



Incorrect application and interpretation of socio-economic factors in environmental impact assessments in South African Law

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DECLARATION

I declare that this thesis is my original work and that it has not been submitted for the award of a degree at any other University.

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Table of Contents

	Page No.
Abstract.....	(ii) - (iii)
Acronyms.....	(iv)
1. Chapter 1: Introduction.....	1
1.1 Background	1
1.2 Statement of the problem	2
1.3 Research questions.....	4
1.4 Methodology.....	4
1.5 Structure.....	5
2. Chapter 2: Incorrect application of socio-economic impacts in environmental impact assessments.....	8
2.1 A brief history of environmental impact assessments in international and South African law.....	8
2.1.1 An international perspective	8
2.1.2 EIA in South Africa	11
2.2 Sustainable development in South African law and interpretational difficulties	14
2.2.1 International law and policy	15
2.2.2 Sustainable development in South African law and policy	22
2.2.3 Normative content, role and attainment of sustainable development	27
2.2.4 Socio-economic rights	32
2.3 Consideration of socio-economic impacts in environmental impact assessments in South African judicial precedent, practice and commentary	37
2.3.1 Introduction	37
2.3.2 EIA regulatory framework.....	37
2.3.3 Interpretation and application of the role of socio-economic considerations in EIAs by South African courts and administrators	51
2.3.4 Why the courts' interpretation is wrong.....	58
2.3.4.1 Incorrect interpretation of section 24(b) of the Constitution	58
2.3.4.2 Incorrect interpretation of section 24 of NEMA	59



2.3.4.3	Incorrect application of the environmental management principles in NEMA	63
2.3.4.4	An incorrect understanding of IEM	64
2.3.4.5	The failure to apply cooperative governance.....	65
2.3.4.6	One dimensional perspective of the requirement to integrate the elements of sustainable development	68
2.4	International comparative	70
2.4.1	United States.....	70
2.4.2	European Union	71
2.4.3	Canada	72
2.5	Consequences for EIAs as a result of the incorrect application of socio-economic impacts.....	73
2.5.1	Duplication of assessment processes	74
2.5.2	Inequity for "listed activities"	75
2.5.3	Poor enforcement.....	76
2.5.4	Balancing value choices and environmental losses.....	77
2.5.5	Environmental sustainability is not attained	78
3.	Chapter 3: Correct role of socio-economic issues in EIAs?	79
4.	Chapter 4: Recommendations to address the flawed precedent and practice	82
4.1	Cooperative governance.....	83
4.2	Integrated development plans.....	87
4.3	Strategic environmental assessment	89
4.4	Formulating a sustainable development Act	90
5.	Chapter 5: Conclusion.....	91
6.	Bibliography	94
6.1	Books and journals	94
6.2	Cases	96
6.3	Foreign laws and policies	97
6.4	International instruments	98
6.5	Legislation	99

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Abstract

Environmental Impact Assessments ("EIA") have been regulated for the last 12 years in South Africa, initially through the Environment Conservation Act 1989, and since 2006 through the National Environmental Management Act 1998 ("NEMA"). The former applied the standard of "substantial detrimental effect" to the environment in determining whether an authorisation should be granted. NEMA requires the authority to take into account environmental management principles. These principles inter alia require that development must be socially, environmentally and economically sustainable. This is also known as sustainable development ("SD").

Administrative officials tasked with considering EIAs have been given legislative direction with respect to the environmental issues which need to be assessed. They have been given no direction on how to assess socio-economic issues. Notwithstanding this there have been an increasing number of decisions based on socio-economic factors, notwithstanding that the environmental impacts have been determined to be acceptable.

In *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* the Constitutional court held that SD must be applied by environmental authorities when they consider applications for EIA authorisation. However a careful analysis of NEMA and the Constitution of the Republic of South Africa, 1996, highlight that our administrators and courts have adopted a one dimensional and ultimately inaccurate interpretation of the application of SD. This is prejudicing the fulfilment of the objective of EIA, namely the determination of the acceptability of a project's environmental impacts.

Whilst SD does have a role to play in the EIA process it is more defined, and does not take the central role the Constitutional Court has indicated. The aim of is to determine whether there are adverse impacts associated with a project. If there are, then ordinarily authorisation should be refused. However the authorities are enjoined to go a step further. They must determine whether the identified adverse impacts can be satisfactorily mitigated, and whether any positive socio-economic factors would accrue

should the project be authorised. If both are answered in the affirmative, then a positive decision is appropriate. This is the balance which NEMA calls for, and this is the correct application of SD in an EIA.

The broader application of SD espoused by the Constitutional Court is achieved not through the environmental authorities in the EIA process alone, but through the constitutional principle of cooperative governance. All authorities with an interest in a particular project must apply the principle of SD within the scope of their administrative functions. The environmental authorities consider the environmental impacts, the planning authorities consider the socio-economic impacts, the agricultural authorities determine the project's impacts on agricultural land, etc. The outcome of their individual decisions can then collectively be assessed to determine whether a project is sustainable or not.

There are various measures which can be employed to address the interpretational deficiency which has now manifested. These include improving cooperative governance principles and practices in decision-making; undertaking strategic environmental assessments; and a dedicated Sustainable Development Act.

Acronyms

BAR	Basic Assessment Report
CEQA	California Environmental Quality Act
DEAT	Department of Environmental Affairs and Tourism
DWEA	Department of Water and Environmental Affairs
ECA	Environment Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EIP	Environmental Implementation Plan
EIR	Environmental Impact Report
EMP	Environmental Management Plan
IDP	Integrated Development Planning
IEM	Integrated Environmental Management
NEMA	National Environmental Management Act 107 of 1998
NEPA	National Environmental Policy Act of 1969
SADC	South African Development Community
SD	Sustainable Development
SDF	Spatial Development Framework
SEA	Strategic Environmental Assessment
WSSD	World Summit on Sustainable Development

1. Chapter 1: Introduction

1.1 Background

Sustainable development ("SD") is a continuum. Grammatically it is an adverbial phrase of manner, and answers the question "how we should develop".¹ Internationally the most commonly quoted definition for the term is that contained in the Brundtland report, namely that "*sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*".² In South Africa the term is defined in the National Environmental Management Act 107 of 1998 (NEMA") as:

"The integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations".³

Sustainable development has been considered, interpreted and applied by our Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*⁴ ("Fuel Retailers" or "the Constitutional Court decision"). It held

¹ B Lutrin and M Pincus, *English Handbook and Study Guide*, Berluit Books CC, 2004

"Develop" (v) is to convert (land) to a new purpose. "Development" (n) is the action of developing or the state of being developed; an area of land with new buildings on it. "Sustain" (v) means to keep something going over time. "Sustainable" (adj) is to be able to be sustained; avoiding using up natural resources. Oxford Dictionary, Third Edition, Oxford University Press, 2007.

² *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the United Nations General Assembly as an Annex to Document A/42/427 (1987). Accessed at <http://www.un-documents.net/wdec/ocf.htm> on 19 October 2009.

³ Section 1(1), NEMA. See also *People-Planet-Prosperity: A National Framework for Sustainable Development in South Africa*, July 2008, Department of Environmental Affairs and Tourism at 14.

⁴ 2007 (6) SA 4 CC.

that sustainable development "*offers a principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand*".⁵ More specifically the court held that this principle must be applied by environmental authorities when they consider applications for authorisation for environmental impact assessments ("EIA") for listed activities.⁶

Prior to and post the Fuel Retailers decision other courts have also considered the role of sustainable development and specifically socio-economic, or social and economic issues in EIAs and the majority have agreed with the Constitutional Court's conclusions in this regard.⁷ It is therefore settled in South Africa "*that sustainable development is central to the environmental right and environmental Regulations*".⁸

Yet notwithstanding this growing bank of judicial precedent on the applicability and relevance of SD in EIAs, there is an emerging concern that "*there is little consensus on what is meant by sustainable development at the level of its implementation – how can the concept be translated into practice?*"⁹

1.2 Statement of the problem

Our courts and administrative authorities have incorrectly interpreted and applied the role of socio-economic factors in EIAs through their requirement that environmental authorities are on their own responsible for applying SD in their assessments and decisions. This is resulting in a

⁵ Paragraph [57], quoted in Sustainable Development in Practice: Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, Loretta Feris (2008) (1) *Constitutional Court Review* 235 at 241.

⁶ Paragraph [77].

⁷ See 2.3 below.

⁸ Op cit 5 at 247.

⁹ Mike Burns and Johan Hattingh, Locating Policy Within the Taxonomy of Sustainable Development, (2007) 14 *SAJELP* at 1.

failure to fulfil the primary purpose of EIA which is to assess the environmental impacts of proposed project level developments. These deficiencies and their implications will be highlighted in this study.

The overarching jurisprudential failure and the source of the intended and unintended consequences for the EIA process in South Africa, is the one dimensional interpretation by our courts and administrators of the principle, or should that be the philosophy, that is SD. It has been applied as an end state, when in fact it is a means to an end. SD is something we strive for, but when is it achieved? It is a multi dimensional, multi faceted concept. Although the contemporary requirements to integrate social, economic and environmental considerations into decision-making are clear, reaching a decision requires a balance to be arrived at between these three pillars. Absent any guidance on how to balance them, it becomes a value choice as to when such balance is achieved.¹⁰ In practice this invariably means a compromise is required where one of the three pillars is deemed to outweigh the others.

Through the Constitutional Court's imposition of the requirement to assess not only environmental, but also socio-economic impacts in project level EIAs, this has "*led to an overreliance on this mechanism as panacea for addressing sustainability challenges. In the process, unrealistic expectations of what EIA can and should deliver have been created*".¹¹ The result, it will be argued, is that EIAs are struggling to fulfil their primary role, namely to assess the environmental impacts of proposed projects on the environment.

That is not to suggest that SD and specifically socio-economic issues have no role to play in an EIA. However it will be argued that our courts have consistently misinterpreted and misunderstood the constitutional and NEMA requirements for SD in EIAs. Our law has a far more defined

¹⁰ Op cit n5 at 249.

¹¹ Francois Retief and Louis J Kotze, *The Lion, The Ape and The Donkey: Cursory Observations on the Misinterpretation and Misrepresentation of Environmental Impact Assessment (EIA) in the Chronicles of Fuel Retailers*, (2008) 15 *SAJELP* 139 at 145.

balancing role for socio-economic issues in EIAs, than that assigned to it by the majority of the Constitutional Court.

1.3 **Research questions**

This dissertation considers two questions:

- Have South African courts and administrative authorities correctly applied the principle of SD in regulated EIAs?
- What is the correct role of SD in EIAs?

1.4 **Methodology**

To address the question of whether our courts and administrators have correctly interpreted and applied SD in EIAs, requires an understanding firstly of the purpose of and process associated with an EIA. Limiting this analysis to a South African context would not provide an appropriate level of assurance that the study's results are accurate. Consequently whilst South African constitutional and legislative principles will be analysed, a broader analysis of the scope and purpose of EIAs at an international and foreign level is required.

Secondly the definition and scope of SD, again at a local and international level, must be understood. A difficulty arises though in merely defining the term because its implications for EIAs can only be understood by considering the way it is implemented. For this reason the judicial decisions will be analysed, deficiencies highlighted and the consequences measured against the legislation which regulates EIAs. At all times this analysis must be checked against the entrenched constitutional right to an environment that is not harmful to health or wellbeing, to ensure that the EIA legislation is not deficient. Further assurance is gained by comparing practices in foreign jurisdictions, which like South Africa, have adopted the principle of SD and which also regulate EIAs.

To validate the role which this study will argue SD should play in an EIA, requires a demonstration that the current role applied by our courts and administrators is not only legally incorrect, but has adverse practical implications for EIAs. If there are no deficiencies in the current model, then little purpose is served in offering an alternative. The role this study will put forward as being the correct one for socio-economic factors in EIAs, will be supported by comparing it with the EIA models of foreign jurisdictions.

The above was undertaken through a desktop study mainly by means of a comparative analysis of legislation, judicial precedent, international and foreign law and policy.

1.5 **Structure**

In an effort to address the research questions logically this paper has been divided into the following chapters:

- Chapter 1 – This chapter introduces the research problem concerning the incorrect interpretation by our courts and administrative authorities of the role of SD in EIAs; sets out the questions to be researched; and provides details of the methodology which will be followed in order to arrive at the conclusion that SD has been incorrectly applied and that there is an alternative and preferred manner in which the principle should be used in the EIA.
- Chapter 2 – This chapter focuses on answering the first research question, namely whether South African courts and administrative authorities have correctly applied the principle of SD in regulated EIAs.

The discourse is contextualised by conducting a brief analysis of the history and role of EIAs in South African, foreign and international law. The same analysis is undertaken of the principle of SD in South African and international law and policy,

and concludes with a description of the generally accepted normative content, role and attainment of SD. The nature of socio-economic rights is considered, in order to distinguish them from environmental rights.

The manner in which South African courts have interpreted SD, and in particular jurisprudential interpretation of the role of socio-economic impacts in EIAs is analysed. This is undertaken primarily through a review of judicial precedent using recognised academic articles as part of the critique. The chapter then debates why our judiciary has incorrectly applied socio-economic impacts in EIAs using constitutional and environmental law as the basis for establishing this failure. It also highlights the manner in which our courts have applied a one dimensional view to the integration component of SD, and failed to enforce the constitutional imperative of cooperative governance.

An analysis of the role of SD and particularly socio-economic issues in EIAs in the law of selected foreign jurisdictions is analysed and used as a comparative in order underpin the central argument of the dissertation. The practical and legal consequences of the incorrect application of SD by our courts and administrative officials is researched and described, and the conclusion is arrived at that as a result environmental sustainability is not attained.

- Chapter 3 – This chapter answers the second research question, namely what the correct role of socio-economic issues is in EIAs in South Africa.
- Chapter 4 – This chapter underpins the analysis of the correct role of socio-economic issues in EIAs, by offering both existing as well as proposed legislative and administrative tools for achieving a satisfactory return on environmental sustainability, whilst at the same time seeking ways in which to appropriately integrate all elements of SD into a meaningful and reasonable statutory framework.

- Chapter 5 – This chapter sets out the conclusion of the dissertation, by firstly confirming that there has been a consistent incorrect application of SD in our EIAs, and secondly emphasizes what the correct application of SD, and in particular socio-economic issues, is in EIAs.

2. Chapter 2: Incorrect application of socio-economic impacts in environmental impact assessments

The proposition of this paper is that sustainable development has been incorrectly applied in the EIA process in South Africa. To substantiate and underpin this argument, it is necessary to briefly consider the history of the EIA process as well as the meaning and scope of the concept of sustainable development.

2.1 A brief history of environmental impact assessments in international and South African law

2.1.1 An international perspective

The first statutory requirement and procedure for EIA was introduced in the United States under the provisions of the National Environmental Policy Act of 1969.¹² It was followed shortly thereafter by the introduction of the California Environmental Quality Act of 1970.¹³ Other countries followed varied paths to employing EIA procedures. Some such as Australia (1974), Colombia (1974), Thailand (1974), France (1976), Ireland (1976) and the Netherlands (1979), did so by passing specific legislation which established EIA systems.¹⁴

Others did so via a variety of tools such as cabinet resolutions (Austria 1972, Canada 1973 and New Zealand 1974). Binding directives, such as the European Union's EIA directive,¹⁵ have also been employed.

¹² *The National Environmental Policy Act of 1969*, as amended (Pub. L91-190, 42U.S.C. 4321–4347, January 1, 1970, as amended). C Wood, *Environmental Impact Assessment, A Comparative Review*, Longman Group Limited, 1995, 17.

¹³ Approved June 15, 1973.

¹⁴ Op cit n12 at 3.

¹⁵ 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC.

The genesis of EIA in developing countries, save for a few examples, some of which were listed above, took a somewhat different approach. The difference as Wood put it, was that in the developing world, "*the first EIAs to be carried out were usually demanded by development assistance agencies on a project-by-project basis, not as a response to a widespread indigenous demand for better environmental conditions*".¹⁶ This situation has of course changed over time, and a number of developing countries have since introduced EIA requirements through legislation.¹⁷

The rationale for the introduction of EIA was firstly to counter what was perceived to be land development that ignored the impacts on the physical or biophysical environment. In the United States, for instance, a "frontier ethic" reigned; land was seen as a disposable asset and controls over it were regarded as a curtailment of individual liberty.¹⁸ Secondly there was a growing awareness in the 1960s that unbridled economic development, frequently utilising environmentally unsuitable technologies, was resulting in significant pollution and degradation. It was the realisation that the effects of a project or plan on the environment should be considered at the earliest possible stage of planning and decision-making, in order to counter or to balance the socio-economic imperative for development, that led to the introduction of EIA.

¹⁶ Op cit n12 at 301.

¹⁷ For example: Environmental Protection (Impact Assessment) Regulations, May 1996 under the *Environmental Protection Act* 9 of 1994 in the Seychelles; Decree on Environmental Impact Assessment No. 51/2004 of 23 July, 2004 under the *Environment Framework Act* 5 of 1998 in Angola; Regulations on the Environmental Impact Assessment Process, Decree No. 45 of 2004 under the *Environmental Law* No. 20/97 of 1 October 1997 in Mozambique; Environmental Audit, Assessment and Review Regulations of 1996 under the *Environmental Management Act* 5 of 2002 in Swaziland; and the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, SI No. 28 of 1997 under the *Environmental Protection and Pollution Control Act* No. 12 of 1990, as amended by the *EPPC (Amendment) Act* No. 12 of 1999 in Zambia.

