Africa failed to formulate any legal principle aimed at establishing environmental law as a separate branch of law in the sense of a body of rules with their own normative identity, distinct from the rules of other traditional branches of the law.

1.3 Aim of the study

The aim of the study is to assess the application and implementation of NEMA.

⁸ Gubb A “Wildlife and environmental society of South Africa” www.lexisnexis.co.za (accessed 24 /08/ 2009).

⁹ Ibid.

¹⁰ Bray E *Co-operative governance in the context of NEMA 107 Of 1998.*

¹¹ Ibid.

1.4. Specific objectives of the study

The specific objectives of the study are to outline the success of NEMA and to assess the role of NEMA in integrating environmental law.

1.5. Significance of the study

The study will assess the gains that South Africa has made in protecting the environment and environmental rights of citizens.

1.6 Research methodology

This research will be literature based, with emphasis being given to the analysis of the available literature on the subject matter. The study shall rely on both the primary and secondary sources of law, being legislation and court decisions in the case of primary sources and literature in the case of secondary sources.

The following two methods will be used, namely legal historic method and the legal comparative method.

1.7 Organization of the chapters

This research consists of five (5) chapters.

Chapter 1 deals with introduction and general statement of the problem. In Chapter 2 a brief history of environmental law in South Africa and the origin of NEMA are looked at while Chapter 3 deals with application of NEMA . Its critique is looked at in chapter 4. The recommendations and the conclusions are found in chapter 5.

Chapter 2

BRIEF HISTORY OF THE ENVIRONMENTAL LAW IN SOUTH AFRICA

2.1 INTRODUCTION

Environmental law as branch of law was first seen in around 1970¹². This does not mean that there was no environmental law before 1970, but the 1970's saw political and legislative attention on environmental issues becoming more focused.

Prior to 1970 and indeed for hundreds of years there had been environmental laws. For example, law affecting wildlife are at least as ancient as civilization. Historically wildlife law was primarily concerned with conserving wild animals so that the privileged classes could hunt them, but nevertheless would qualify as environmental law.¹³

There were conservation statutes passed in the Cape from as early as 1652¹⁴ but most laws of an environmental nature passed from that time until the early twentieth century were concerned with conservation of the natural resources particularly wild life. Since then there has been increase of activity in the environmental sphere in South Africa.¹⁵

The development as stated above displayed a serious problem as the South African environmental law was concerned with the protection of wildlife as opposed to the environment and the environmental rights of the human beings.

¹² Department of Environmental Affairs and Tourism "Towards a new environmental policy for South Africa discussion document" (April 1996) www.lexisnexis.co.za (accessed 28 August 2009).

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

The enactment of the Environmental Conservation Act¹⁶ was followed by number of developments aimed to give substance to the Act for example it provided for the promulgation by the minister of Environmental Affairs, through regulations, of policy for environmental conservation¹⁷. Notwithstanding the Act was regarded as the most important conservation measure that had been adopted in the history of South African environmental law, whose purpose was to co-ordinate all action directed at or having an influence on the environment. The Act relied heavily on the Minister of Environmental Affairs to promulgate regulations to give more meaning and direction.

Prior to April 1994, South Africa was governed by three tiers of government, namely central government , four provinces and numerous local authorities.¹⁸ This system of government did not help the country to solve the challenges encountered daily as the spirit of co-operative governance was not promoted and as a result the environmental protection and environmental rights were not given attention. Legislation that affected the environment either directly or indirectly emanated from any and all of the following sources, namely statutes passed by independent homelands, homeland laws, provincial gazette passed by each of the provinces, and local authority by-laws in many of the towns and cities.¹⁹

1994 saw a new constitution and a new government . The Constitution²⁰ amongst other things provides for the protection of the environment and the division of the responsibility between national and provincial government. The Constitution also paved way for the promulgation of NEMA which is discussed in full hereunder.

¹⁶ Act 73 of 1989.

¹⁷ Preliminary note www.lexisnexis.co.za (accessed 28 August 2009)

¹⁸ Preliminary note supra.

¹⁹ Ibid.

²⁰ Act 108 of 1996.