¹⁸ Op cit n12 at 16.

The objective of EIA has traditionally been to "*lead to the abandonment of environmentally unacceptable actions and to the mitigation to the point of acceptability of the environmental effects of proposals which are approved*".¹⁹ Although the procedure for conducting EIAs varies, albeit moderately from jurisdiction to jurisdiction, certain fundamental principles apply generally. These are that the process is anticipatory and inclusive. The key elements may loosely be described as follows:

- Identifying and disclosing to the public and decision-makers, the significant environmental impacts and the consequences of proposed activities.
- Identifying what is necessary to prevent or mitigate environmental damage through an investigation of feasible alternatives or mitigation measures.
- Fostering inter-agency coordination.
- Enhancing public participation.
- Disclosing to the public reasons for decisions to allow or refuse projects.

While the normative content of an EIA will be considered in more detail later in this paper, at this juncture it is emphasised that EIA evolved out of a globally perceived need to counter balance unbridled land development, by considering and assessing the environmental impacts of projects before they are implemented. As it is central to the thesis of this paper, and a recurring theme, it is highlighted that the traditional objective of EIA has been to assess environmental and not social and/or economic impacts.

¹⁹ Op cit n12 at 1.

2.1.2 EIA in South Africa

The history of EIA in South Africa has had a similar genesis. Kidd and Retief describe a four stage evolution of the process in this country.²⁰ The four periods extend from 1976 when the South African Council for the Environment Report²¹ proposed methods and procedures for environmental evaluation, to the latest amendments to the EIA Regulations under NEMA.²² During the first stage, which Kidd and Retief suggest occurred from 1976 to 1989 when the first regulated EIA process was introduced,²³ it was evident that the purpose of considering the introduction of environmental assessment, was to provide a mechanism to curb the adverse impacts of development projects. In those early days the dichotomy between development and environment was seen as a conflict, apparent or real.²⁴ The second stage from the early to middle 1990s saw the development of the concept of integrated environmental management ("IEM"), firstly through the release by the Council for the Environment of a report on IEM,²⁵ and subsequently through releasing of six IEM guideline documents.²⁶

²⁰ M Kidd and F Retief, Environmental Assessment, in *Environmental Management in South Africa*, First Edition Edited by RF Fuggle and MA Rabie and Second Edition Edited by HA Strydom and ND King, Juta 2009 at 974.

²¹ CE Bepaling en Evaluering van die Invloed van Ontwikkelings Projekte op die Omgewing – Interne Verslag. Determining and Evaluating the Influence of Development Projects on the Environment – Internal Report, Council for the Environment, Pretoria (1976).

²² GNR385, GNR386 and GNR387, GG28753 of 21 April 2006 as amended. There has been a further amendment to the EIA process in 2009 in terms of the National Environmental Management Amendment Act 62 of 2008 which came into effect on 1 May 2009. These changes will be discussed in more detail below.

²³ Op cit n20. GNR1182, GNR1183, GNR1184, GG18261 of 5 September 1997, under the Environment Conservation Act 73 of 1989.

²⁴ Op cit n20 at 975.

²⁵ CE Council for Environment – Integrated Environmental Management in South Africa, Joan Lotter Publications, Pretoria (1989).

²⁶ *DEA IEM Guideline Series*, Department of Environmental Affairs, Pretoria (1992).

In the context of the argument advanced in this paper, the emergence of IEM has ultimately had unintended consequences for the scope of project level EIAs and the interpretation thereof by our judiciary. Although IEM was not only concerned with environmental impact assessment, but with the full planning cycle which included implementation and monitoring; the fact that it provided an environmental evaluation policy when no other published EIA process existed, meant that it became closely linked to the undertaking of voluntary EIAs at that time.²⁷ Importantly however IEM was never intended to be limited to defining the framework for project level EIAs. It also defined an assessment procedure for policies and programmes, and consequently, as Kidd and Retief explain, it made "*no distinction between principles and procedures for strategic and policy level assessment*".²⁸ Strategic Environmental Assessment ("SEA") will be discussed in greater detail later in this paper. At this point, and in order to introduce the concept and distinguish it from project level EIA, it suffices to record that SEA "*is a mechanism for integrating environmental goals and principles into plans, programmes and policies that shape a multitude of overlapping and subordinate initiatives*".²⁹ More than this SEA is a mechanism for testing the opportunities and constraints which social, economic and ecological elements or the sustainability elements impose on development.³⁰ In simple terms SEA looks from a macro perspective at the impacts and opportunities for the development of an area, region or country as a whole, whereas project level EIAs are confined to considering the impacts of "listed activities" on the receiving environment.

It will be argued that by adopting this combined and expanded concept of IEM as the basis for performing EIAs in legislation which subsequently followed, particularly NEMA, our legislators and subsequently our courts, have failed to separate out and to isolate

²⁷ The most famous example at the time being the voluntary EIA conducted for the eastern shores of Lake St. Lucia in KwaZulu-Natal.

²⁸ Op cit n20 at 976.

²⁹ Op cit n9 at 23.

³⁰ Ibid.

those criteria which should correctly only be applied in project level EIAs, and those which should more appropriately be applied in SEAs or planning procedures.

The third and fourth stages described by Kidd and Retief cover the period from 1997 when the first EIA legislation was promulgated under the Environment Conservation Act 73 of 1989³¹ ("ECA"), to 2006; and from 2006 to the present when the requirement for EIAs shifted to NEMA.³² The requirements of ECA and NEMA EIAs will be discussed later in this paper. At this stage and from a historical perspective, it is recorded that there is no reference to "sustainability", "social", "economic" or "socio-economic" in the ECA and in the EIA Regulations under it. Prior to the promulgation of our Constitution,³³ which contains an entrenched environmental right³⁴ which refers to "sustainability"³⁵ and socio-economic rights, certain commentators considered the definition of "environment" under the ECA to be wide enough to include social, economic and socio-economic issues.³⁶ On this basis, they argue that EIAs under the ECA were required to consider not just biophysical and human health impacts of activities, but also socio-economic impacts associated with them.

For the purposes of the argument advanced in this paper, there is another feature of the third and fourth stages of EIA development which is relevant. Efforts continue to evolve an SEA policy and procedure as a result of the debate which emerged and which centered around SEA and sustainable development, in particular insofar as the debate was linked to development planning.³⁷ As Retief

³¹ See footnote 23.

³² Section 24 of NEMA and GNR385, GNR386 and GNR387 cited at footnote 22.

³³ Constitution of the Republic of South Africa, 1996.

³⁴ Section 24.

³⁵ More specifically it refers to "ecological sustainability", the meaning of which is discussed at clause 2.2.2 below.

³⁶ See for example Tumi Murambo, *From Crude Environmentalism to Sustainable Development: Fuel Retailers*, 2008 *SALJ* 488 at 492.

³⁷ *Op cit* n20 at 979.

and Kidd explain "*the initial need for SEA was related to the limitations of EIA, and the need to assess cumulative effects and the promotion of sustainable development. It [was] during this period that strategic level assessment moved away from the extension of EIA approach... to a sustainability centered approach*".³⁸

In 1998 and as a prelude to NEMA, the Department of Environmental Affairs and Tourism ("DEAT") gazetted a White Paper on Environmental Management Policy for South Africa.³⁹ In endorsing the principles of IEM it clarified that they would play a central role not just in impact assessment, but also in development planning, economic policy formulation and spacial development plans.⁴⁰ Importantly it clarified that the broad focus of IEM included more than just project level EIA, and placed the onus on the national DEAT, (now the Department of Water and Environmental Affairs or "WEA"), to integrate and coordinate IEM for all spheres of government through organisational and institutional arrangements, legislation and policy.⁴¹

This paper argues that this mandate has not yet been fulfilled, and is a further cause for the misapplication of social and economic issues in project level EIAs by our administrative and judicial authorities.

2.2 Sustainable development in South African law and interpretational difficulties

The definition of "sustainable development" in section 1 of NEMA⁴² clearly reflects the internationally accepted notion of the integration of the three pillars of social, economic and environmental factors into decision-making.

³⁸ Ibid.

³⁹ GNR749, GG18894 of 15 May 1998.

⁴⁰ See below the definition of "integration" at 23 as well as at 34.

⁴¹ See clause 6 generally.

⁴² See chapter 1 above.

Although there is some debate as to the origin of the term,⁴³ it is generally agreed upon by academics and our courts.⁴⁴

2.2.1 International law and policy

The historical path sustainable development followed during its evolution in international law and policy which is cited by most writers, and the one accepted by the Constitutional Court in *Fuel Retailers*, had its foundation in principle 13 of the Declaration of the United Nations Conference on the Human Environment, which emerged from the session held in Stockholm in 1972.⁴⁵ It recognised that there is a relationship between development and the protection of the environment, by emphasising a need "to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their population".

However the extension of the principle to the notion that it can address not just intragenerational equity, but also intergenerational equity was first elucidated in the Report on the World Commission on Environment and Development, also known as the Brundtland Report in 1987.⁴⁶

⁴³ Dire Tladi, *Fuel Retailers*, Sustainable Development and Integration: A Response to Feris, (2008) 1 *Constitutional Court Review* 225.

⁴⁴ See for example Michael Kidd, Removing the Green Tinted Spectacles: The Three Pillars of Sustainable Development in South African Environmental Law, (2008) 15 *SAJELP* 85 at 85; Jan Glazewski, The Nature and Scope of Environmental Law in *Environmental Law in South Africa*, Juta 2000 at 14; Feris note 5 at 236; Tracey-Lynn Field, Sustainable Development Versus Environmentalism: Completing Paradigms for the South African EIA Regime, (2006) *SALJ* 123 at 409; Michael McCloskey, The Emperor Has No Clothes: The Conundrum of Sustainable Development, 9 *Environmental Law and Policy* 153. In terms of case law see for example Claassen J in *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W)*.

⁴⁵ United Nations Conference on the Human Environment, Stockholm, 1972.

⁴⁶ See footnote 2 above.

The report defines sustainable development as "*the development that meets the needs of the present without compromising the ability of future generations to meet their own needs*".⁴⁷ Ngcobo J in the *Fuel Retailers* also highlighted the integration as the focus of sustainable development in the Brundtland report, whereby the concept "*provides a framework for the integration of environment[a] policies and development strategies*".⁴⁸

At the next United Nations conference, this time on "environment and development" held in Rio in 1992, sustainable development became the cornerstone of its declaration.⁴⁹ Principle 3 provides that "[t]he right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations", thereby reinforcing the intra- and intergenerational focus. Principle 4 carries through the integration approach by stipulating that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". The Rio conference also produced Agenda 21⁵⁰ which "was agreed upon as a blueprint for sustainable development, reflecting global consensus and political commitment to integrate environmental concerns into social and economic decision-making processes".⁵¹

The evolutionary shift at a global level from considering the "human environment" in Stockholm in 1972 to "environment and development" at Rio in 1992, to sustainable development was completed at the World Summit on Sustainable Development ("WSSD") held in

⁴⁷ Chapter 2 at paragraph 1.

⁴⁸ Paragraph [48].

⁴⁹ United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 1992, which resulted in the Rio Declaration on Environment and Development accessed at <http://www.unep.org/Documents/default.asp?DocumentId=78&ArticleId=1163>, accessed on 16 January 2010.

⁵⁰ Agenda 21 accessed at http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml on 16 January 2010.

Johannesburg in 2002. The outcomes of WSSD were the Johannesburg Declaration on Sustainable Development, and the Johannesburg Plan of Implementation, with the latter as its title suggests, having the aim of guiding the implementation of the Declaration principles. Both documents continued the theme of the "*integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforced in pillars*".⁵²

However although international law and policy instruments exist which direct nation states to integrate sustainable development into their evaluation and decision-making, there is no international legal instrument which directs them on how to go about this. There are a number of treaties and other binding instruments which require the performance of an EIA in specified circumstances. The key instruments which focus specifically on the EIA process are the 1985 EC Directive on Environmental Impact Assessment,⁵³ which was followed by the 1991 UNECE Convention on Environmental Impact Assessment in the Transboundary Context (1991 Espoo Convention),⁵⁴ and the 1991 Protocol on Environmental Protection to the Antarctic Treaty.⁵⁵

The EC directive requires the environmental assessment "*of public and private projects which are likely to have significant effects on the environment*".⁵⁶ The term "significant effects on the environment" are

⁵¹ People-Planet-Prosperity: A National Framework for Sustainable Development in South Africa, Department of Environmental Affairs and Tourism, July 2008 at 17.

⁵² Paragraph 2 of the Johannesburg Plan of Implementation (2002). See also paragraph 5 of the Johannesburg Declaration which states that "*accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels*".

⁵³ Council Directive 85/337/EEC/OJ L175, 5 July 1985, 40.

⁵⁴ Espoo, 25 February 1991, in force 10 September 1987.

⁵⁵ Protocol on Environmental Protection to the Antarctic Treaty (Madrid) for October 1991, in force 14 January 1998; 30 ILM1461 (1991).

⁵⁶ Article 1(1).

not defined. However the directive requires the EIA to identify, describe and assess the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- the interaction between the factors mentioned in the first and second indents,
- material assets and the cultural heritage.⁵⁷

Annexure 4 provides further detail on the information which must be assessed under the directive. All of the items listed relate to the biophysical and human impacts associated with the project, and there is no mention of the need to consider socio-economic impacts, nor any direction on how one would go about assessing such factors.

The 1991 Espoo Convention commits parties to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts from proposed activities.⁵⁸ The Convention defines "impact" broadly to include any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures, as well as the interaction among these factors.⁵⁹ The definition also includes the effects on cultural heritage or socio-economic conditions, (as opposed to socio-economic impacts), resulting from alterations to the aforementioned physical factors.⁶⁰ Appendix II sets out the content of the EIA documentation. There is no reference to a requirement for including information relating to the socio-economic impacts of a proposed project. Appendix III sets out the general criteria to assist in the determination of the environmental significance of activities which are not listed in Appendix I, (which are therefore not

⁵⁷ Article 3.

⁵⁸ Article 2.

⁵⁹ Article 1(vii).

⁶⁰ Ibid.

required to follow the same formal procedure). Under the criteria to assess the "effects" of a proposed activity, reference is made to those adverse effects which give rise to serious effects on humans or on valued species or organisms. No reference nor direction is given to assessing socio-economic impacts.

There are a number of other international conventions which focus on specific environmental media. Although their purpose is not specifically towards regulating the EIA process, frequently the requirement to undertake such a process is incorporated under the provisions. Examples include the United Nations Convention on Biological Diversity⁶¹ and the 1991 Antarctic Environment Protocol.⁶² Neither of these international instruments provide any direction, nor specific requirement on the assessment of socio-economic impacts in the stipulated EIA processes.

The same lack of direction exists in regional African multilateral laws and agreements. Whilst agreements such as the African Charter on Human and People's Rights⁶³ provides that "*all people shall have the right to a general satisfactory environment favourable to their development*",⁶⁴ there is no reference to how this is to be achieved, and in particular there is no requirement to assess the environmental impacts of proposed development projects by taking into account potential socio-economic implications. Similarly the African Convention on the Conservation of Nature and Natural Resources,⁶⁵ requires contracting states to "*adopt the measures necessary to ensure conservation, utilisation and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people*".⁶⁶ Whilst the

⁶¹ Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31ILM822 (1992).

⁶² Protocol on Environmental Protection to the Antarctic Treaty (Madrid) 4 October 1991, in force 14 January 1998; 30ILM1461 (1991).

⁶³ Adopted June 27, 1981 and entered into force October 21, 1986.

⁶⁴ Article 24.

⁶⁵ CAB/LEG/24.1, 2004.

⁶⁶ Article II.

Convention provides clear direction on the natural resources which require protection, and informs states how to go about this, there is no requirement nor even reference to assessing the socio-economic implications. The Treaty Establishing the African Economic Community⁶⁷ requires the harmonisation and coordination of environmental protection policies.⁶⁸ Yet notwithstanding that the focus of the treaty is on social and economic development, with a number of provisions to protect the environment in achieving these goals, no direction is given on how social, economic and environmental impacts should be assessed and balanced.

At a subregional level the South African Development Community ("SADC") has formulated a number of protocols on issues which have relevance to environmental, social and economic concerns. These include the Protocol on Shared Watercourse Systems,⁶⁹ Protocol on Energy,⁷⁰ Protocol on Mining,⁷¹ Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community,⁷² Protocol on Fisheries,⁷³ and Protocol on Forestry.⁷⁴ Whilst all directly or indirectly call for appropriate assessments before decisions are taken which may affect the environment, and whilst several include the requirement to consider social and economic factors when taking decisions, no indication on how such factors must be integrated is given.

⁶⁷ The Treaty Establishing the African Economic Community (Abuja Treaty), ratified 31 May 2001.

⁶⁸ Article 4.

⁶⁹ 1995, ratified 26 November 1997.

⁷⁰ 1996, ratified 29 April 1999.

⁷¹ 1997, ratified 29 April 1999.

⁷² 1999, ratified October 2003.

⁷³ 2001, ratified 24 July 2003.

⁷⁴ 2002.

Nevertheless SD has been confirmed as an international legal term by the International Court of Justice in the *Gabcikovo-Nagymaros* case.⁷⁵ The ICJ said:

*"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed and, set forth in a great number of instruments during the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".*⁷⁶

Sands points out that *"by invoking the concept of sustainable development, the ICJ indicates that the term has a legal function and both a procedural/temporal aspect... and a substantive aspect".*⁷⁷ However he concedes that the ICJ did not provide further detail as to the practical consequences of SD, and more specifically as to how the concept should be addressed in EIAs.

The gap described above at an international law level has resulted in states developing their own, often similar, laws on the EIA process and its scope. This is described in section 2.4 below. As environmental and social factors are transboundary it would, it is submitted, be of great benefit were internationally binding legal instruments to be formulated which provide direction on the normative content of sustainability assessments. In the absence of such an

⁷⁵ *Case concerning the Gabcikovo-Nagymaros Project* (1997) ICJ reports 7.

⁷⁶ (1997) ICJ reports 78, paragraph 140.

⁷⁷ Philippe Sands, *Principles of International Environmental Law, Second Edition* Cambridge University Press, 2003, 255

instrument nation states are now endeavouring to expand the EIA process to address sustainability assessments, notwithstanding that the former were never designed to achieve an appropriate level of integration of social, economic and environmental issues.

2.2.2 Sustainable development in South African law and policy

Within South African law and policy this paper has already highlighted the inclusion of the definition for sustainable development, (which accords with the international framework described above), in NEMA. However the Constitution contains a similar but different reference to sustainable development. Section 24 of the Bill of Rights is an entrenched environmental right.⁷⁸ Whilst the content of the right will be discussed further below, it is useful to pause at this juncture to remember that notwithstanding section 24 having been promulgated after Stockholm in 1972, the Brundtland report of 1987 and the Rio conference of 1992 the drafters of our Bill of Rights chose not to entrench a right to sustainable development, but rather elected to provide an environmental right.

The right is framed in two parts. Part (a) is a right every person has to an environment which is not harmful to their health or wellbeing, and has been described as an enforceable defensive right.⁷⁹ Part (b) places an obligation on the state to take reasonable legislative and other measures to ensure the environment is protected. This latter

⁷⁸ "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 in the use of natural resources while promoting justifiable economic and social development".

⁷⁹ Anel du Plessis, Adding Flames to Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight (2008) 15 SAJELP 57 at 61.

portion of the right has in turn been described as a "*right to state performance*".⁸⁰

It is also part (b) which the Constitutional⁸¹ and other courts⁸² as well as commentators⁸³ have used to declare that sustainable development is entrenched in the environmental right. It is clear that elements of the principles of sustainable development, if not the principle itself, are contained in at least section 24(b). The requirement to protect the environment for present and future generations, and to do so whilst still promoting economic and social development, align with the understanding of the concept at an international law and policy level. Indeed section 24(b)(iii) requires sustainable development to be secured. However our courts and commentators have, it is suggested, missed certain important aspects of the environmental right in reaching this conclusion.

Firstly they seem to ignore the fact that section 24 refers to "ecologically sustainable development". If it is accepted, as clearly both South African and international law have, that sustainable development already includes the environment as one of its three interlinked pillars to be given equal weight to the other two, then why was it necessary for the drafters of section 24 to add the word "ecologically"? A dictionary definition of the term "ecology" is "*the branch of biology concerned with the relations of organisms to one another and their physical surroundings*".⁸⁴ The use of the adverb "ecologically" therefore indicates that the object of this portion of the right, (and it is suggested of the entire right), is to ensure that development occurs in such a manner that the viability of the natural environment remains intact. Consequently sustainable development in section 24 is not intended to provide an equitable balance that has

⁸⁰ Ibid.

⁸¹ At [45].

⁸² See 2.3.3 below.

⁸³ See for example Kidd Op cit n44 at 88.

⁸⁴ Oxford dictionary accessed at http://www.askoxford.com/concise_oed/ accessed on 1 February 2010.

come to be read into the right by our courts. There is a clear bias in section 24 towards preserving an ecological balance, as opposed to achieving a balance between the environment and socio-economic interests.

That is not to suggest that section 24(b) has ignored the internationally accepted elements of sustainable development. Firstly the intra- and intergenerational equity element is clearly stated. Secondly the requirement to consider social and economical developmental needs, in other words the integration approach, is also included.

However the use of the term "ecologically sustainable development" and the context and content of the balance of section 24 places this right, it is suggested in its correct place and context in the notion of achieving sustainable development. The environmental right in the Constitution is one that stands on its own. It is not a synonym for sustainable development. It is but one component of the broader principle of sustainable development. Consideration must be given to socio-economic implications in protecting the environment, but the focus of the right is nevertheless clearly on the protection of natural resources. Tobias Van Reenen emphasises that section 24(b) requires ecologically sustainable development to be "secured", and concludes that "*the promotion of economic and social development [in terms of section 24(b)] can consequently only be justifiable once ecological sustainability has been secured*".⁸⁵

Clarification of this point is important for the argument that follows in this paper, namely that EIAs are primarily there to give effect to the constitutional environmental right, and whilst socio-economic considerations in environmental decisions have a role, the process is

⁸⁵ Tobias Van Reenen, Rudiments of a Jurisprudential Methodology of Sustainable Development: The Judgment of Ngcobo J in *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga and Others 2007 (6) SA 4 (CC)*, (2008) 15 in *SAJELP* 169 at 178.

not a sustainable development assessment. Section 24 of the Constitution, it is submitted, supports this argument.

However this subtle but material point was missed in *Fuel Retailers* which concluded that it is as a result of section 24 of the Constitution that NEMA requires environmental authorities to include socio-economic factors "as an integral part of its environmental responsibility".⁸⁶

Sustainable development is addressed in a number of other policy and legislative instruments in South Africa. The White Paper on Environmental Management Policy for South Africa⁸⁷ places much emphasis on environmental management contributing to sustainable development. The strategic goals of the policy also reflect the key elements of equity and integration.⁸⁸ A National Framework for Sustainable Development in South Africa has also been published.⁸⁹ NEMA, aside from defining sustainable development, contains national environmental management principles which apply to the actions of all organs of state that may significantly affect the environment.⁹⁰ However notwithstanding that these are environmental principles, several contain a strong reference to sustainable development or at least its core elements. For instance there is a requirement that development must be socially, environmentally and economically sustainable;⁹¹ and that social, economic and environmental impacts of activities must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment.⁹² In fact one of the principles states that sustainable development requires a number of factors and then

⁸⁶ Paragraphs [61] and [62].

⁸⁷ See footnote 40 above.

⁸⁸ At 27.

⁸⁹ See footnote 3 above.

⁹⁰ Section 2.

⁹¹ Section 2(3).

⁹² Section 2(4)(i).

lists them.⁹³ Perhaps ironically or perhaps by design, none of the eight factors listed contain any reference to socio-economic factors. On the contrary all are ecology or natural resource focused. It is submitted that by focusing the principle of sustainable development on the environment in this manner the NEMA principles correctly align with the requirement to achieve ecologically sustainable development required under section 24 of the Constitution. It is conceded though that given the accepted core elements of sustainable development, any suggestion that section 2(4)(a) is limited to the natural environment, would be misleading and potentially confusing.

Sustainable development and its elements have not been confined to NEMA. Several contemporary administrative and planning Acts include clear reference to it. The Local Government: Municipal Demarcation Act⁹⁴ *inter alia* requires the interdependence of people, communities and economies; existing and expected land use, social, economic and transport planning; and environmental characteristics of the area⁹⁵ to be taken into account in demarcating municipal boundaries. The Local Government: Municipal Structures Act⁹⁶ requires a district municipality to seek and achieve the integrated, sustainable and equitable social and economic development of its area as a whole, through *inter alia* integrated development planning.⁹⁷ The Local Government: Municipal Systems Act⁹⁸ includes in its long title that its purpose is *inter alia* to provide the framework for the "overall social and economic upliftment of communities in harmony with their local natural environment". The principal tool provided in the Systems Act for achieving its objectives is integrated development planning.⁹⁹ The Development Facilitation Act¹⁰⁰ *inter alia* declares that

⁹³ Section 2(4)(a).

⁹⁴ Act 27 of 1998.

⁹⁵ Section 25(a)(i), Section 25(h) and (j).

⁹⁶ Act 117 of 1998.

⁹⁷ Section 83(3)(a).

⁹⁸ Act 32 of 2000.

⁹⁹ Chapter 5.

¹⁰⁰ Act 67 of 1995.

its policy principles must ensure administrative practice and laws which promote integrated land development.¹⁰¹ These principles on the one hand include the requirement to "*promote the integration of the social, economic, institutional and physical aspects of land development*", and on the other "*encourage environmentally sustainable land development practices and processes*".¹⁰²

The inclusion of sustainable development in South African planning legislation gives further credence to the proposition that section 24 of the Constitution and regulated environmental assessment procedures, are not the sole, or even the correct fora for assessing the impacts of all three elements of social, economic and environment. The purpose of EIAs is to assess but one aspect, the environment. Although in the process of doing so, EIAs must be mindful of social and economic implications, and feed the outcomes of these assessments into integrated planning processes, where the latter will have assessed the social and economic impacts of developments. In this way integrated and equitable development decisions can be arrived at.

2.2.3 **Normative content, role and attainment of sustainable development**

Whilst the basic elements of sustainable development are generally agreed at an international and national legislative and policy level, there is less consensus and clarity as to the normative content of the term: when it is achieved, and at a practical level, how it is achieved. A brief consideration of these aspects is relevant, firstly because they were largely ignored in the *Fuel Retailers* case, and secondly because it is at the practical level that the difficulties of conducting sustainable development assessments in EIAs becomes most apparent.

The court in *Fuel Retailers* stated that "*commentators on international law have understandably refrained from attempting to define the*

¹⁰¹ Section 3(1)(c).

¹⁰² Section 3(1)(c)(i) and (viii).

concept of sustainable development",¹⁰³ but have instead focused on the concept's core elements, (which have been described above). Ngcobo J therefore confined the judgment to a search for the incorporation of the elements of equity and integration in South African law,¹⁰⁴ before concluding that "construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires the interests of the environment to be balanced with socio-economic interest".¹⁰⁵

What the court failed to deliver however, was an interpretation on the normative content of sustainable development. How is this concept translated into practice; how are the relationships between the three pillars to be balanced; what value choices are to be applied to achieve equity? This has led to further questions such as whether sustainable development is an empty hope, and whether it has any practical substance.¹⁰⁶ As Burns explains, we have secured a "first level understanding" of the concept of sustainable development's core ideas, "*in the sense that there is broad acknowledgement that sustainable development can serve a new trajectory for development*".¹⁰⁷ However its usefulness has been questioned as "*there is growing realisation that failure in the realm of sustainable development has resulted from the confusion about the concept at a second level of understanding: that of practical implementation*".¹⁰⁸

It is therefore difficult to determine satisfactory answers to these questions in settled law or commentary on it. At present it is easier to

¹⁰³ Paragraph [51].

¹⁰⁴ Paragraphs [57] - [61].

¹⁰⁵ Paragraph [61].

¹⁰⁶ McCloskey op cit n44 at 153.

¹⁰⁷ Op cit n9 at 5.

¹⁰⁸ Ibid. See also Tumi Murambo op cit n36 where he explains that in *Fuel Retailers* "the court fell short of specifically explaining how the obligations [of sustainable development] are to be exercised in practice". Also Alexander Patterson, *Fuelling the Sustainable*

identify what sustainable development is not, or what are believed to be its failings or weaknesses, than it is to determine how to measure or achieve it. As Murambo puts it:

*"The difficulty of measuring sustainability clearly shows the still unsettled nature of the notion of sustainable development. A critical question that remains unanswered both nationally and in international environmental law is whether there is a universal way of measuring the sustainability of a given development model. It appears easier to identify an unsustainable model of development and to prescribe the essential attributes of a sustainable model".*¹⁰⁹

The main criticisms of the role, content and implications of sustainable development are as follows:

- Both the Brundtland definition as well as that in NEMA for sustainable development is anthropocentric in nature in that it focuses more on development than sustainability. In so doing it assumes that human needs will be met regardless of future population size, and that the technical means exist to allow society to choose the right course of action and the one that will allow future generations to meet their needs.¹¹⁰ As Steven Pete puts it *"the problem with the concept of sustainable development is that it encourages the view that, with careful balancing, it is possible to have our cake and eat it"*.¹¹¹

However can present and future needs be so easily harmonised? The definition of sustainable development reflects an optimistic view that limitations to development are

Development Debate in South Africa, 2006 SALJ 53 at 54 which concedes that the *"exact meaning and ambit of sustainable development remains subject to debate"*.

¹⁰⁹ Op cit n36 at 496.

¹¹⁰ McCloskey op cit n44 at 154.

¹¹¹ Steven Pete, Shuffling Deck Chairs on the Titanic? A Critique on the Assumptions Inherent in the South African Fuel Retailers Case from the Perspective of Deep Ecology, (2008) 15 SAJELP 103 at 111.

not bound in limitations to the natural environment and its resources, but rather the rate at which technology and social institutions develop. It assumes "*that the environment is incredibly adaptive and resilient*".¹¹² Of course, if we are not as good at achieving the balance as the concept suggests then as Pete puts it, "*the environmental price that humanity may ultimately be required to pay for our arrogance will be very high indeed*".¹¹³

- Taking the above critique a step further to the political realm, is the view that the concept of sustainable development is nothing more than a means of justifying the need for continuous human development, whatever the cost. Tobias Van Reenen captures this more radical view, (arguably one that has some merit), in the following statement:

"Bogged down in repeating mantras written on the distorted interpretations of the Rio Declaration, the UN Millennium Development Goals, and the WSSD Plan of Action, courts have become conditioned to using the socio-economic prerequisites of purported poverty alleviation arguments in a justificatory and rationalising way to support government's short term politically expedient chases after gross domestic product (GDP) as an indicator of the degree and nature of human development".¹¹⁴

Based on this view, the purpose of sustainable development is nothing more than a formula to attempt to reconcile the opposing views of developers and environmentalists. Field suggests that sustainable development could thus be described as the "*conceptual vehicle chosen by a diverse range of actors to negotiate the tensions arising from the need*

¹¹² McCloskey op cit n44 at 155; Pete op cit n86 at 111.

¹¹³ Pete ibid.

¹¹⁴ Op cit n60 at 170/171.

for social economic development on a planet with finite resources".¹¹⁵

- The element of "integration" in sustainable development has also been criticised.¹¹⁶ What does integration of the three pillars of social, economic and environment really mean, and when is it achieved? Ultimately it becomes a value choice as to which of the three pillars will outweigh the others in any particular development scenario. However on what basis will values be applied? Although extensive information exists on economic, social and environmental systems, what is lacking are details and extensive databases on the relationships between them.¹¹⁷

For this reason Feris argues that whilst value driven integration process cannot be avoided, to be legitimate it must be principled, and that such principles must be formulated in policy and legal instruments, that must provide direction to norms and values that will take precedence in sustainable development decision-making.¹¹⁸

Perhaps the most significant barrier to understanding the practical implementation and attainment of sustainable development is, as was described in the introduction of this paper, that the concept is a philosophical one. It is not an end state, but is something that must continuously be strived for, checked, balanced, and where needs be, amended. That is not to suggest that it has no purpose or role in our law and development. However for so long as its normative content is not defined in policy and legislation, it will continue to fail at a practical level, be misused, abused, and at least from the perspective of this

¹¹⁵ Tracey-Lynn Field, Sustainable Development Versus Environmentalism: Competing Paradigms for the South African EIA Regime, (2006) 123 *South African Law Journal* 409 at 411.

¹¹⁶ See for example Feris op cit n5 at 248 – 251; and Field op cit at 420.

¹¹⁷ Field Ibid.

¹¹⁸ Op cit n5 at 251 and 253.

paper, will result in environmental degradation and loss, to the point where the concept will have no practical or even idealistic meaning at all. In short the ability to achieve sustainability, even from a purely anthropocentric perspective, will no longer exist. A second observation, and central to the theme of this paper, is that the complexities of the concepts of integration and equity from a competing social, economic and environmental perspective, are such that their attainment must be pitched at the correct level of decision-making. It will be argued below that this level is not, nor should it be, at the project EIA level.

2.2.4 **Socio-economic rights**

These rights generally require a state to provide certain goods and services to members of society to the extent that it is practically possible.¹¹⁹

The Constitution contains certain rights which are clearly socio-economic, such as the right to have access to adequate housing,¹²⁰ and the right to have access to healthcare, sufficient food and water, and social security.¹²¹ Section 24(b) of the Constitution enjoins government to promote justifiable economic and social development when taking measures to secure ecologically sustainable development.

Although NEMA does not define the term "socio-economic", (or "social" or "economic" for that matter), reference to the term is found in several provisions. Firstly the definition of "sustainable development" includes the integration of social and economic factors into planning

¹¹⁹ Loretta Feris, *The Socio-Economic Nature of Section 24(b) of the Constitution – some thoughts on HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2008) 23 *SAPR/PL* 195. See also *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (CC).

¹²⁰ Section 26.