2.2 The origin of NEMA

2.2.1 Public participation

In recent years, signature to number of environmental conventions has increased significantly. Conventions which deal with a wide range of issues on which global action is required, for example the Rio Declaration and Principles, Agenda 21²¹ which is administered by the Department of Environmental Affairs and Tourism and whose main objective which is to promote sustainable development principle which played an important role towards the promulgation of NEMA, were signed.

The provisions of Rio principle²² played an important role in guiding and shaping the framework of NEMA as the provisions of principle 10²³ are contained in NEMA. As a result members of the public played important role towards the promulgation of NEMA because a healthy environment was created for the members of the public to participate in decision making.

Department of Environmental Affairs and Tourism press release heralding the Act's approval by the National Assembly²⁴ provides that " one of the cornerstones of NEMA is public participation in the implementation of environmental legislation, or the affording of civil society opportunities for involvement in environmental governance". This principle can be seen as encompassing the three aspects of public participation suggested by Rio principle.

²¹ International law conventions and agreements www.lexisnexis.co.za (accessed 28 August 2009).

²² Principle 10 of the Rio Declaration on Environment and Development (1992) provides: " Environmental issues are best handled with the participation of all concerned citizens, at the relevant level, at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision process by making information widely available".

²³ Ibid

²⁴ M Kidd "Environmental law prepares for the new millennium" SAJELP 6. See also www.gov.za/envweb/indexenv.h.t.m.

2.2.2 Consultative National Environmental Policy Process

NEMA's origin is in the environmental policy development process known as Consultative National Environmental Policy process (CONNEPP) which was launched in August 1995 at a national conference²⁵ to which about 500 delegates were invited. In April 1996 a discussion document was released, which was followed in late October 1996 by the release of the green paper on an environmental policy for South Africa. Comments were invited from the general public to be submitted before 16 December 1996 and a second conference was held in January 1997.²⁶

The final white paper on environmental management policy for South Africa was released on 15 January 1998, after which on 1 July 1998, the draft National Management Bill was published, and comments were invited and were to be released, by 28 July, a day after cabinet approved the Bill on 21st September. The national assembly approved the Bill and at about the same time , there were several public hearings hosted by National Council of Provinces(NCOP) in consideration of the Bill. NCOP approved the Bill shortly afterwards, subject to few minor amendments. The was finally passed by the National Assembly on 5 November 1998.²⁷

The above steps highlight level of transparency , openness and public participation in decision making which was something never done in the history of South Africa as far as the promulgation of legislation is concerned, Something that gives hope when it comes to issues relating to environmental rights and environmental protection.

²⁵ M Kidd "NEMA and pubic participation" (1999) 6 SAJELP.

²⁶ Ibid.

²⁷ M Kidd supra.

2.2.3 Promulgation of NEMA

The Environmental Conservation Act of 1989²⁸ contained many improvements as compared to Environmental Conservation Act of 1982²⁹ which required promulgation by Minister to regulate pollution, waste management and environmental impact assessment but it was clear that a thorough revision was necessary and answer came by way of promulgation of NEMA after a lengthy consultation process.

The Act has repealed substantial portion of the Environmental Conservation Act and is intended, in due course, to repeal it in its entirely. The national policy has been replaced by state environmental management principles which are intended to co-ordinate the actions and decisionmaking of all organs of state in accordance with the principle of sustainable development.³⁰

2.2.4 The role played by the Constitution

Section 24 of the Constitution³¹ provides:

Everyone has the right:

- (a) To the environment that is not harmful to their health and well-being,
- (b) To have their environment protected for the benefit of the present and the future generations through legislative and other measures that :
 - (i) Prevent pollution and ecological degradation;
 - (ii) Promote conservation, and
 - (iii) Secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 (b) puts an obligation on the government to protect everyone's environment through legislative and other measures. That led to the promulgation of NEMA to protect the environment for the benefit of the present and future generations.

²⁸ Act 73 of 1989.

²⁹ Act 100 of 1982.