¹²¹ Section 27.

and decision-making.¹²² Secondly there are several references to the term/s in the national environmental management principles.¹²³ For example environmental management must *inter alia* serve "developmental", (ie. economic considerations) and social interests;¹²⁴ development must *inter alia* be "socially" and "economically" sustainable;¹²⁵ and *inter alia* "social" and "economic" impacts on activities must be considered, assessed and evaluated, and decisions must be appropriate in light of such considerations.¹²⁶

One of the general objectives of integrated environmental management ("IEM") in chapter 5 of NEMA, requires the identification, prediction and evaluation of the actual and potential impact on socio-economic conditions.¹²⁷ In the EIA procedure prescribed under GNR385 ("the EIA Regulations") to NEMA, both the requirement for the basic assessment report process ("BAR")¹²⁸ and the full EIA process,¹²⁹ make reference to socio-economic issues. The BAR, for instance, must contain *inter alia* a description of the manner in which social and economic aspects of the environment may be affected.¹³⁰ The same requirement exists for a scoping report.¹³¹

There is a further albeit indirect reference to socio-economic issues in NEMA. One of the purposes of environmental implementation plans and environmental management plans which must be prepared by various organs of state,¹³² is to ensure the achievement, promotion and protection of sustainable development.¹³³

¹²² Section 1(1).

¹²³ Section 2.

¹²⁴ Section 2(2).

¹²⁵ Section 2(3).

¹²⁶ Section 2(4)(f).

¹²⁷ Section 23(2)(b).

¹²⁸ Part 2, chapter 3.

¹²⁹ Part 3, chapter 3.

¹³⁰ Regulation 23(2)(d).

¹³¹ Regulation 29(1)(d).

¹³² Chapter 3, NEMA.

¹³³ Section 12(a).

To reiterate, there is no definition or direction in NEMA for the term "socio-economic" nor how it is practically to be identified, quantified or assessed.

Although the Constitutional Court did not consider the scope of socio-economic issues *per se*, it touched on this aspect when it addressed the nature and scope of the obligation to consider socio-economic conditions.¹³⁴ Ngcobo J did this from the starting point that because socio-economic development and protection of the environment are interlinked, it follows that socio-economic conditions have an impact on the environment.¹³⁵ In the context of the case being considered, namely the impacts of establishing a new fuel filling station, the court applied the NEMA principle that requires that environmental management must place people and their needs at the forefront of its concern,¹³⁶ to conclude that it is not enough for an EIA to focus on the needs of the developer "*while the needs of society are neglected*".¹³⁷ This in turn led the court to conclude that "*if a development is to serve the developmental needs of the people, the impact of new developments on existing ones is a legitimate concern*", and as a result the environmental authorities were obliged to consider and assess the impact of a proposed activity on existing socio-economic conditions "*which must of necessity include existing developments*".¹³⁸

However that is where the court's guidance on the meaning and scope of the socio-economic considerations in an EIA ended. Are only local socio-economic impacts relevant? One could be forgiven for thinking so, as the only example repeatedly raised by the court, is the potential impact on the viability of existing service stations and their employees' job security as a result of any new service station.¹³⁹ There would

¹³⁴ Paragraphs [71] to [83].

¹³⁵ Paragraph [71].

¹³⁶ Section 2(2).

¹³⁷ Paragraph [76].

¹³⁸ Paragraphs [76] and [77].

¹³⁹ Paragraphs [71], [75], [77] and [80].

clearly be other socio-economic impacts such as job creation at the new service station; upliftment of economically disadvantaged areas; easier access of communities to petrol services; and even the possibility of downstream local socio-economic benefits where for example the establishment of the new filling station became the trigger for other retail enterprises to open in close proximity. Then what about macro socio-economic impacts? For example a new service station will result in more fuel being pumped which in turn results in more tax being paid to government, which will in turn lead to improved infrastructure spending and other government investment in communities.

In summary the court adopted a very narrow and one dimensional view of socio-economic conditions, and thereby left more questions than answers. The term "socio-economic conditions" rolls very easily off the tongue, but is clearly a term where the devil lies in the detail.

Some attempt to clarify this issue was made in *Hangklip/Kleinmond Federation of Ratepayers Association v The Minister for Environmental Planning and Economic Development: Western Cape and Others*.¹⁴⁰ The court in interpreting section 2(4)(i) of NEMA held that the "disadvantages and benefits" of *inter alia* the social and economic impacts of activities "*do not have an independent existence apart from the impacts of the proposed activities*".¹⁴¹ It added that "*in our view, section 2(4)(i) refers to the impact of the authorised activities and not to extraneous benefits divorced from impacts of the authorised activities*".¹⁴² Whilst making this distinction may have some merit in assisting to "draw the line" on how far an assessment of socio-economic conditions has to go, it is a somewhat arbitrary and subjective effort at doing so. Certainly section 2(4)(b) does not include the word "direct" with respect to "disadvantages and benefits", and therefore why an impact on the viability of existing service

¹⁴⁰ Unreported case of the full bench of the Western Cape High Court, Louw and Bozalek JJ Case No. 4009/2008, Judgment of 1 October 2009.

¹⁴¹ Paragraph [66].

¹⁴² *Ibid.*

stations, (to use the *Fuel Retailers* example) is relevant, but not say the broader economic advantages of more tax revenue due to a new service station, is not clear. It is submitted that the court in *Arabella* is wrong in drawing a fictitious, unscientific and unsubstantiated line between relevant and irrelevant socio-economic considerations in the manner in which it did. A preferred test for determining the limitation of the role of socio-economic issues in EIA will be discussed further below, under chapter 3.

Kidd offers some thought on the types of social and economic issues which should be considered in development applications.¹⁴³ Social issues, he says, should include things such as health impacts; aesthetics; "sense of place"; cultural heritage; infrastructure and general convenience; as well as transformation and redress, (although he acknowledges that several of these overlap with environmental factors). Economic issues he lists as including: economic need for development; impact on employment/unemployment; impact on competitors; and the potential for synergies.¹⁴⁴

Kidd makes one further point which is relevant both to the unsatisfactory way in which the *Fuel Retailers* decision, (and *Arabella* for that matter), dealt with the meaning and scope of socio-economic issues, and to the central argument of this paper. The court held that the requirement to consider "need and desirability" in a local authority planning ordinance is not the same as a consideration of socio-economic impacts.¹⁴⁵ It stated that the latter was a wider duty than the former.¹⁴⁶ Kidd takes issue with this on the basis that there is no

¹⁴³ Op cit n44 at 92.

¹⁴⁴ Du Plessis and Britz offer other examples at 267: Social – population impacts; community or institutional arrangements; conflicts between local residents and newcomers; individual and family level impacts; community infrastructure needs. Economic – job opportunities; job distribution; product growth; property tax base.

¹⁴⁵ Paragraph [86].

¹⁴⁶ Paragraph [85].

material difference between a consideration of socio-economic impacts, and that of need and desirability.¹⁴⁷

Socio-economic issues in development applications were therefore generally not addressed satisfactorily in either *Fuel Retailers* or *Arabella*. This paper now turns to consider the implications of this for EIAs.

2.3 **Consideration of socio-economic impacts in environmental impact assessments in South African judicial precedent, practice and commentary**

2.3.1 **Introduction**

The object of this section is to consider the procedural requirements of EIAs both in terms of the law in place at the time of the *Fuel Retailers* case, and the current regulatory framework. In particular the manner in which socio-economic considerations in EIAs have been applied by both our administrators and judiciary will be assessed, and comment will be offered on why these issues have been incorrectly applied.

2.3.2 **EIA regulatory framework**

EIA legislation has evolved in South Africa firstly through the ECA and subsequently through NEMA.¹⁴⁸ At the time the authorisation which formed the focal point of the decision in *Fuel Retailers* was issued,¹⁴⁹ the ECA regulated EIAs. The procedural requirements were specified in section 22¹⁵⁰ and GNR1182 and 1183.¹⁵¹ It was pointed out at

¹⁴⁷ Op cit n44 at 95.

¹⁴⁸ See section 2.1 above for the history of EIA in South Africa.

¹⁴⁹ 9 January 2002.

¹⁵⁰ Section 22 of the ECA provided the following:

"(1) *No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by*

section 2.1 above that there was no direct reference to socio-economic issues in the procedural requirements of the ECA. "Environment" is defined in the Act as "*the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or other organism or collection of organisms*".¹⁵² Murambo suggests that this definition includes socio-economic conditions,¹⁵³ although he does not demonstrate why he reaches this conclusion. It is nevertheless conceded that the definition is particularly broad in its potential scope.

GNR1183 which set out the procedure for conducting EIAs, required the submission of a scoping report followed by an environmental impact report ("EIR").¹⁵⁴ It stated that a scoping report must as minimum include:

- a brief project description;
- a brief description of how the environment may be affected;
- a description of environmental issues identified;

the Minister or by a competent authority or local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the gazette.

- (2) *The authorisation referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.*
- (3) *The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorisation for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.*
- (4) *If a condition imposed in terms of subsection (3) is not being complied with, the Minister or competent authority or any local authority or officer may withdraw the authorisation in respect of which such condition was imposed, after at least 30 days written notice was given to the person concerned".*

¹⁵¹ See note 23 above.

¹⁵² Section 1.

¹⁵³ Op cit n36 at 495.

¹⁵⁴ Regulations 6 and 8.

- a description of all alternatives identified; and
- an appendix containing a description of the public participation process followed.

The EIR was required to include as a minimum:

- a description of each alternative assessed, including particulars on the extent and significance of each identified environmental impact, and the possibility for mitigation of each impact;
- a comparative assessment of all the alternatives; and
- appendices containing descriptions of the environment concerned; the activity to be undertaken; public participation; media coverage; and any other information required in a plan of study.

The EIA procedure under the ECA was repealed by section 50 of NEMA.¹⁵⁵

EIAs are now regulated under chapter 5 of NEMA, in particular section 24. Initially there was an overlap between the EIA requirements of the ECA, and the original text of section 24 of NEMA which came into effect on 29 January 1999. The original text, which will be discussed below, and which was used by the court in *Fuel Retailers* was headed "Implementation", and was worded as follows:

"In order 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,*

¹⁵⁵ With effect from 3 July 2006 in terms of GNR615 and GNR616, GG28938 of 23 June 2006.

of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting or otherwise allowing the implementation of an activity".¹⁵⁶

The reference to "*the general objectives of integrated environmental management ("IEM")*", was to section 23 of NEMA which sets out the objectives, (which remain unaltered to today), as follows:

- "(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 risks and consequences of alternatives and options for mitigation of the activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;*
- (c) ensure that the effects of activities on the environment receive adequate consideration for actions are taken in correction of them;*
- (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;*
- (e) ensure that consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and*

¹⁵⁶ Section 24(1).

- (f) *identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2".*

The term "environment" was defined somewhat differently, (to the ECA), in NEMA, as follows:

"The surroundings within which humans exist and that are made up of-

- (i) *the land, water and atmosphere of the earth;*
- (ii) *microorganisms, plant and animal life;*
- (iii) *any part or combination of (i), (ii) and the interrelationships among and between them; and*
- (iv) *the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.*¹⁵⁷

Although anthropocentric in its focus,¹⁵⁸ its content more clearly limits the definition of the term to the natural environment, and the impact of such on human health and wellbeing.¹⁵⁹ It is submitted that it is a more helpful and ring fenced definition than that contained in the ECA.

The original text of section 24 permitted the national Minister for Environmental Affairs or a provincial MEC, to identify activities that could not be commenced without prior authorisation.¹⁶⁰ However no activities under section 24 were identified until 2006.¹⁶¹

Any assessment in terms of section 24 was required, in the original text, to take place in accordance with procedures that complied with

¹⁵⁷ Section 1(1).

¹⁵⁸ See for example Anel du Plessis op cit n54 at 63.

¹⁵⁹ W Du Plessis and Lizette Britz, The Filling Station Saga: Environmental or Economic Concerns? 2007 (2) *TSAR* 263 at 264.

¹⁶⁰ Section 24(2).

¹⁶¹ GNR386 and 387. See note 32 above.

section 24(7).¹⁶² The section went further and not only preserved the ECA EIA procedure, but also stipulated that it must comply, (presumably as a minimum), with the procedures set out in section 24(7).¹⁶³

The procedure in section 24(7) is set out in full below, firstly because it is central to the criticism of the *Fuel Retailers* decision, but also because as part of the process for determining the correct role of socio-economic issues in an EIA, it is important to compare this provision from the original text of NEMA, to the procedure in section 24 which subsequently replaced it:

"Procedure for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure the following:

- (a) investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;*
- (b) investigation of the potential impact, including cumulative affects, of the activity and its alternatives on the environment, **socio-economic conditions**, and cultural heritage, and assessment of the potential significance of the potential impact;*
- (c) investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing their activity;*
- (d) public information and participation, independent review and conflict resolution in all phases of the investigation and assessment of impacts;*

¹⁶² Section 24(3)(a).

¹⁶³ Section 24(3)(c) and (d).

- (e) *reporting of gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;*
- (f) *investigation and formulation of arrangements for the monitoring and management of impacts, and the assessment of the effectiveness of such arrangements after the implementation;*
- (g) ***coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;***
- (h) *that the findings and the recommendations flowing from such investigation, and the general objectives of IEM laid down in this Act and the principles of environmental management set out in section 2 are taken into account in any decision by an organ of state in relation to the proposed policy, programme, plan or project;*
- (i) *...".*

(emphasis added).

Key points to highlight from the original text which will be taken forward in the argument contained in this study, is that section 24(7) was not limited to prescribing a procedure for EIA, but applied to activities that required any "permission by law"; clear provision was made for cooperative governance to apply in decision-making where the activity fell under the jurisdiction of more than one organ of state; nowhere in section 24 did it state that the environmental authority in an EIA, must on its own and in isolation consider the impacts on the environment and socio-economic conditions, provided such impacts were "reported" to any authority permitting an activity, (including the environmental authority), which may have a significant impact on the environment; and the procedure was not limited to project level EIAs as per section 24(7)(h).

Subsequent to the commencement of NEMA, section 24(7) has been amended twice.¹⁶⁴ The first amendment was acknowledged by the Constitutional Court in *Fuel Retailers*.¹⁶⁵ Whilst the court's explanation that it had to consider the text of section 24 in effect when the application for authorisation was made is understood, it is entirely mystifying why it ignored the amended section 24 altogether, given that the change is essential to the issue of the role of socio-economic considerations in EIAs, and therefore central to the *ratio* of the judgment.

Act 8 of 2004 amended section 24(1) by changing the heading from "Implementation" to "Environmental Authorisations", and substituting the original text for the following:

*"In order to give effect to the general objectives of IEM laid down in this chapter, the potential impact on the environment of listed activities must be considered, investigated and assessed and reported to the competent authority charged by this Act with granting the relevant environmental authorisation"*¹⁶⁶ (emphasis added).

The first obvious difference between the original and the 2004 amendment texts, is that the latter removed reference to the terms "socio-economic conditions" and "cultural heritage". The assessment is therefore now focused on impacts to the environment as a result of activities. Secondly gone is the requirement to undertake the assessment and to report the outcome to every organ of state that will

¹⁶⁴ The first amendment occurred in 2004 in terms of the National Environmental Management Amendment Act 8 of 2004 which came into effect on 3 July 2006. The second occurred in 2009 in terms of the National Environmental Management Amendment Act 62 of 2008 which came into effect in 1 May 2009.

¹⁶⁵ Note 76 to paragraph [65].

¹⁶⁶ "Environmental authorisation" is defined in NEMA as "*when used in chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental Act*" (section 1(1)).

need to permit the activity. The requirement in the 2004 amendment is to report the outcome of the EIA to the environmental authority granting the environmental authorisation.

Those are not the only significant amendments introduced by Act 8 of 2004. It also amended the minimum procedural requirements for EIAs. Now framed in section 24(4), (and no longer section 24(7)), it amended section 24(7)(b) of the original text by deleting all reference to the requirement to assess the impact of the activity on "*socio-economic conditions and cultural heritage*". Section 24(4)(b) read as follows:

"Investigation of the potential impact of the activity and its alternatives on the environment and assessment of the significance of that potential impact" (emphasis added).

The court in *Fuel Retailers* was therefore not comparing apples with apples in its decision on the role of socio-economic conditions in EIAs. It is hard to believe it would have come to the same conclusion it did, had it considered the 2004 amendment.

The 2008 amendment to section 24, (which came into effect in May 2009), made certain important textual and procedural changes, but importantly, did not reintroduce a specific requirement to consider the impacts of activities on socio-economic conditions. Section 24(1) was subtly amended firstly to add the words "*potential consequences for*" the environment, and secondly, although perhaps superfluous,¹⁶⁷ the words "*except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act*".¹⁶⁸

¹⁶⁷ Superfluous because since 2004 only listed activities were required to comply with section 24(1).

¹⁶⁸ There were other (subtle) changes to the wording which are not relevant to this paper. The full text of section 24(1) is therefore currently as follows:

"(1) *in order to give effect to the general objectives of integrated environmental management laid down in this chapter, the potential consequences for or*

The minimum procedural requirements for EIAs is still set out in section 24(4), which has now been divided into two parts.¹⁶⁹ Notwithstanding this, the scope and text remains largely as it was in 2004, although given the amendment to the wording of section 24(1), the requirement is now:

*"Investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity"*¹⁷⁰ (emphasis added).

The 2009 amendment *inter alia* added section 24O to NEMA, which sets out the criteria to be taken into account by competent authorities when considering applications.¹⁷¹ Its scope is wide and *inter alia* requires the authority to comply with NEMA and to "*take into account all relevant factors*".¹⁷² However with respect to the latter, section 24O(1)(b) gives some guidance by offering what such "relevant factors" may be. From an impact perspective, it limits the scope to "*any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused*".¹⁷³ Importantly there is no reference to socio-economic considerations. Nevertheless "all relevant factors" leaves the scope of the competent authority's consideration open, save that they must be able to show

impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported to the competent authority or Minister of Minerals and Energy, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act".

¹⁶⁹ Section 24(4)(a) and (b).

¹⁷⁰ Section 24(4)(b)(i).

¹⁷¹ "Competent authority" is defined as "*in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing environmental authorisation in respect of that activity*" (section 1(1)).

¹⁷² Section 24O(1)(a) and (b).

¹⁷³ Section 24O(1)(b)(i).

that any factors considered are relevant. In appropriate circumstances, which will be discussed at chapter 3 below, it is possible that such factors may include socio-economic considerations.

This latest amendment means that the approach adopted in NEMA continues to validate the argument of this study, that the central role of an EIA remains an assessment of the impacts of activities on the natural environment and concomitant impacts on human health and wellbeing, and that socio-economic considerations have a limited role to play.

This is further supported in the detailed procedural requirements for EIAs in GNR385.¹⁷⁴ The reference to socio-economic conditions and the procedural requirements has already been highlighted and discussed. Looking firstly at the "short form" of the EIA, the BAR, whilst there is a requirement to include "*all the information that is necessary for the competent authority to consider the application*",¹⁷⁵ and the requirement to describe the environment that may be affected by the proposed activity, (including the manner in which *inter alia* the social and economic aspects of the environment may be affected),¹⁷⁶ the assessment component is focused exclusively on "the environment":

*"A description and assessment of the significance of any environmental impacts, including cumulative impacts, that may occur as a result of the undertaking of the activity or identified alternatives or as a result of any construction, erection or decommissioning associated with the undertaking of the activity"*¹⁷⁷ (emphasis added).

The requirement to include management and mitigation measures is also confined exclusively to the environment.¹⁷⁸

¹⁷⁴ See sections 2.1.2 and 2.2.4 above.

¹⁷⁵ Regulation 23(2).

¹⁷⁶ Regulation 23(2)(d).

¹⁷⁷ Regulation 23(2)(h).

¹⁷⁸ Regulation 23(2)(i).

The full EIA process, with scoping and EIR requirements, is similarly focused on the environment. Scoping reports, while having to describe the physical and biological way in which the environment may be affected, as well as the social and economic effects,¹⁷⁹ are only required to describe potential environmental impacts.¹⁸⁰ Importantly specialist studies which may be required for the EIR phase must be identified, but only for environmental impacts.¹⁸¹ The EIR clearly also focuses on environmental assessment with the following requirement:

*"A description of all environmental issues that were identified during the environmental impact assessment process, and assessment of the significance of each issue and an indication of the extent to which the issue could be addressed by the adoption of mitigation measures"*¹⁸² (emphasis added).

The EIR also requires the environmental impact statement,¹⁸³ (as opposed to a sustainable development or sustainability impact assessment), and a draft environmental management plan, (as opposed to a sustainable development or sustainability management plan).¹⁸⁴

It is however a requirement of both the BAR and EIR processes that *"a description of the need and desirability of the proposed activity"* be included.¹⁸⁵ It is important to note though that the requirement is to describe and not assess need and desirability, a distinction which this study argues is material in the context of the role of socio-economic issues in EIAs.

¹⁷⁹ Regulation 29(1)(d).

¹⁸⁰ Regulation 29(1)(f).

¹⁸¹ Regulation 29(1)(g).

¹⁸² Regulation 32(2)(j).

¹⁸³ Regulation 32(2)(n).

¹⁸⁴ Regulation 32(2)(o).

¹⁸⁵ Regulation 32(2)(o).

One final aspect of the EIA process is relevant. The environmental management principles of section 2 of NEMA were discussed earlier in this study, with respect to the context of their inclusion in the terms "sustainable development", "social" and "economic".¹⁸⁶ The principles "*apply throughout the Republic to the actions of all organs of state that may significantly affect the environment*", and serve as guidelines by reference to which an organ of state must take a decision concerning protection of the environment.¹⁸⁷

Whilst it was noted¹⁸⁸ that the principles, which after all apply not just to environmental authorities making EIA decisions, but to every authority taking a decision which may affect the environment,¹⁸⁹ contained reference to social and economic considerations, their overwhelming focus is on the management of the natural and human health environments. In fact, as was highlighted in section 2.2.3 above that the requirements of sustainable development at section 2(4)(a) refer only to the natural environment, and contain, rather amazingly, no reference to social and economic issues.¹⁹⁰

¹⁸⁶ See section 2.2.3 above.

¹⁸⁷ Section 2(1) generally and specifically section 2(1)(c).

¹⁸⁸ At section 2.2.2 above.

¹⁸⁹ Op cit n44 at 96.

¹⁹⁰ Section 2(4)(a) states the following:

"(a) *Sustainable development requires the consideration of all relevant factors including the following:*

- (i) *that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- (ii) *that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- (iii) *that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or it cannot be altogether avoided, is minimised and remedied;*

In summary it is clear that the EIA regulatory framework has evolved since its formal introduction under the ECA in 1998. Insofar as this evolution concerns the role of socio-economic issues, and for that matter the concept of sustainable development, it is the author's view that this has narrowed and been refined. This conclusion is based on the 2006 and 2009 amendments to section 24 of NEMA described above. Field suggests that the 2006 amendment resulted in a "*critical shift in emphasis which tends to move EIAs away from sustainable development thinking*".¹⁹¹ She mentions that at least one academic, Jan Glazewski, has commented that the 2006 amendments to section 24 are *ultra vires* since they conflict with section 2(4)(i) of NEMA.¹⁹² However it is suggested that neither view is correct. Rather the 2006 and 2009 amendments have now placed the role of sustainable development in the correct context in the EIA process, and aligned it with section 24(b) of the Constitution, a proposition which is discussed further below.

Where Field is correct, it is submitted, is in her conclusion that the current EIA regime under NEMA is aimed at considering the impacts

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- (iv) *that waste is avoided, or it cannot be altogether avoided, is minimised and reused or recycled where possible and otherwise disposed of in a responsible manner;*
 - (v) *that the use and exploitation of non renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;*
 - (vi) *that the development, use and exploitation of renewable resources and the ecosystems of which they are a part do not exceed the level beyond which their integrity is jeopardised;*
 - (vii) *that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge throughout the consequences of decisions and actions; and*
 - (viii) *that the negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied".*

¹⁹¹ Op cit n90 at 429.

¹⁹² Ibid at 431.

of activities on the natural environment.¹⁹³ This view aligns not only with the prescribed procedural requirements of EIA in section 24(4) of NEMA and GNR385 under it, but it also reflects the purpose and objects of the concept of EIA.

2.3.3 **Interpretation and application of the role of socio-economic considerations in EIAs by South African courts and administrators**

In the *Fuel Retailers* case the applicant, (the Fuel Retailers Association of Southern Africa), sought a High Court review of the decision by the Mpumalanga environmental authority to grant an authorisation under section 22 of the ECA for the development of a petrol filling station in White River, Mpumalanga. However the Supreme Court of Appeal upheld the department's decision.¹⁹⁴ Like the High Court had done in the first instance of the review, the SCA 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 a duty to consider these aspects in rezoning applications.¹⁹⁵ The issue of the requirement to consider social and economic issues in EIAs was then taken to the Constitutional Court who framed the enquiry thus:

*"The questions which fall to be considered in this application are therefore, firstly, the nature and scope of the obligation consider the social, economic and environmental impact of the proposed development; second whether the environmental authorities complied with the obligation; and, if the environmental authorities did not comply with that obligation, the appropriate relief".*¹⁹⁶

¹⁹³ Ibid at 427.

¹⁹⁴ *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and Others* 2007 (2) SA 163 (SCA).

¹⁹⁵ Paragraph [27] of the Constitutional Court judgment.

¹⁹⁶ Paragraph [34].

The Constitutional Court held that the nature and scope of the obligation to consider the impact of a proposed development on socio-economic conditions had to be determined in light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment.¹⁹⁷ On the basis that NEMA requires a consideration, assessment and evaluation of the social, economic and environmental impacts of proposed activities, "*this clearly enjoins the environmental authorities to consider and assess the impact of a proposed activity on existing socio-economic conditions which must of necessity include existing developments*".¹⁹⁸ It further based this conclusion on the wording of section 24(7)(b) which was in place prior to its amendment in 2004, and which required an "*investigation of the potential impact, including cumulative effects, of the activity and its alternatives on... socio-economic conditions... and assessment of the significance of the potential impact...*".¹⁹⁹ Finally its *ratio* was based on section 23(2)(b) of NEMA, which has a similar requirement.

In the court's view the duty of environmental authorities is to integrate environmental, sustainable development and social and economic interests into decision-making so that they are informed by these considerations.²⁰⁰ In the context of the facts of the case, the court, as was highlighted in section 2.2 above, concluded that this "*makes it plain that the obligation to consider the socio-economic impact of a proposed development is wider than the requirement to assess need and desirability under [a local planning] ordinance*".²⁰¹

There was a dissenting judgment by Sachs J. In his view social and economic issues are only relevant to the extent that they 'implicate' or pose threats to the environment.²⁰² The only other role he saw these

¹⁹⁷ Paragraph [71].

¹⁹⁸ Paragraph [77].

¹⁹⁹ Ibid.

²⁰⁰ Paragraph [79].

²⁰¹ Paragraph [82].

²⁰² Paragraphs [113] and [116].

issues playing were in those cases that it was determined that an activity may cause environmental damage, and the "*economic sustainability of a proposed economic enterprise could be highly relevant as a countervailing factor in favour of finding that on a balance the development is sustainable*".²⁰³

It is submitted that Sachs' summation of the role of socio-economic issues in EIAs is correct.

Prior to the *Fuel Retailers* case, (and other than the High Court and Supreme Court of Appeal consideration of that matter), several judgments either considered or commented on socio-economic issues in EIAs.

Two courts adopted the view that an EIA was not the correct place to consider these issues. In *Sasol Oil (Pty) Ltd and Another v Metcalfe NO*,²⁰⁴ Willis J held that the sustainable development principle in section 2 of NEMA did not extend the mandate of the environmental authority in an EIA to taking socio-economic, (and not just environmental), factors into account.²⁰⁵ Even more emphatically in *All The Best Trading CC*²⁰⁶ Patel J would not allow an applicant to object to an EIA authorisation where they relied purely on economic concerns which could not demonstrate that they had an environmental impact. He states that even if a development has "*a direct and substantial impact upon the sales of applicants... a party may not rely upon the provisions of the ECA or the Government Notice to prevent the respondents from developing the site [as] the applicants do not indicate that they have an interest of an environmental nature that needs to be protected. They are in essence seeking to protect commercial interests*".²⁰⁷ The court also clarified that in the context of

²⁰³ Paragraph [117].

²⁰⁴ 2004 (5) SA 161 (W).

²⁰⁵ Paragraph 171E – 172B.

²⁰⁶ *All The Best Trading CC t/a Parkville Motors and Others v SN Nayager Property Development and Construction CC and Others* 2005 (3) SA 396 (T).

²⁰⁷ Paragraph 400l.

considering socio-economic impacts, the effect of a development on a competitors profit margins, is not within the scope of an EIA.²⁰⁸

However in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*²⁰⁹ Claassen J took the opposite view. He held that ecologically sustainable development must be promoted jointly with justifiable economic and social development, and that this obligation "*make[s] it abundantly clear that the department's mandate [in an EIA] includes the consideration of socio-economic factors as an integral part of its environmental responsibility.*"²¹⁰

Further the appeal of the *Sasol Oil* case was heard by the SCA in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*,²¹¹ which overturned the High Court's decision. The court's reasoning was based on the premise that the interpretation of environmental laws needs to be informed by the NEMA principles, and that sustainable development lies at the core of this process and requires the state to evaluate the social, economic and environmental impacts of activities. "*To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical, but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development...*"²¹²

In *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd and Others*,²¹³ and in upholding the *BP Southern Africa* case, the court concluded that the applicants had *locus standi* to protect

²⁰⁸ Willemien du Plessis and Lizette Britz, *The Filling Station Saga: Environment or Economic Concerns?* 2007 (2) *TSAR* 263 at 272.

²⁰⁹ 2004 (5) SA 124 (W).

²¹⁰ Paragraph 151E.

²¹¹ 2006 (5) SA 483 (SCA).

²¹² Paragraph [16].

²¹³ Unreported judgment of Claassen J of 18 March 2007 in the TPD under Case No. 3016/05.

their commercial interests in an EIA as environmental legislation includes socio-economic and not only environmental conditions.²¹⁴

Post the *Fuel Retailers* judgment, there has been at least one other judgment which has applied the Constitutional Court's adduced principles. In the unreported full bench decision of the Western Cape High Court in *Hangklip/Kleinmond Federation of Ratepayers Association v The Minister for Environmental Planning and Economic Development: Western Cape and Others* on 1 October 2009,²¹⁵ the court held:

"A decision-maker who acts in terms of section 22 of NEMA²¹⁶ must therefore consider the environmental and socio-economic impact of the activities for which approval is sought, including the disadvantages and benefits. The negative impacts (environment and socio-economic) are to be minimised and the beneficial impacts (environment and socio-economic) are to be maximised".²¹⁷

The court based this conclusion *inter alia* on the *Fuel Retailers* decision, and stated that "[t]hese judgments emphasise that a section 22 decision concerns the interaction between social and economic development and protection of the environment".²¹⁸ More specifically the court based its decision on an application of section 24 of the Constitution which it says contemplates the integration of the environmental protection and socio-economic development.²¹⁹ As a result even though the ECA and NEMA are laws concerned with the environment, the court stated that their provisions must be seen against the background of section 24 of the Constitution. It also applied the NEMA environmental management principles, in particular

²¹⁴ Paragraphs [15] – [17].

²¹⁵ Op cite n115.

²¹⁶ This is presumably a typographical error and should have read section 22 of the ECA.

²¹⁷ Paragraph [50].

²¹⁸ Paragraph [52].

²¹⁹ Paragraph [55].

the requirement that the socio-economic and environmental impact of activities must be considered.²²⁰

In summary our courts have generally held, (and it was settled with the Constitutional Court decision), that as a result of section 24, and in particular section 24(b) of the Constitution, read together with the NEMA environmental management principles and section 24(7), (as it was worded prior to the 2004 NEMA amendment), there is a requirement for environmental authorities to integrate and balance socio-economic and environmental considerations in EIAs.

Environmental legislation and the EIA process is administered by environmental departments. At a national level the Department of Water and Environmental Affairs ("DWEA") fulfils this function, while in the provinces various environmental departments do so.²²¹ It is therefore relevant to consider how these authorities have seen the role of the EIA process, particularly with respect to socio-economic conditions and sustainable development. In 2007 DWEA, (which at the time was the Department of Environmental Affairs and Tourism), initiated a study to assess the effectiveness and efficiency of regulated EIA since its implementation in 1997. A report was completed and published in 2008 under the heading *Review (of) the Effectiveness and Efficiency of the Environmental Impact Assessment (EIA) System in South Africa*.²²² The methodology used to compile the study included reviewing EIA case files, a questionnaire completed by the

²²⁰ Paragraph [53].

²²¹ For example in Gauteng it is the Gauteng Department of Agriculture and Rural Development, in KwaZulu-Natal it is the KwaZulu-Natal Department of Agriculture, Environmental Affairs and Rural Development and in the Western Cape it is the Department of Local Government, Environmental Affairs and Development Planning.

²²² Review of the Effectiveness and Efficiency of the Environmental Impact Assessment (EIA) System in South Africa, 20 November 2008, Mosakong Management CC in Association with Environomics CC, Savannah (Pty) Ltd and Environmental Council CC, draft document, made available by the Department of Environmental Affairs and Tourism at the Ten Years of Environmental Impact Assessment Conference in Somerset West, Cape Town, 2008.

authorities, and an analysis of statistical information held by the authorities.

In the introduction to the report definitional and aspirational aspects of the EIA process were discussed. It records that EIA is "*one of the key environmental management instruments that are to ensure sustainable development*".²²³ However it adds that it is not the only instrument, but is supported by other sectoral legislation, and importantly notes that the environmental management principles are "*also binding on all organs of state that exercise functions that may impact on the environment*".²²⁴ The report states further that "*the role and expectations for EIA with regard to sustainable development must accordingly be viewed within the limitations of the instrument. It is not the sole implementing agent for sustainable development, but promotion of sustainable development is one of its key objectives*".²²⁵

The above being the theory, the report's findings of the contribution of EIA to sustainable development as defined in NEMA, were determined to be very different in practice:

"Very few participants in the questionnaire indicated that the purpose of EIA is to ensure or promote sustainable development... Only one person recognised the sustainable development imperative imposed by the Constitution and NEMA. This is indicative of the general ignorance amongst both officials and practitioners in respect of the sustainable development purpose of EIA, and while it might be in the back of our minds it is seldom reflected deliberately and comprehensively in EIA documents or decision documents, except by mentioning it in passing".²²⁶

It is therefore clear that the environmental administrator's practical implementation of the role of socio-economic issues in EIAs, and the

²²³ Page 16.

²²⁴ Ibid.

²²⁵ Op cit at 17.

²²⁶ Page 92.

judiciary's interpretation of how it should be applied, exist, to put it plainly, in two separate galaxies, so far are they apart.