³⁰ Preliminary note www.lexisnexis.co.za (accesses 22 August 2009)

³¹ Act 108 of 1996

Chapter 3

APPLICATION OF NEMA

3.1 Interpretation of NEMA

Like any other piece of legislation NEMA is subject to interpretation and as result the rules of interpretation are applicable. The Constitution plays an important role in interpreting NEMA in that the spirit and purport of the Constitution must be carried out by the Act.

The guiding provision of the Constitution in the interpretation of NEMA is section 24. The court in *Bareki and Others v Gencor Ltd and Others*³² used the provision of section 39(2) of the Constitution to hold that the court in interpreting NEMA must promote the spirit and objects of the Bill of Rights and that NEMA was enacted to give content to section 24 of the Constitution. Of importance is the following part of the preamble to NEMA which provides:

“Whereas many inhabitants of South Africa live in an environment that is harmful to their health and well-being:

Everyone has a right to the environment that is not harmful to his or her health and well-being;

Everyone has the right to the environment that is protected for the benefit of the present and the future generation, through reasonable and other measures that prevent pollution and degradation”

NEMA contains ways and means in terms of which it should be interpreted i.e. national environmental principles.

Section 2(1)(e) provides:-

“The principles set out in this section apply through the Republic to the actions of all the organs of state that may significantly affect the environment and-

(e) Guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment”.

³² [2006] 2 All SA 392 (T).

The court showed the manner in which the Act should be interpreted and the approach to be adopted in trying to ascertain the meaning and the purpose of NEMA. In doing so, the first step is to understand and align the provision of the Act with that of the section 24 of the Constitution, and the principles and the preamble of NEMA.

3.2 The impact of the Constitution on the interpretation of NEMA

In *BP South Africa (Pty) Ltd v MEC for Agriculture Conservation, Environment and Land Affairs*³³ court commented that by virtue of section 24 of the Constitution, environmental considerations, often ignored in the past, had since been given rightful prominence by their inclusion in the Constitution. The court further indicated that the “ MEC and the department were at the centre of the administrative processes as far as promotion and protection of the constitutional right to the environment in Gauteng is concerned. As result they could not avoid that constitutional duty”. The case added to what the court said in *Save the Vaal case*.³⁴

The constitution as the supreme law of the land required of NEMA to properly protect the environment as stated in the Constitution and use the constitutional guidelines to achieve its objectives.

3.3 Locus standi

He who seeks relief in our courts must have *locus standi* to bring the matter before the court . *Locus standi* is not discussed here as such emphasis is put on the changes brought by the Constitution and NEMA to the common law principle of standing in terms of which he who seeks legal relief in our courts must be directly and indirectly affected.

³³ [2004] 3 All SA 201 (W)

³⁴ *Director: Mineral Development Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) where the court said that our constitution by including the environmental rights as fundamental , justiciable human rights, by necessary implication required that the environmental consideration be accorded appropriate recognition and respect in the administrative processes in our country, together with the change in our legal and administrative approach to environmental concerns.

Section 38³⁵ of the Constitution gives a list of persons who may institute legal proceedings. In turn section 32(1) of NEMA provides:

“Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or any other statutory provision concerned with the protection of the environment or the use of the natural resources”

The Act goes further to mention a list of types of person similar to those mentioned in section of the Constitution including anyone who can take the matter to court in the interest of protecting the environment.

In *Bareki case*³⁶ the plaintiffs averred that they had necessary standing in terms of section 38 of the Constitution and section 32 of the NEMA. Standing was never challenged in the proceedings. The plaintiffs were seeking an order compelling the defendant to take steps to correct the pollution and/ or degradation of the environment in the mining and surrounding area caused by the defendant long before NEMA was enacted.

3.4 The costs

NEMA also makes an exception to the principle of awarding costs to the winning party by not awarding costs against the losing party.

Section 32(2) provides:

“A court may not decide to award costs against a person who or a group of persons who or group of persons which fails to secure a relief sought in respect of any breach of any provision or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of the natural resources if the court is of the opinion the person or group of persons acted reasonably

³⁵ Of Act 108 of 1996 provides: “Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of rights has been or is threatened and the court may grant the appropriate relief, including declaration of the right. The person who may approach the court are:

- (a) Anyone acting in their own interest,
- (b) Anyone acting on behalf of any person who cannot act in their own name,
- (c) Anyone acting as a member of, or in the interest of a group or class of person,
- (d) Anyone acting in the public interest, and
- (e) An association acting in the interest of its members.

³⁶ *Bareki and others v Gencor Ltd and others* [2006] 2 All 392 (T)

out of the public interest of protecting the environment and had made the due affords to use the other means reasonably available for obtaining the relief sought”

In *Sivermine Valley Coalition v Sybrand van der Spuy Boerderye*³⁷ a voluntary organization which consisted of 10 non- governmental organizations (NGO) of which all save for the Wild Life and Environmental Society of South Africa (“WEssa”) have voted to have a relief in court and lost the case, in dealing with the costs the court said:

“the fact however remains that the applicant had acted in public interest, in terms of reasonable interpretation of the regulations and furthermore, after a failure on the part of the authorities to protect the environment within the Cape Peninsula. Unfortunately the manner in which this dispute has been placed before this court leaves it with no option than to rule on the basis of the relief sought. However that does not mean that the court exercise its discretion insofar as costs are concerned.”

The court said further:

“it seems that the (NGOS) should not have unnecessary obstacle placed in their way when they act in a manner designed to hold the state and indeed the private community accountable to the constitutional commitment of our new society, which includes the protection of the environment”

The application was dismissed with no order as to costs against the losing party.

3.5 Duty of the state to protect the environment

Section 31 (A)³⁸ of the Environmental Conservation Act of 1989 provides :

“If in the opinion of the Minister or the competent authority or government institution concerned any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously affected, the Minister, competent authority, local authority or government authority or the government institution, as the case may be, may in writing order such person –

- (a) to cease such activity, or
- (b) to take reasonable steps as the Minister, competent authority, local authority or government institution, as the case may be deem fit,

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect”.

³⁷ 2002 (1) All SA 10 (C).

³⁸ Act 73 of 1989.

This section gives the state through the Minister, the provincial MEC or the local government power to prevent or stop any person whom in their view is engaged in an activity that might or will damage the environment by way of a directive. He who feels offended by the decision of the Minister can approach a competent court having jurisdiction for a relief and such a court should be in position to confirm or overturn the decision of the minister.

In *Khabisi and Others v Aquarella Investment 83 (Pty) Ltd*³⁹ the respondent intended to build two properties through the erection of a series of three of four stories cluster units. The applicant issued compliance notice in terms of section 31L⁴⁰ of NEMA and directive in terms of section 31(A) Environmental Conservation Act to both the first and second respondents to cease all construction and construction related activities. The respondents ignored the directive and continued with the construction, as a result of which the applicant lodged an application on an urgent basis.

The respondents argued that the decision to stop the development based on section 31(A) directive was invalid and of no legal force and effect. The court said:

"it is abundantly clear that once such compliance notice has been issued, a person on whom it is served (*in casu* the respondents) is obliged by the law to comply therewith ,(section 31L(4) of NEMA) . For obvious reasons, this section is couched in peremptory terms. Self-evidently it does not give the respondent a choice to abide by the compliance notice or not. Furthermore any person who feels aggrieved by the compliance notice is free to lodge an objection in terms of section 31L(5) and 31(m) of NEMA. In order to give might and teeth to NEMA, section 31(N) creates an offence for anyone who fails to comply with the compliance notices properly by a competent person and the court authorizes the final interdict".

³⁹ 2007 (1) All SA 10 (C).

⁴⁰ Section 31L(1) provides: "an environmental inspector, within his or her mandate in terms of section 31D, may issue a compliance notice in the prescribed form and following the prescribed procedure, If there are reasonable grounds for believing that a person has not complied-

- (a) With the provision of the law for which that inspector has been designated in terms of section 31D ,or
 - (b) With a term or condition of a permit, authorization or other instrument issued in terms of that law,
- (2)A compliance notice must set out-
- (a) details of the conduct constituting non-compliance;
 - (b) any steps the person should take and the period within which those steps must be taken-
 - (c) anything which any person may not do, and the period during which the person may not do it, and
 - (d) the procedure to be followed in lodging the objection to the compliance notice with the minister or MEC as the case may be"

In *HIF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁴¹ the court set aside the directive by the Minister. According to the respondent the applicant had conducted an illegal activity in clearing the site for the purpose of construction prior to obtaining authorization from the Department of Agriculture, Conservation and Environment.