2.3.4 **Why the courts' interpretation is wrong**

There are six core criticisms of the *Fuel Retailers* decision, (and other judgements before and after it which followed the same approach), that socio-economic impacts must be assessed in an EIA:

2.3.4.1 **Incorrect interpretation of section 24(b) of the Constitution**

The basis of this criticism of the *Fuel Retailers* interpretation of section 24(b) was set out in detail in section 2.2.2 above. To summarise, the Bill of Rights does not entrench a right to sustainable development in section 24(b). It limits the right to "ecologically sustainable development", which it is submitted differs materially meaning and context to the broader principle. Put another way, section 24(b) qualifies the type (ie. ecological) of sustainable development envisaged in that right under the Constitution.²²⁷ There are other rights in the Constitution that address the socio-economic aspects of developments.²²⁸ Nevertheless section 24 enjoins government to ensure that in achieving the sustainability of our ecology it must promote economic and social development. Consequently the attainment of sustainable development does not occur in section 24 as the courts have stated, but occurs through the balancing of all the entrenched social, economic and environmental rights in the Constitution. Both sections 26 and 27 of the Constitution, like section 24(b), enjoin government to take "reasonable legislative and other measures" to realise these rights. It is clearly here that a vehicle has been provided to government to link and coordinate legislation for the realisation of these (and other) entrenched

²²⁷ Feris op cit n5 at 252.

²²⁸ Such as section 25 (Property), section 26 (Housing), and section 27 (Healthcare, Food, Water and Social Security).

rights, in order to achieve sustainable development. Sections 26 and 27 go further in this regard by limiting the requirement for government to take measures to doing so "within its available resources". It is submitted that one such resource, (and a very important one), is the environment. In this way achieving the socio-economic rights is entirely linked to protecting our natural resources.

It would seem that our courts' interpretation of section 24 picked up on the "buzz words" associated with the concept and elements of sustainable development at an international law level. As Van Reenen puts it, they became "*bogged down in repeating mantras written on the distorted interpretations of the Rio Declaration, the UN Development Goals, and the WSSD plan of action*",²²⁹ in failing to understand the complexities of the concept, and interconnectedness of socio-economic and environmental rights in the Bill of Rights, (which is amazing given that the courts repeat the integration and equity elements of sustainable development continuously in their decisions), and consequently extended the meaning of section 24 way beyond its terminology and context.

It is submitted that as a direct result of this misinterpretation, NEMA and the EIA process were also incorrectly interpreted in our case law.

2.3.4.2

Incorrect interpretation of section 24 of NEMA

A detailed description of the evolution of section 24 was set out in section 2.3.2 above. What is clear is that there was a significant amendment to section 24 in 2004, in particular through the removal of the requirement to consider socio-economic conditions.

There are varying views as to the consequences of the amendment. Murambo holds that the change is "virtually

²²⁹ Op cit n60 at 170.

immaterial" because of the decision in *Fuel Retailers* on the role of socio-economic issues in EIAs.²³⁰ He argues that the amendment has not confined integrated environmental management to purely environmental considerations.

Du Plessis and Britz, whilst acknowledging that the scope of assessment in section 24 was curtailed in 2004 with the deletion of socio-economic issues, nevertheless suggest that with the retention of section 23 and together with the NEMA environmental principles, socio-economic issues still have a role to play in EIAs.²³¹

Field on the other hand suggests that the 2004 amendment has seen a "... *critical shift in emphasis which tends to move EIAs away from sustainable development thinking...*".²³² She feels this is supported by the environmentalist focus of important provisions of NEMA, such as the definition for the term "environment", which she says "*seems confined to the natural, physico-chemical, biological environment*".²³³

The Constitutional Court's rather bizarre acknowledgement in *Fuel Retailers* of the 2004 amendment, but its refusal to consider it, can only mean one of two things. Either the court saw no change in the obligation to consider socio-economic issues in the 2004 amendment. If this is the case it would be very strange indeed, given that the very notion under its consideration in that case had been removed from the very section of NEMA it relied upon in its *ratio*. Alternatively it chose to interpret the law as it stood prior to the 2004 amendment, and in so doing has left the new wording, and by implication the continued role of socio-economic issues in EIAs, still to be considered and interpreted by our courts. This is an equally bizarre notion. In declaring the role of socio-economic

²³⁰ Op cit n36 at 496.

²³¹ Op cit n134 at 264.

²³² Op cit n90 at 429.

²³³ At 430.

issues to be valid components of an EIA, the highest court of this country has set a precedent which it must have known at the time would have significant ramifications for developments and EIAs. It was therefore incumbent upon it to have at the very least considered whether the amended wording changed its views on the subject.

It is submitted that it is material that our legislature saw fit to amend section 24 again in 2008 after the *Fuel Retailers* decision, to reinforce not only the removal of socio-economic issues from the minimum requirements for EIAs, but also to ignore this aspect entirely in prescribing the criteria environmental authorities must take into account in considering EIA applications.²³⁴ In section 2.3.2 above a careful analysis of the current procedural requirements was made. It therefore seems clear that the intention of the legislature is to limit, (in the manner described in chapter 3 below), the role which socio-economic issues play in an EIA. It is further submitted that such an approach is correct as it aligns the EIA process with the section 24 environmental right contained in the Constitution.

Consequently when viewed in light of the current wording of section 24 of NEMA, the *Fuel Retailers* decision incorrectly holds that this section demonstrates that socio-economic impacts must be assessed in an EIA. This statement acknowledges that the detailed procedural requirements for an EIA in GNR385 has a requirement for a description on how, *inter alia*, socio-economic aspects may be affected by the activity. It was described in section 2.3.2 above that notwithstanding this, the requirement to assess impacts in the process is limited to environmental impacts. This is the correct role for socio-economic issues in EIAs – the focus is the assessment of impacts of an activity on the natural and the human health and wellbeing environments. However various other potential effects as results of the activity, including socio-economic factors, must be described. The purpose, as will

²³⁴ Section 24O. See section 2.3.2 above.

be highlighted in chapter 3 below, is so that where adverse environmental impacts are identified, these can be mitigated and balanced with any positive or negative socio-economic aspects described. Importantly the socio-economic issues could have been, (and it is submitted should have been), assessed outside of the EIA process, and merely described in the reports required for it.

Moreover it is submitted that even based on the wording of the law in place at the time the court in *Fuel Retailers* considered the matter, there was still no basis to conclude that EIAs are the correct forum for assessing socio-economic impacts. Firstly the ECA, as set out in section 2.3.2 above, which was the relevant law in place at the time, contained no reference to socio-economic issues. Its focus was clearly on the environment. Secondly the wording of section 24(7) did not stipulate that the environmental authority must assess socio-economic issues. Rather it stated that they must be assessed and the outcome reported to the environmental authority. Consequently socio-economic issues could have been assessed outside of the EIA process, provided the environmental authority took the outcome into account in the EIA decision. This it is submitted accords with section 24(b) of the Constitution. Unfortunately the Constitutional Court failed to recognise this.

Moreover the minimum procedure for assessments in section 247(b) prior to 2004 applied not just to the EIA process, but also to any process that required permission by law.²³⁵

Consequently *Fuel Retailers* incorrectly concluded that because of the wording of section 24, environmental authorities in EIAs were required to assess the socio-economic impacts of activities in their decision-making.²³⁶

²³⁵ See section 2.3.2 above for a detailed discussion of section 24(7)(b) and section 24(3).

²³⁶ Paragraph [77].

2.3.4.3

Incorrect application of the environmental management principles in NEMA

Two key errors were made by the Constitutional Court in applying the principles.

Firstly it assumed that only the environmental authorities were required to apply the NEMA principles to their decision-making. However as both Kidd²³⁷ and Murambo²³⁸ point out, the principles apply to any and every organ of state whose actions may significantly affect the environment.²³⁹ A local authority considering a rezoning application is clearly an instance where a decision could have a significant impact on the environment. Consequently that authority is as obliged as an environmental authority in an EIA to apply the NEMA principles. Consequently the court was wrong where it said that "*the local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA*".²⁴⁰

Secondly, and Kidd suggests, probably the "biggest flaw" of the judgment, is that the court in ignoring section 2(1) of NEMA²⁴¹ failed to draw the conclusion "*... that there is, in reality, little or no difference between the obligation resting on the local authority (required to make a town planning decision) and the environmental authority (required to make an environmental authorisation)*".²⁴²

²³⁷ Op cit n20 at 96.

²³⁸ Op cit n36 at 500.

²³⁹ Section 2.3.2 above discussed the wording of section 2 of NEMA in detail.

²⁴⁰ Paragraph [85].

²⁴¹ That the principles apply to the actions of all organs of state.

²⁴² Op cit n20 at 95 and 96.

The consequence of this failure once again resulted in the court incorrectly concluding that it is the environmental authority in an EIA that is required to assess socio-economic impacts.²⁴³

2.3.4.4 **An incorrect understanding of IEM**

The court in *Fuel Retailers* held that the integrated environmental management ("IEM") requirement in section 23 of NEMA is furthered in the EIA procedure of section 24.²⁴⁴ Section 23 states that its purpose is to promote the application of appropriate environmental management tools in order to ensure the IEM of activities. As was explained in section 2.2.4 above, one of the objectives of IEM in section 23 is the identification, prediction and evaluation of socio-economic conditions.

However Retief and Kotze criticised the court for treating IEM as being synonymous with EIA.²⁴⁵ They point out that IEM was developed due to the realisation that no single governance mechanism can deliver sustainability, and as a result the need arose for a "toolbox or hybrid approach".²⁴⁶ IEM provides for an integrated environmental governance approach and methodology during decision-making. The elements which should be integrated during the decision-making include: various governance tools, (such as EIA), different spheres of government, and different line functionaries. Put another way its purpose is to pool government and information resources in order to understand and reach informed decisions on all aspects of the environment in order to achieve, (or at least attempt to achieve) sustainable development.

²⁴³ Field op cit n44 at 433 where she states "... one could argue that section 2(4)(i) does not require that economic, social and environmental aspects be considered in the EIA process. Rather, the EIA process – by establishing impacts on the natural-physical environment – feeds into other processes that then consider the three E's in an integrated fashion". See also chapter 3 below.

²⁴⁴ Paragraph [69].

²⁴⁵ Op cit n11 at 143.

²⁴⁶ Ibid.

Environmental authorities and the EIA process do not have the capacity to cover all aspects of sustainable development.

On this basis Retief and Kotze conclude that IEM is not EIA.

However instead of adopting this approach in *Fuel Retailers*, the court seems to have preferred an "add on" focus where they simply add to the environmental authority's existing burden for assessing issues in EIAs. *"In short the obligation on EIA and environmental authorities as formulated in the judgment goes beyond what EIA is designed realistically to deliver"*.²⁴⁷

As has been pointed out above the legislature's design and refinement of the EIA process clearly precludes the prospects of sustainable development being achieved through this mechanism alone. The following two criticisms amplify this concern.

2.3.4.5 **The failure to apply cooperative governance**

Cooperative governance is a constitutional imperative.²⁴⁸ All spheres of government must conduct their activities within the principles of cooperative governance set out in chapter 3.²⁴⁹ The principles include the requirement to exercise powers and perform functions in a manner that does not encroach on the functional or institutional integrity of government in another sphere.²⁵⁰ Organs of state must also cooperate with one another *inter alia* to coordinate their actions and legislation with one another.²⁵¹

²⁴⁷ At 145.

²⁴⁸ Chapter 3 of the Constitution.

²⁴⁹ Section 40(2).

²⁵⁰ Section 41(1)(g).

²⁵¹ Section 41(1)(h).

NEMA contains an entire chapter on 'Procedures for Cooperative Governance'.²⁵² Its primary mechanism for achieving this end is through the requirement for every listed national department²⁵³ and every province, to prepare and maintain environmental implementation plans ("EIP").²⁵⁴ A second requirement is for listed national departments²⁵⁵ to prepare environmental management plans ("EMP").²⁵⁶

NEMA states that the purpose and objects of EIPs and EMPs is *inter alia* to:

- minimise the duplication of procedures and functions that may affect the environment;
- give effect to the principle of cooperative governance in chapter 3 of the Constitution; and
- enable the Minister to monitor the achievement, promotion and protection of sustainable development.²⁵⁷

Consequently both NEMA and the Constitution envisage the integration, coordination and streamlining of functions between organs of state to achieve sustainable development. Both provide tools to achieve this. Yet notwithstanding this, the Constitutional Court ignored these tools and mechanisms, and saw fit rather to burden environmental authorities in EIAs with a role they were never designed nor legally required to fulfil.

²⁵² Chapter 3.

²⁵³ For example the Department of Water and Environmental Affairs, Department of Land Affairs, Department of Agriculture, Department of Housing, the Department of Trade and Industry and the Department of Transport.

²⁵⁴ Section 11(1).

²⁵⁵ See for example Department of Water and Environmental Affairs, Department of Mining, Department of Energy and Department of Health.

²⁵⁶ Section 11(2).

²⁵⁷ Section 12.

One of the consequences, although this too was missed by the Constitutional Court, is that there is now a duplication of sustainable development assessments given that all organs of state must, when taking decisions that may significantly affect the environment, apply the NEMA principles and general objectives of IEM. This situation is precisely the one which chapter 3 of the Constitution enjoins organs of state to avoid.

Du Plessis and Britz highlight the implications in a practical example.²⁵⁸ They point out that filling stations are regulated by at least two different government departments, namely the Department of Water and Environmental Affairs under section 24 of NEMA and the Department of Energy under the Petroleum Products Act.²⁵⁹ In terms of the Constitutional Court's interpretation in the *Fuel Retailers* case, both DWEA as well as the Department of Energy would be required to conduct an assessment of the environmental and socio-economic impacts of the proposed development of a filling station as part of their decision on licence applications under the respective Acts. Du Plessis and Britz argue that this could not have been the intention of the legislature, nor that the environmental authority alone is required to consider the socio-economic aspects of the project firstly given the principle of cooperative governance and secondly because the Department of Energy has a mandate to regulate the fuel retail market in terms of Regulations under the Petroleum Products Amendment Act.²⁶⁰ In terms of this Act the Department of Energy considers the economic and competition aspects of filling stations in the issuing of petroleum products site and retail licences, as well as petroleum products wholesale licences. They argue that where there is an overlap "*the two government*

²⁵⁸ Op cit n183 at 265 and 266.

²⁵⁹ Act 120 of 1977.

²⁶⁰ Act 58 of 2003.

departments should cooperate on the basis of cooperative governance as set out in the Constitution and NEMA".²⁶¹

It is submitted that there was a failure by the Constitutional Court to apply cooperative governance firstly at the level of correctly identifying which authority is to consider the elements of environment, social and economic factors in a development application, and secondly at the level of determining through the interaction of all organs of state which have a role to play in a particular development application, whether the objects of IEM and sustainable development will be achieved.

2.3.4.6

One dimensional perspective of the requirement to integrate the elements of sustainable development

This point follows from the previous two. A number of commentators have criticised the Constitutional Court's one dimensional understanding of the central element of sustainable development, namely the integration of social, economic and environmental considerations into decision-making.²⁶²

It has already been discussed in this study that the Constitutional Court incorrectly interpreted both the wording of the EIA requirements under NEMA prior to and post the 2004 amendments, and that under neither scenario was it a requirement for the environmental authorities to assess the impacts of all three elements of sustainable development. Section 24 of the Constitution, the NEMA environmental management principles, IEM under section 23 of NEMA, as well as the principles of cooperative governance set out under both the Constitution and NEMA, clearly describe, (and more specifically prescribe) a framework for integrating the assessment of social, economic and

²⁶¹ Ibid.

²⁶² See Du Plessis and Britz op cit n183; Feris op cit n5; Murambo op cit n36; Field op cit n90; and Van Reenen op cit n60.

environmental impacts in decision-making at a higher level than the EIA process. As such the EIA is but one mechanism for measuring sustainability, and its outcomes must be fed into a broader and cooperative decision-making process, that will determine the sustainability, and therefore the ultimate outcome of a development proposal.

It is conceded that at present neither our legislation nor the administration of our law has established an appropriate body or procedure to ensure that there is fulfilment of the aforementioned regulatory framework. However this is not as a result of the law being defective, but more a result of the failure on the part of government to properly understand or apply the principles.

This paper has nevertheless highlighted in section 2.2.2 above that the term and concept of sustainable development has not been confined to NEMA alone. It was highlighted that legislation such as the Local Government: Municipal Demarcation Act, Local Government: Municipal Structures Act, Local Government: Municipal Systems Act and the Development Facilitation Act, all contain direct references to the concept of sustainable development, or at the very least contain provisions which require the integration of social, economic and environmental issues into development planning processes and decisions. Aside therefore from the fact that our legislation creates a framework for integrating and balancing development decisions at a higher level, perhaps more importantly the inclusion of sustainable development in planning legislation give further credence to the proposition that section 24 of the Constitution and regulated environmental impact assessment procedures, are not the sole, and arguably even the correct, bank for assessing the impacts of all three elements of social, economic and environment.

The Constitutional Court's failure to recognise the multi dimensional legal framework for integration, renders its decision materially defective.

2.4 International comparative

Although the criticisms of the *Fuel Retailers* approach to considering socio-economic issues in EIAs is based on South African constitutional and statutory provisions, it is instructive to conduct a brief comparative of the manner in which this principle is applied in foreign jurisdictions, both to reflect on the fairness of the criticisms which have been levelled, but also to focus on a way forward to address the unfortunate circumstances which the South African EIA process now finds itself in.

2.4.1 United States

A brief discussion of the history of EIA law in the United States is set out in section 2.1.1 above.