In ruling against the respondent the court said:

“the appellant’s activities had nothing to do with such land, and therefore did not fall within the prohibition relied on by the respondent. Further that item 10 of the regulations was flawed in that it was void for vagueness. In terms of the doctrine of vagueness, laws must indicate with reasonable certainty what is required by them and that the respondent lack of compliance with the requirements that a directive issued by the Department must be preceded by the publication of a draft notice”

The appeal was upheld and the Minister’s directive was set aside.

3.6 Polluter pays principle

The principle of “polluter pays” requires that a person responsible for environmental harm or damage should take necessary steps to rectify that or prevent more harm to the environment than have innocent people having to pay for that either directly or through the government. To be precise the *rationale* behind this principle is that the costs of the pollution should be borne by generator of the pollution rather than the population at large.

According to Kidd⁴² the principle entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by such activity, instead of passing these on to somebody else. This includes both the costs of prevention and dealing with the consequences of pollution already caused. The costs are not only incurred by humans but also costs to the environment itself, thus it can be seen that the principle has both the proactive (preventive) aspects and reactive (compensatory) aspects.

⁴¹ [2007] 4 All SA 1108 (SCA)

⁴² Kidd M Environmental Law (2008) at page 7.

The white paper on environmental management states that those responsible for environmental damage must pay the repair costs both to the environment and the human health and the costs of the preventive measures to reduce and/or prevent further pollution and environmental damage.⁴³

Section 28(1) of NEMA⁴⁴ and section 2(1)(p) deal with the issue. Section 2(1)(p) provides :

“ The costs of remedying pollution, environmental degradation and consequent adverse health effect and of preventing, controlling or minimizing further pollution environmental damage or adverse health effects must be paid for by person responsible for harming the environment”

Even though the polluter is responsible for the damage caused to the environment by his or her conduct the Act is not applicable to any polluting activities which occurred before 29 January 1999, the day in which NEMA came into operation. This position was clearly stated in *Bareki and Another v Gencor Ltd and Others*⁴⁵ where the plaintiff’s case was based on the alleged degradation of the environment caused by the mining activities conducted over a number of years, which activities were discontinued some time ago, in 1981 or 1985. The question that the court had to address was whether NEMA applied retrospectively or not.

The court said: “ At common law the *prima facie* rule of construction is that a statute should not be interpreted as having retrospective effect. That presumption against retrospectivity may be rebutted either expressly or by necessary implication, by provision or indication to the contrary in the enactment under consideration”.

The court held “ unfairness would occur if the Act were given retrospective application” and ruled that it did not have such application. The claim that the Act did not have retrospective application was accordingly upheld.

⁴³ Chapter 3 of white paper on environmental management policy for South Africa .Notice 749/1998 gg 18894 dated 15 May 1998.

⁴⁴ Which provides: “ Every person who causes , has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by way or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment”

⁴⁵ [2006] 2 All SA 392 (T).

In making sure that the polluter takes responsibility for his or her actions the legislature came with changes to NEMA by passing the National Environmental Laws Amendment⁴⁶ which came into force on 1 May 2009. In a provision that is substantially the same as section 28(16) of an earlier version of this law (which provision was removed in subsequent drafts and then reappeared as section 28(1A), the duty of care imposed under NEMA is now clearly retrospective and will apply to pollution which occurred before NEMA's commencement and also to pollution which emerges at a time different to the time the pollution activity occurred.⁴⁷ This will address the decision in *Bareki*⁴⁸ in which the court found that the use of the 'has caused pollution' did not create retrospective liability and that the duty arose only in respect of pollution caused after NEMA's commencement in January 1999.

3.7 Co-operative governance

One of the features of NEMA that makes it to be unique to any of the legislation before it is provision for co-operative governance. Chapter 3 of NEMA provides extensive procedures for co-operative governance (e.g. the distribution and sharing of functions between national and provincial governments, departments as well as mechanism for coordination and alignment of these function e.g. environmental implementation plans and environmental management plans)

NEMA is regarded as a landmark statute in environmental affairs in South Africa, not only as pioneering work done in terms of the democratic and negotiated policy and legislative processes that preceded it, but it is also the first "umbrella" national legislation which endeavours to establish an integrated environmental

⁴⁶ 14 of 2009

⁴⁷ Winstanley T "environmental update " 2009 (August) *De Rebus* 53.

⁴⁸ *Bareki and Others v Gencor Ltd and others* [2006] 2 All 392 (T).

management framework which in time will transform and co-ordinate most of the currently diverse and fragmented sectors of the environment.⁴⁹

In the case of *BP South Africa (Pty) Ltd v MEC for Agriculture Conservation, Environment and Land Affairs*⁵⁰ the court said:

“All spheres of government and all organs of state must co-operative with and consult and support one another, that it is desirable that the laws should promote certainly with regard to decision making by organs of state on matters affecting the environment, that the law should establish principles guiding the exercise of functions affecting the environment and that the law should establish procedures and institutions to facilitate and promote public participation in the environmental governance”⁵¹

Guided by the above principle it is clear that the intention of the legislature was to establish a co-operative and integrated policy of protecting the environment which will take into account social, economic and environmental factors in the planning, implementation and evaluation thereof for the benefit of present and future generations. The principle called for legislative and other measures which would develop a framework for integrated and good environmental management and certainly of decision making by organs of state, all of which were to be the result of public participation in environmental governance.

The Department of the Land Affairs came up with clear management plan to comply with the principle of co-operative governance. In its plans the Department emphasized that it was not a “plan for integrated environmental management, but rather a plan to foster co-operative governance and align the exercising of the departmental function regarding the environment, with other relevant departments and organs of state.”⁵²

The Department exercises functions which may affect the environment and are largely associated with land reform while functions which involve the management of the environment have been categorized as those components

⁴⁹ Ibid

⁵⁰ [2004] 3 All SA 201 (W).

⁵¹ At 220

⁵² Consolidated environmental implementation and management plan 2000. www.lexinexis.co.za accessed (28 August 2009)

dealing with land development facilitation, spatial planning and state land management.⁵³

3.8 Application of administrative justice to protect the environment

Environmental law can be described as an administrative law in action because the latter is essentially concerned with administrative decision-making. Resolution of environmental conflicts invariably turns on the exercise of administrative decision-making powers.⁵⁴

The proper application of the administration of justice as provided in Promotion of Administrative Justice Act⁵⁵ can play an important role in the protection of the environment and environmental rights, for example when important decisions are to be made all interested and affected parties should be given an opportunity to make presentation or raise an objection where necessary and /or have access to information in the possession of the authority in terms of section 3(1)(2)(a)(b) which provides :

“(1) Administrative action which materially and adversely affect the right or legitimate expectation of any person must be procedurally fair,(2)(a) A fair administrative procedure depends on the circumstance of each case

(b) In order to give effect to the right to procedurally fair administrative action, an administrator subject to subsection(4), must give a person referred to in subsection(1)-

- (i) adequate notice of the nature and purpose of the administrative action,
- (ii) a reasonable opportunity to make representations,
- (iii) a clear statement of the administrative action,
- (iv) adequate notice of any right of review or internal appeal, where applicable, and
- (v) adequate notice of the right to request reasons in terms of section 5”.

The importance of listening to interested and affected persons was stressed in the case of *Director: Mineral Development, Gauteng Region v Save the Vaal*

⁵³ Ibid

⁵⁴ Glazewski J “Environmental law in South Africa ” (2000) at 97

⁵⁵ Act 3 of 2000.