At a federal level the National Environmental Policy Act of 1969 ("NEPA") defines the word "environment" to include social and economic impacts, as well as physical environmental impacts.²⁶³ As a result the types of environmental impacts covered by NEPA are broad and include socio-economic and market effects.²⁶⁴

However at a state level Wood points out that the extent of coverage of issues under the federal EIA system has seldom been followed. The California Environmental Quality Act ("CEQA") for instance, for which EIAs are required for "projects", defines this term as "*the whole of an action which has the potential for resulting in a physical change to the environment, directly or ultimately...*".²⁶⁵ Economic and social effects should only be analysed where they are related to a physical change in the environment under CEQA.²⁶⁶ "*In practice, the evaluation of social or economic effects is generally treated as*

²⁶³ Wood op cit n12 at 87.

²⁶⁴ At 90.

²⁶⁵ At 91.

²⁶⁶ At 93.

optional, but tends to be less comprehensive than in EIAs prepared under NEPA".²⁶⁷

The California Environmental Quality Act Statute and Guidelines published in 2009,²⁶⁸ provides an important practical demonstration for the role which socio-economic issues should play in an EIA:

"(c) economic or social effects may be used to determine the significance of physical changes caused by the project. For example, if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant... Where an EIR uses economic or social effects to determine that a physical change is significant, the EIR shall explain the reasons for determining that the effect is significant".²⁶⁹

Consequently CEQA limits the role of socio-economic effects to where they have an environmental impact.

2.4.2 European Union

Europe has issued two directives, the one which describes the procedure for EIAs,²⁷⁰ and the second which describes a procedure for strategic environmental assessment ("SEA").²⁷¹

²⁶⁷ Ibid.

²⁶⁸ 2009 California Environmental Quality Act Statute and Guidelines, AEP at www.califaep.org accessed on 12 October 2009.

²⁶⁹ Guidelines, Article 9: Contents of Environmental Impact Reports at clause 15131.

²⁷⁰ European Union EIA Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC.

²⁷¹ European Union Directive of Strategic Environmental Assessment, 2001/42/EC.

With respect to the EIA directive, there is no requirement to consider social and economic impacts.²⁷² Wood points out that "*it was the neglect of the physical environment in decision-making which was the original stimulus for EIA in the United States, and this was the reason why the European Directive on EIA was narrowly focused; it was felt the balance needed to be addressed*".²⁷³

In a 2009 European Union study on the application and effectiveness of the EIA directive,²⁷⁴ it was determined that the SEA directive "*applies 'upstream' to certain public plans and programmes, while the EIA directive applies 'downstream' to certain public and private projects. **The two directives address different subjects and are distinct in nature. The following main differences have been identified: The objectives of the SEA are expressed in terms of sustainable development, whereas the aims of EIA are purely environmental...***" (emphasis added).

2.4.3 Canada

Canadian EIAs are regulated under the Canadian Environmental Assessment Act of 1992.²⁷⁵ Canadian law adopts a very restrictive view of the role of socio-economic issues in EIAs. Only those socio-economic and cultural effects that "*flow directly from the environmental effects of the project*" must be considered, and in general the requirement to link effects on socio-economic conditions directly with the project are treated very restrictively.²⁷⁶

²⁷² Wood op cit n12 at 88.

²⁷³ At 89.

²⁷⁴ Commission of the European Communities, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: On the Application and Effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC), Brussels 23.7.2009, COM (2009) 378 Final accessed at <http://eur-lex.europa.eu> accessed on 13 October 2009.

²⁷⁵ Canadian Environmental Assessment Act 1992, c.37.

²⁷⁶ Wood op cit n12 at 96.

The Canadian Environmental Assessment Agency's Sustainable Development Strategy of 2009 reflects that project level environmental assessment is limited to considering environmental issues and associated socio-economic impacts, to once again show how narrowly these issues are considered in Canada, and the fact that they must be connected directly to the environmental effects of the project²⁷⁷.

The Sustainable Development Strategy makes a further compelling point in the context of this paper namely that:

*"Sustainable development is not a fixed state, achieved through a one-time effort by following a set and clear path. It is a dynamic equilibrium realised by [Canadians] making informed strategic choices over time..."*²⁷⁸

The clear and pragmatic distinction which Canadian law therefore makes, but which our Constitutional Court failed to realise, is that endeavouring to determine the sustainability of a development at a project level is all but impossible, given the philosophical nature of the term. For so long as our courts fail to adopt a more pragmatic approach, it is likely that EIAs will continue to suffer from the deficiencies which they have up to this point.

2.5 **Consequences for EIAs as a result of the incorrect application of socio-economic impacts**

There are a number of measurable adverse consequences as a result of the position adopted by the majority of our courts with respect to the requirement to assess the impacts of socio-economic conditions in EIAs. It is not suggested that the list that follows is finite:

²⁷⁷ Canadian Environmental Assessment Agency, Sustainable Development Strategy 2007 – 2009 at 4, found at <http://www.ceaa-acee.gc.ca> accessed on 13 October 2009.

²⁷⁸ At 7.

2.5.1 Duplication of assessment processes

Notwithstanding that the Constitutional Court appears to have missed one of the implications that arose as a result of its interpretation of the requirements of section 24 of the Constitution, section 23 of NEMA, and the section 2 environmental management principles, a direct consequence is that every organ of state whose decision may have a significant effect on the environment, is required to investigate and assess the social, economic and environmental impacts of activities, on their own accord.

The duplication this creates for a project proponent is unreasonable.²⁷⁹ Whilst having to duplicate processes for even two separate licences should be unnecessary, to illustrate the point, and example of developing a new industrial site is useful to show how many licences and therefore the number of duplicated processes that are required. Aside from the NEMA section 24 environmental authorisation, a land use change application under the Development Facilitation Act²⁸⁰ may be required, as may planning consent from the local authority. In addition an emissions licence under the National Environmental Management: Air Quality Act,²⁸¹ a water use licence under the National Water Act,²⁸² and a waste management licence may be required under the National Environmental Management: Waste Act.²⁸³ There may also be effluent permits and storage of flammable substance certificates required at a local level.

The implication of the *Fuel Retailers* decision is that each and every one of the aforementioned licence processes must include an assessment by the relevant authority of the social, economic and environmental impacts of the proposed development. The inefficiency

²⁷⁹ Kidd op cit n20 at 97.

²⁸⁰ Act 67 of 1995.

²⁸¹ Act 39 of 2004.

²⁸² Act 36 of 1998.

²⁸³ Act 59 of 2008.

of such a scenario, (which has become reality since the *Fuel Retailers* decision), is palpable.

2.5.2 Inequity for "listed activities"

The Constitutional Court held that an assessment of a new filling station must include a consideration of its impacts on the viability of existing ones.²⁸⁴ Put another way, the court endorsed the notion that competitor interests have *locus standi* in an EIA.²⁸⁵

Aside from the questionable legal correctness of this conclusion,²⁸⁶ the unfair business practice this introduces makes the concern even more material. In short if a business is a listed activity under section 24 of NEMA, (and it needs to be kept in mind that this section lists activities that are deemed to have a potential impact on the natural environment; not because they are overtraded), that businesses' competitors are entitled to use the EIA process to attempt to block permission being granted. However if a business is not a listed activity, then its competitors do not have an avenue to attack it; or perhaps more accurately they would have to seek assistance in more appropriate fora, (than an EIA), such as planning applications or the Competition Commission.²⁸⁷

Notwithstanding the court's insistence that it was not saying that considering socio-economic issues in an EIA is a vehicle to stamp out competition,²⁸⁸ as Sachs J pointed out in his minority judgment, that in the circumstances of the case, this is exactly what happened.²⁸⁹

²⁸⁴ Paragraph [78].

²⁸⁵ Sachs J in his dissenting judgment at paragraph [115] concludes that "*what the applicant's argument ultimately boiled down to was that the risk of overtrading was real and this was an economic factor that should have been taken into account when the question of sustainable development was being considered*".

²⁸⁶ Ibid.

²⁸⁷ Feris op cit n5 at 249.

²⁸⁸ Paragraph [78].

²⁸⁹ Paragraph [115].

2.5.3 Poor enforcement

Government departments which administer section 24 of NEMA are neither geared nor capacitated to assess socio-economic impacts in EIAs. Where these departments do not have social or economic skills or access to them, how do they scope the requirements for considering socio-economic impacts in an EIA, and furthermore once the information of this nature is received, how can they be expected to interpret and analyse it when all their training is limited to the biophysical environment?

The result as the recent study commissioned by the national environmental department showed, is that lip service is paid to socio-economic issues in EIAs, and the notion of determining when a particular project will constitute sustainable development is ignored altogether.²⁹⁰

The Canadian perspective described in section 2.4 above further illustrates why environmental authorities don't know how to address socio-economic and sustainable development issues in EIAs:

"Sustainable development is not a fixed state, achieved through a one-time effort by following a set or clear path".

In addition the wording of the regulated EIA process is very heavily slanted in favour of assessing environmental impacts, with very little guidance given as to what the socio-economic impact study should look like, and how it should be assessed.²⁹¹

²⁹⁰ Op cit n191 at 92.

²⁹¹ See section 2.3.2 above.

2.5.4 **Balancing value choices and environmental losses**

It was described in section 2.1 above that the EIA process was historically developed in order to fetter unrestrained development that was causing unsustainable environmental loss. The manner in which the *Fuel Retailers* case interpreted the contemporary EIA procedure to apply, (with socio-economic issues playing a central role), arguably takes us a full circle and back to the starting point in terms of environmental loss associated with development. In fact it probably leaves the process worse off, because there is now legal justification for why environmental degradation can be pursued in the name of "sustainable" development.

It would be an over-generalisation to state that all developments with adverse environmental impacts but positive socio-economic impacts are approved in an EIA process. However as has been described earlier in this paper,²⁹² requiring firstly the assessment and then the balancing of social, economic and environmental impacts in an EIA, leaves the environmental authority with a value choice in terms of its decision-making.²⁹³ No longer is its decision based solely on whether the environmental impacts of a proposed development are acceptable, as this finding may be overtaken by the consideration of whether there are important societal benefits associated with the project.

In an emerging economy such as South Africa's, where rapid development is seen as a poverty alleviation mechanism, (which in turn is politically expedient), then where there are conflicts within an EIA the balancing of the three pillars of sustainable development will often see social needs outweighing environmental ones.²⁹⁴ This risk is particularly acute where environmental authorities neither understand socio-economic issues adequately, nor do they know how to scope or balance them.

²⁹² At section 2.2 above.

²⁹³ Feris op cit n5 at 248.

²⁹⁴ Feris at 252 and Van Reenen op cit n60 at 170/171.

Where this occurs the EIA process will have come the full circle where development will outweigh environmental sustainability; only this time such environmental loss is legitimised in the name of sustainable development. The irony is that in reality while the loss to the natural environment at a project level may not be deemed to be unsustainable, the cumulative loss of many developments may result in such unsustainability, which will in turn ultimately lead to social and economic instability.

For this reason alone the suggestion that environmental authorities at a project level, and in isolation, are in a position to understand the social, economic and environmental sustainability of development, is delusional.

As Feris explains, the *Fuel Retailers* and *BP* cases are an *"...inadequate and ultimately unsatisfying application of sustainable development. Whilst both decisions were at first glance 'good for the environment', they were really motivated by socio-economic considerations, and as such applying economic centered variations of integration when the Constitution and NEMA really required environment centered variations. If the latter were applied, different outcomes would have followed in both cases"*.²⁹⁵

2.5.5 **Environmental sustainability is not attained**

This consequence is a factor of the two consequences described immediately above. Where section 24 of the Constitution provides a right to an environment that is not harmful to health or wellbeing which is to be ensured and measured at the level of ecologically sustainable development, then through the *Fuel Retailers* case shifting the focus of project level EIAs to the broader notion of sustainable development, it has become difficult to determine whether the current rate of use and destruction of ecological resources is sustainable.

²⁹⁵ Feris op cit n5 at 253.

3. **Chapter 3: Correct role of socio-economic issues in EIAs?**

Although this study criticises the interpretation by our Constitutional and other courts of the role of socio-economic issues in EIAs, it does not suggest that such factors have no role to play in the process. However this role must be defined by the correct and reasonable understanding of the prevailing regulatory framework. On this basis it is submitted that what follows reflects the correct and lawful position. It is based on the following provisions as they have been defined and interpreted in this study:

- Section 24 of the Constitution, and its central tenet of "ecologically sustainable development", when read together with the socio-economic rights contained in the balance of the Bill of Rights.
- Chapter 3 of the Constitution which requires cooperative governance.
- Section 24 of NEMA and GNR385 as they are currently worded, and which set out the EIA procedure.
- Section 23 of NEMA based on a proper understanding of the meaning and scope of IEM.
- Section 2 of the environmental management principles in NEMA, based on the understanding that they apply to the decisions of all organs of state, and not just to those of environmental authorities.
- The fact that other sectoral legislation such as the Development Facilitation Act and the Local Government: Municipal Systems Act, also address sustainable development and in particular socio-economic rights.
- On the basis that NEMA has through the requirement for EIPs and EMPs to be prepared by organs of state, created a mechanism to integrate social, economic and environmental

conditions at an inter department level in decision-making and post or as part of the EIA process.

The function of an EIA is to assess the environmental impacts of a proposed listed activity in order to determine whether they are acceptable.²⁹⁶ During the process the potential impacts on the natural environment must be identified, investigated and assessed to determine their significance and potential consequences for the ecology and human health and wellbeing.²⁹⁷ Also during the process the environment that may be affected by the activity must be described, (but not assessed). This description must *inter alia* include reference to the way in which the social and economic aspects of the environment may be affected.²⁹⁸ It is submitted that Sachs J in the minority judgement in *Fuel Retailers*, is correct that this description is limited to those socio-economic impacts that arise as a direct consequence of the environmental impacts,²⁹⁹ (in order to ring fence the scope of the description to the project level).

Once all the information has been submitted to the environmental authority, it must determine whether any adverse environmental impacts have been identified. In the event that there are no such adverse impacts, then, from an EIA perspective at least, this is the end of the enquiry, and an environmental authorisation must be issued under section 24 of NEMA. Conversely if adverse environmental impacts are identified, as will often be the case, the environmental authority must then determine whether they are acceptable. This will be informed firstly by any mitigation measures available to reduce the identified environmental impacts.³⁰⁰ They must secondly be informed of any socio-economic conditions (adverse or positive), which were described during

²⁹⁶ Section 24 of the Constitution is wide enough to accept that some harm to the environment may occur, provided that this does not pose a risk to human health or wellbeing. Consequently the test for the environmental acceptability of listed activities under NEMA, is whether the impacts are acceptable.

²⁹⁷ Section 24(4) and section 24O read with *inter alia* section 2(4)(a), section 2(4)(p) and section 2(4)(q) of NEMA; and Regulations 23(2)(h) and (i), 32(j) and (n) of GNR385.

²⁹⁸ Regulation 23(2)(d) and 29(1)(d), GNR385.

²⁹⁹ Paragraph [116].

³⁰⁰ See Regulation 23(2)(i) for example in the basic assessment report EIA process.

the EIA process. This two stage test allows the environmental authority to then integrate and balance its decision using sustainable development principles.³⁰¹ If the environmental impacts can be mitigated, and in the event that only positive socio-economic conditions accrue as a result of the environmental impacts, (eg. a small greenfields development on previously disturbed land, with limited natural resource requirements, and resulting in employment and community benefits), then an environmental authorisation should correctly be issued.

It is a further requirement that the environmental authority inform all other interested organs of state of the outcome of the environmental assessment to enable these decision-makers to inform their own processes.³⁰²

There is support for this notion that the EIA function should remain focused on the environment, (but suitably informed by socio-economic considerations arising from environmental impacts of the project), and that other organs of state, more suitably qualified to do so, should consider the socio-economic impacts of the development project.³⁰³

It is submitted that besides the above more accurately reflecting the Constitution and the EIA regulatory framework than that offered in *Fuel Retailers*, it will also, as was described in 2.4, bring our EIA procedure in line with contemporary EIA practice and thinking in foreign jurisdictions with respect to the role of socio-economic issues in EIAs.

³⁰¹ Section 24(b), Constitution; section 2(4)(i), NEMA.

³⁰² Chapter 3, Constitution; section 2(4)(l), NEMA.

³⁰³ Field op cit n5 at 434 where she states: "*Given the narrow focus on environmental considerations in the amended provisions [of NEMA] and the fact that while the social, economic and environmental impacts of activities must be considered, this does not necessarily have to take place in the EIA process*". See also Kidd op cit n20 at 98 – 100, although he suggests this as a solution in order to avoid duplication rather than because the current regulatory environment does not support it. Also see Du Plessis and Britz op cit n183 at 265/266.

4. **Chapter 4: Recommendations to address the flawed precedent and practice**

This study has argued that the present regulatory framework for EIAs has not correctly described the role of socio-economic issues in the EIA process. Rather it is the incorrect interpretation by our Constitutional and other courts which has resulted in the deficiencies which have been described above. Consequently the first and obvious solution to the dilemma which the EIA process now finds itself in, is for the courts, and in particular the Constitutional Court to be offered a further opportunity to clarify, and hopefully to revise the judgment in *Fuel Retailers*, in order to align its interpretation with the regulatory framework. Hopefully an opportunity for it to do so will occur in the near future. In the interim EIA proponents and the environmental authorities required to issue decisions, are left in the predicament which the legacy of the *Fuel Retailers* decision has established. At best it will be necessary to endeavour to distinguish a particular EIA from the facts and findings of the Constitutional Court's decision. However it will be particularly difficult to escape the court's requirement for socio-economic impacts associated with development activities, to be assessed in each and every EIA.