*Environment*⁵⁶ where the court said “ our Constitution by including environmental rights as fundamental rights, by necessary implication requires that consideration be accorded appropriate recognition and respect in the administrative process in the country”

In *Save the Vaal* case while the Sasol’s mining right application was still under consideration, Save through their attorney raised a contention that they were entitled to be listened to in opposing the application. The director informed Save the Vaal that he was not obliged to hear them at that stage and that he was not prepared to do so and he later issued a mining license to Sasol mining. In ruling against the director and the Department of Minerals and Energy the court said: “these are environmental matters about which the respondents have legitimate concerns . The Director would therefore have to give them an opportunity to be heard at that stage unless there are other provisions of the Act which require them to defer raising their environmental concerns until some other time”

Even though the court ruled against the Department in *Save case* , that did not mean that the Department was precluded from exercising its discretion in opposing any activity which could cause harm to the environment or to grant an application that would harm the environment provided the Department followed the correct procedures in reaching the decision and that all interested and affected parties were consulted and given fair opportunity to be heard. This position was emphasized in *BP*⁵⁷ case where the court said:

“the complexity of the factors to be taken into account by the department in exercising its discretion to refuse or allow the application for the new filling station is such that the guideline was indeed called for in the present instance, the department was not only lawfully entitled, but indeed duty bound to take it into consideration in arriving at a decision in regard to the applicant’s application”.

In *Oude Kraal Estates (PTY) Ltd v City of Cape Town and others*⁵⁸ the court had to deal with the question whether, or in what circumstances, an unlawful

⁵⁶ 1999 (2) SA 709 (SCA)

⁵⁷ Footnote 50 at page 17.

⁵⁸ 2004 (3) All SA 1 (SCA)

administrative act might simply be ignored and on what basis the law might give recognition to such acts. In that case the appellant submitted an application for approval of an engineering services plan to the relevant local authority. The local authority responded that the plan could not be approved because the development right had lapsed, but the administrator extended the time limit. The court held that an unlawful administrative act as well as all acts and consequences flowing there from, remain in existence until set aside by the court in proceedings for judicial review and that the approval of the township was invalid at outset.

Chapter 4

CRITIQUE OF NEMA

4.1 Introduction

In the better part of the previous chapters of this paper emphasis was on the positive features of NEMA as opposed to its negative features, creating impression that NEMA was a perfect piece of legislation as far as environmental law is concerned. In this chapter the negatives and the failures of NEMA will be briefly discussed.

4.2 The process of enacting NEMA

The process of the promulgation of NEMA was characterized by almost indecent haste to have the Bill passed, with the impression being created that public participation in the Act's enactment process was a necessary obstacle that had to be encountered on the way to the winning tape, rather than on the integral component of the entire process.⁵⁹ This shows that even though the authorities were showing the intentions of promoting public participation in the enactment of the Act, they were still worried by the delay that will be caused as result of objections or changes brought by the members of the public.

Analysis of the process behind the enactment of NEMA reveals that there was two and half years period during which the national policy was being developed at which stage there were at least three occasions when the general public were invited to submit comments on draft or discussion documents. The public was never given enough time to participate in the finalization of the Bill, for example the publication of the draft National Environmental Management Bill, barely a month after the publication of the final policy document, members of the public

⁵⁹ Kidd M "NEMA and Public participation" (1999) 6 SAJELP.

had just over three weeks to make comments on a Bill which was to become probably the most important environmental statute in this country.⁶⁰

Following the praiseworthy efforts at ensuring public involvement in the policy development process, when it came to putting the nuts and bolts into place, it is difficult to understand why the public was given such a short time to make submission.⁶¹

There were other influences that wanted to have the Act finalized as soon as possible for example when substantive comments on the Bill were being considered by the National Council of Provinces, this body was persuaded not to amend the Bill because the amendments would amount to amendment of principle which would result in a delay of at least six months before the Act was passed.⁶²

Even months earlier, it appeared that those in control of the process were determined to have the Act passed without delay.⁶³

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Parliamentary update number 14 (October 8 1998)at. It is reported here that the main areas of debate in the Select Committee on Agriculture, Land and Environmental Affairs centered around the Kwazulu- Natal proposal that the Department of Minerals and Energy Affairs be added to the list of departments which would be required to produce an environmental implementation plan. The issue was extensively discussed during the National Assembly stages of the Bill and during the pre- parliamentary interdepartmental talks. The Department of Environmental Affairs and Tourism as included in schedule two, which requires it to prepare an environmental management plan. The departmental affairs and Tourism requested that the proposal not to be adopted as the change would be a change in principle and would require the Bill to go back to Cabinet and through Parliament again as this would delay the adoption of the Bill for six months. The Bill did make provision for the schedule to be changed and added to. The Department of Minerals and Energy Affairs be added at the later time if such agreement was reached.