For so long as this situation exists, it is submitted that the EIA process is impaired, weakened and unsustainable. The consequential implications are that the natural environment and associated human health and wellbeing, are, perhaps, imperceptibly at first, but no doubt more visibly in the future being compromised through a flawed EIA process that relies unduly on balancing socio-economic issues with environmental impacts, to justify development. It is acknowledged that this is a general statement, and as has been highlighted in this study,³⁰⁴ there are, albeit through ignorance, a number of environmental authorities that choose to ignore the requirement to consider the sustainable development of the project.

However rectifying the *Fuel Retailers* decision will not solve the problem. What remains outstanding is a mechanism, statutory or otherwise, which will allow for true integration of sustainable development issues into development

³⁰⁴ In section 2.3.2 above.

decisions at an appropriate level. It has been shown that the EIA level is the incorrect one at which to decide on what is a continuously moving target. What then is the correct level and mechanism?

What follows is a brief consideration of possible short and medium term solutions to this dilemma. It is not intended to be a detailed analysis of each recommendation, as that generally is a separate dissertation topic of its own. Rather the discussion is offered at a level that demonstrates the viability of each solution offered.

4.1 **Cooperative governance**

One of the central failings of the *Fuel Retailers* decision was the fact that the Constitutional Court seemingly ignored the constitutional imperative of cooperative governance altogether in its decision.³⁰⁵ Several commentators have considered cooperative governance, or the lack thereof, in an environmental management context, and whilst all agree that it is a useful tool, if not an imperative, similarly all agree that it has thus far failed at an operational level.³⁰⁶

The general consensus as to why cooperative governance has failed thus far, particularly with respect to environmental cooperative governance, may be summarised in the statement that South Africa has a fragmented, disjointed and uncoordinated regulatory framework that emanates from

³⁰⁵ See section 2.3.4.5. See also Elmine Bray, *Unco-operative Governance Fuelling Unsustainable Development* (2008) 15 *SAJELP* 3 at 8 where she states that the "defective ROD" in the *Fuel Retailers* matter was due "to the breakdown in proper cooperative governance and intergovernmental relations during the EIA process".

³⁰⁶ Louis Kotze, Johan G Nel, Willemien Du Plessis and Esme Snyman, *Strategies to Integrate Environmental Policy at the Operational Level: Towards an Integrated Framework for Environmental Authorities*, (2007) 14 *SAJELP* at 57; Willemien Du Plessis, *Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures*, (2008) *SA Public Law* Volume 23 at 97; Elmiem Bray op cit n280; Kidd op cit n20 at 98; and Johan Nel and Willemien Du Plessis, *Unpacking Integrated Environmental Management – A Step Closer to Effective Cooperative Governance?* (2004) 19 *SAPR/PL* 181.

sectoral policy processes, and which has paid little thought to sustainability and an integrated environmental governance legal framework, and this has in turn resulted in and exacerbated the fragmented environmental governance effort.³⁰⁷ However all commentators considered in this paper offer strong views as to why cooperative governance remains a viable and important tool to ensuring not only environmental cooperative governance, but also for achieving sustainable development. There are a number of existing tools or opportunities which could be utilised and enhanced in order to firstly achieve and thereafter improve cooperative governance, towards the desired end state of properly implementing sustainable development. These measures include:

- The EIPs and EMPs prescribed for various organs of state in chapter 3 of NEMA, given that their stated function is *inter alia* to ensure cooperative governance.³⁰⁸
- The Intergovernmental Relations Framework Act³⁰⁹ has as its objective the facilitation for the coordination in the implementation of policy and legislation.³¹⁰ It furthermore requires that there must be coordination of actions when implementing policy or legislation affecting the material interests of other spheres of government.³¹¹
- Institutions such as the National Council of Provinces; the Intergovernmental Forum; the Ministerial Forums (MINMECS), and the Premier Forum, have all been described as viable structures within which to formulate cooperative governance policy and strategy, and to ensure that it is implemented at an operational level.³¹²

³⁰⁷ Kotze et al op cit n281 at 59/60.

³⁰⁸ Bray op cit n280 at 15.

³⁰⁹ Act 13 of 2005.

³¹⁰ Section 3.

³¹¹ Section 4.

³¹² Du Plessis op cit n281 at 94/95; Bray op cit n280 at 13.

- There are also the provisions in section 2 and 23 of NEMA, and chapter 3 of the Constitution, which have been described earlier in this paper, which can be used as a basis for developing and implementing cooperative governance strategies.
- At an EIA level the driver for applying cooperative governance is written into the procedure itself. Section 24(4)(a)(i) stipulates that the process must ensure "*coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state*".

However notwithstanding the tools described above, "*virtually no arrangements have been made to align and integrate governance processes at the operational level*".³¹³

Consequently given that it is generally accepted that cooperative governance is needed to properly implement sustainable development, the starting point must clearly be to implement strategies, and if necessary legislation, in order to achieve cooperative governance at the appropriate levels of decision-making. It is submitted that this needs to be undertaken at two levels. Firstly at the permitting level, (ie. the EIA process and other permitting processes), and secondly at a policy and strategy setting level. Given that the former will probably be informed by the latter, appropriate mechanisms at a national and provincial strategic level are needed to set sustainable development principles and benchmarks to assist project level decisions. For example integrated planning and environmental principles at a strategic national level in terms of which developable and sensitive areas are identified, and policy decisions are taken on how government's macro economic plans fit in to the limitations that have been identified. Using these macro cooperative governance tools, authorities at a project level processes can then implement them into licensing and other decision-making processes in order to determine whether specific projects should be authorised or not. However the project level also requires a coordinated approach to decision-making, to ensure that relevant authorities in specific areas, (eg. environment, planning, minerals, trade

³¹³ Kotze et al op cit n281 at 81.

and industry, etc.) feed the outcomes of their specific licensing processes into a centralised decision-making body, which can then determine the ultimate approval as to whether a proposed project firstly accords with national, provincial and local development strategies and environmental standards, and secondly can determine whether the project itself will result in sustainable development.

A similar process towards achieving what they describe as "cooperative environmental governance" is offered by Kotze et al.³¹⁴ The first stage involves what they term "optimisation of administration, procedural and service delivery efficiencies, and alignment of certain procedural and administrative functions". Stage 2 is a further refinement of stage 1 "*with improvement in interagency cooperation through the governance cycle*". Stage 3 involves structural and legal reform to address inefficiencies and gaps in the provisions made for environmental governance. Such law reform should address integrated decision-making and authorisations. The final stage is what they term "full integration" with a single agency in a single Act dealing with environmental authorisations pertaining to all matters environmental across all media, sectors and project cycle divides.

It is suggested that a similar process may be useful to achieve cooperative governance in sustainable development, where "cooperative environmental governance" will merely form one component of the broader integration process.

A level of cooperative governance, at least with respect with respect to environmental licensing, has been incorporated into NEMA through the 2009 amendments.³¹⁵ Section 24L under the heading "Alignment of Environmental Authorisations" *inter alia* provides for "an integrated environmental authorisation".³¹⁶ In effect it allows for single application processes for multiple environmental licence requirements, as well as for the issuing of a single integrated environmental authorisation, once again

³¹⁴ Kotze op cit at 78 – 80.

³¹⁵ National Environmental Management Amendment Act 62 of 2008, effective from 1 May 2009.

³¹⁶ Section 24L(1)(b).

to cover multiple licence requirements. It will be important to monitor the progress of this very recent development, in order to determine whether it achieves the desired levels of integration and cooperation with respect to environmental licensing. If the outcomes are positive, this may feed into a broader integrated sustainable development process. The one obvious deficiency already evident, it is suggested, is that cooperative governance at a project licensing level may still run into difficulties with respect to dealing with broader issues such as socio-economic implications, when cooperative governance tools at a higher level of government have not yet been developed.

4.2 Integrated development plans

Chapter 5 of the Local Government: Municipal Systems Act³¹⁷ ("Systems Act") regulates integrated development planning ("IDP"). It firstly stipulates that a municipality must undertake developmentally-oriented planning.³¹⁸ It requires that such planning must be aligned with and compliment the development plans and strategies of other affected municipalities and organs of state in order to ensure that the principles of cooperative governance contained in chapter 3 of the Constitution are given effect to.³¹⁹ It then enjoins every municipality to adopt a single, inclusive and strategic plan for the development of the municipality.³²⁰ The IDP must also be used to ensure the progressive realisation of fundamental rights in the Constitution, including the environmental (section 24) and socio-economic (sections 25, 26 and 27) rights.³²¹

The core components of IDPs must *inter alia* reflect a spacial development framework which must include provision for basic guidelines

³¹⁷ Act 32 of 2000.

³¹⁸ Section 23(1).

³¹⁹ Section 24(1).

³²⁰ Section 25.

³²¹ Section 23(1)(c).

for land use management for the municipality, as well as the council's vision for the long term development of its jurisdiction.³²²

Developmentally focused strategic planning also takes place at a provincial level through provincial spacial development frameworks ("SDF").³²³

It is submitted that IDPs and SDFs provide ideal tools to align the elements of sustainable development, in order to achieve sustainability in decision-making. At present, the EIA process and the IDP/SDF frameworks, at best inform each other, but have no formal relationship, and consequently do not at an operational level achieve integration as envisaged by sustainable development.

Notwithstanding this, and given that these macro planning instruments exist both in law and in practice, they should be used as the "missing link" in sustainable development decision-making. The reason for this is that they adopt a strategic approach at a local or provincial level in terms of determining developmental needs from a social and economic context, but while doing so within the context of finite natural resources of their jurisdiction. Whilst certainly the IDPs are arguably lacking in terms of their level of environmental investigation and understanding this should not be a difficult hurdle to overcome. It is suggested that if the IDPs and SDFs could be enhanced to ensure that a macro assessment of the environmental resources within the jurisdiction, (and possibly even surrounding jurisdictions), is undertaken, then short, medium and long term planning scenarios to achieve desired socio-economic results, could then be set at a strategic planning level. These documents would then inform project level EIAs. This will allow the environmental authority to focus its attention on the environmental impacts associated with a particular development proposal. The IDP/SDF would nevertheless assist by, for example indicating that the project proponent's selected location

³²² Section 26(a) and (e).

³²³ See for example in the Western Cape the Spacial Development Framework Final Document, November 2008, Provincial Government of the Western Cape: Department of Environmental Affairs and Development Planning.

for the development falls within an area which has been identified for such land use, on the basis that development will improve the socio-economic needs of the surrounding community. This would allow the environmental authority to balance its environmental decision in the event that adverse environmental impacts are identified.

4.3 **Strategic environmental assessment**

Whilst the proposal to utilise IDPs and SDFs is desirable from the perspective that they may more holistically integrate all three basic elements of sustainable development, a macro and forward planning environmental instrument would also be useful to direct project level EIAs. It would in particular assist EIA in their consideration of cumulative impacts. The recognised means for achieving this is known as strategic environmental assessment ("SEA"), and has been described as "*one of the most significant developments to the global imperative of sustainable development*".³²⁴

SEA is a mechanism for integrating environmental goals and principles into plans, programmes and policies that shape a multitude of overlapping and subordinate initiatives.³²⁵ It is also able to address cumulative effects resulting from multiple development actions.

In simplistic terms SEA involves the assessment of human development on the environment at a macro level, either across a country, province, local authority area. The environmental attributes and weaknesses of the targeted area are identified, and a determination is made as to which areas are available for further development, and which areas need to be protected either through no development or limited development, in order to protect a defined minima required for ecological sustainability. It is also a mechanism for addressing and testing alternatives such as whether, where and what type of sectoral or regional development should be promoted given an understanding of the opportunities and constraints

³²⁴ Burns and Hattingh op cit n9 at 22.

³²⁵ At 23.

which the social, economic and ecological elements of the environment impose on development.³²⁶

SEA is recommended as a viable means for measuring sustainable development not only because of the inefficiencies of attempting to do so at project level EIAs, but also because NEMA appears to neither recognise nor prescribe a non negotiable "bottom line" for natural resources and ecosystems, which are needed to achieve ecologically sustainable development. On this basis project level EIAs are essentially "operating in the dark", in terms of determining whether specific applications will either individually or cumulatively push below the bottom line in terms of maintaining a viable natural environment. SEA should address this. It should also take into account socio-economic influences, when identifying developable and conservation areas.

4.4 **Formulating a sustainable development Act**

As legitimacy is critical in any solution selected, it needs to be principled, and such principles would be most effective where they are formulated in legal instruments. Consequently a dedicated Sustainable Development Act may be the most effective solution. This would both capacitate government and inform it as to how true integration and equity must be achieved in development.

Such an Act would need to describe the principles, standards and procedures for assessing social, economic and environmental impacts in development proposals at both a project, and preferably, at a cumulative level, (given the difficulties of determining the sustainability of a development and project level have been identified in this paper).

Establishing a Sustainable Development Act would no doubt be a mammoth task, but is certainly an opportunity to ensure that the philosophy that is sustainability has some prospect of practical measurement and implementation.

³²⁶ Ibid.

5. Chapter 5: Conclusion

Whilst the judiciary's considered and analytical views of EIA legislation is to be welcomed, it is unfortunate that due to the complexity of the concepts of "environment" and "sustainable development", as well as due to the fragmented legislative framework, we find our law in a position, now that the dust has settled, where the Constitutional Court has set the EIA process on a course which reflects an incorrect understanding of the law. Though noble in its intent, the role which the court has settled for socio-economic issues in EIAs, places a significant burden on the EIA process and environmental decision-makers, who are neither geared nor capacitated to properly assess SD issues. It has also left project proponents with the unenviable task of having to repeat sustainable development assessments in multiple licence application processes for the same development.

In chapter 1 of this thesis the problem was described. It was highlighted that SD has become an internationally and locally accepted principle for the integration of social, economic and environmental factors into planning, implementation and decision-making. However in interpreting and applying the principle our Constitutional and other courts have failed to correctly understand the meaning and limitations of the EIA process in South Africa. Chapter 2 set out to support this argument through analysing the concepts of EIA and SD. The analysis of the former demonstrated that at both an international and a South African level the EIA process has been confined and directed towards an analysis of the environmental impacts associated with proposed projects and development. The chapter thereafter analysed the manner in which socio-economic impacts have been considered in South African judicial decisions, and focused principally on the Constitutional Court's interpretation and application of SD in the EIA process. Arguments were put forward as to why the judicial interpretation is wrong based on an analysis of South African constitutional principles, enabling legislation and a comparative analysis of EIA legislation in foreign jurisdictions. Chapter 2 concluded that our courts have not gone far enough in their interpretation and understanding of the role of socio-economic issues in EIAs. It was submitted that had our courts done so, they would have realised that their noble intention to apply

the internationally accepted principle of SD needs to be taken to a higher level than the EIA process in order to achieve its objectives. The thesis concluded that this is what is required by section 24 of our Constitution. Chapter 2 thereafter described the consequences for South African law and for project proponents as a result of the incorrect application of the principle of SD. It concluded that our law and the EIA process has been weakened and less effective as a result.

Chapter 3 set out to describe the correct role of socio-economic issues in EIAs. The thesis emphasised that it does not reject the notion that socio-economic issues have a role to play in EIAs. However it concluded that the function of an EIA remains, at least in its currently legislated format, to assess the environmental impacts of a proposed listed activity in order to determine whether they are acceptable. Whilst the aim is to identify, investigate and assess the potential environmental impacts, it must at the same time describe, (as opposed to investigate and assess), the social and economic aspects of the environment that will be affected. Once the EIA process has been concluded, the authority is then left to determine whether any adverse environmental impacts have been identified. In the event that there are no adverse impacts, then insofar as the EIA enquiry is concerned, the process is concluded and an environmental authorisation must be issued. Conversely if adverse impacts are identified, the environmental authority must then determine whether they are acceptable. This will be informed firstly by determining whether any satisfactory mitigation measures are available to reduce the identified environmental impacts. Secondly acceptability must be informed by the socio-economic conditions which were described. This two stage test allows the environmental authority to integrate and balance its decision using sustainable development principles. If the environmental impacts can be mitigated, and in the event that positive socio-economic conditions will accrue as a result of the project, then an environmental authorisation should be issued.

Chapter 4 set out to describe appropriate measures which could address the flawed precedent and EIA process. It recommended improving cooperative governance between the various departments and spheres of government to ensure that a truly integrated and sustainable decision-making process is arrived at. Secondly it recommended using the integrated development

planning process under the Local Government: Municipal Systems Act and spatial development frameworks to align the elements of SD in order to achieve sustainability in decision-making. The object being to achieve a macro assessment of environmental and socio-economic factors at a strategic planning level. These plans would then assist in informing project level EIAs, and more importantly would allow the environmental authority to focus its attention on environmental impacts associated with particular development proposals, rather than endeavouring to assess macro and micro socio-economic issues, which it is poorly geared to undertake. Two further alternatives were recommended in chapter 4, firstly the strategic environmental assessment process, which allows for macro consideration of environmental assets of particular areas, and during which socio-economic factors could be considered. Once again this would assist in freeing up the project level EIA process to focus on its core objectives, namely the consideration of the environmental impacts of a particular development proposal. Secondly it was suggested that to overcome the deficiencies which now exist in our EIA legislation, consideration could be given to formulating a dedicated Sustainable Development Act, which would aim to formulate standards to properly integrate social, economic and environmental factors into decision-making.

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