⁶³ Bishop C, Mail and Guardian online 29 May 1998 Dealing with dumping, commented that if the Bill were to become Law in September, individuals and organization had until July 29 to submit comments on the Bill, which the Department of Environmental Affairs and Tourism was determined to push the parliamentary session.

4.3 Failures of NEMA

NEMA fails to establish an integrated platform where applications for environmental authorization are lodged, decisions are made and authorization issued. It fails to identify the standards to be met, neither does it provide for establishment of a standard generating and enforcement review committee, nor does it provide an interface between the various role players such as Department of Water Affairs and Forestry, Department of Minerals and Energy, Health, Agriculture and Labour.

For example section 17(1) of the Minerals and Petroleum Resources Development Act⁶⁴ provides :

- (1) Subject to subsection (4), the Minister must grant a prospecting right if-
 - (a) The applicant has access to financial resources and has technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting right programme;
 - (b) The estimated expenditure is compatible with the proposed prospecting operation and the duration of the prospecting work programme;
 - (c) The prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment.

The above-mentioned Act is also one of the most important legislation in the mining industry regulating the mining activities and the protection of the environment but the main problem about it is that it requires the applicant to show its financial and technical capability to conduct the prospecting activities but is at the same time silent about the right of the interested and affected parties to be heard before the prospecting right is granted to raise objection to it and NEMA does not provide solution in this regard.

NEMA also fails to make arrangements for the operation and archival record keeping requirements for both the private and public sector public archival record keeping in the country.

⁶⁴ Act 28 of 2002

Chapter 5

RECOMMENDATIONS AND CONCLUDING REMARKS

5.1 Recommendations

The following recommendations will serve our country very well in addressing the challenges of environmental protection and the promotion of the environmental rights.

5.1.1 Environmental commission

The government would do well to establish a body to be named, for instance the environmental commission. The commission should be headed by the commissioner and it should consist of two bodies namely-

- (i) Tribunal; and
- (ii) Appeal board.

The purpose of the commission should be to assist people whose environmental rights have been infringed or threatened to report the matter to the commission to investigate. The commission should be established with the power to investigate and thereafter prosecute the alleged violation of the environmental rights and a party not happy with the decision of the Tribunal should be able to take the matter up on appeal through the appeal board.

5.1.2 Amendments to NEMA

Further amendments to NEMA should be effected to correct and prevent the wrongs that other bodies or departments make in taking decisions that affect the environment through the enabling legislation. NEMA should be declared an umbrella legislation as far as environmental rights and environmental protection is concerned. Any legislation passed that seeks to control or regulate

environmental activities should take the purpose and principles of NEMA into consideration.

5.2 Conclusion

NEMA is an important piece of legislation ever enacted in South Africa as far as the environmental law is concerned. It does not only promote the environmental rights and the protection of the environment, it also shows growth on the part of our young democracy by ensuring public participation during the passing of this Act. It also gives individuals platform to raise objection where their right to the environment that is clean and not harmful to the health and well-being of the present and future generations is infringed or threatened. NEMA is also one of the easiest legislation to read and interpret because proper interpretation of NEMA should be aimed at promoting the spirit of the Constitution.

The legislature deserves credit for incorporating the ‘polluter pays’ principle in NEMA, because such principle should be used to deal with polluters that cause harm to the environment, be it before or after the enactment of NEMA. As a result one would not agree with the decision in *Bareki and others v Gencor Ltd and Others*⁶⁵ where the court held that NEMA did not apply to pollution that took place before it came to operation. The legislature is also commended for correcting the above decision because by passing National Environmental Law Amendment⁶⁶ which ensures that NEMA’s duty of care is now clearly retrospective and will apply to pollution which occurred before the commencement of NEMA.

⁶⁵ [2006] 2 All SA 392 (T).

⁶⁶ 14 of 2009.

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