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**The impact of retroactive authorisation of listed activities on  
sustainable development in South Africa**

**By**

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Masters of Law

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## **ABSTRACT**

This dissertation comprises of a two-fold analysis in an attempt to answer the main question: how does Section 24G of NEMA impact sustainable development in South Africa? This dissertation analyse current literature on sustainable development and delves into how sustainable development in South Africa is currently understood. The second analysis focusses on the operation of Section 24G in the current legislative framework, which is contextualised in the current Integrated Environmental Management system and specifically, Environmental Impact Assessments and Social Impact Assessments. Once these two questions have been answered, this dissertation then will proceed to answer how Section 24G of NEMA impacts on this understanding of sustainable development. By encouraging a unique view of sustainable development in South Africa, it is submitted that sustainable development should be used as a mechanism to uplift the poor in South Africa and a means to obtain a better environment for those who have been negatively impacted by Apartheid.

This study finds that Section 24G of NEMA has a cumulative negative effect on sustainable development in South Africa and is open to abuse by developers. The abuse referred to, detracts from the effectiveness of Section 24G and renders the section as a toothless paper tiger and mere rubber stamp. The recently promulgated 2017 Regulations as discussed below, will indicate that, while a positive step in the right direction, these regulations do not go to the heart of how development should occur in South Africa.

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## **LIST OF ACRONYMS & ABBREVIATIONS**

<b>CER</b>	Centre for Environmental Rights
<b>DEA</b>	Department of Environmental Affairs
<b>EIA</b>	Environmental Impact Assessment
<b>IEM</b>	Integrated Environmental Management (system)
<b>NEMA</b>	National Environmental Management Act of 3 of 1998, as amended
<b>SIA</b>	Social Impact Assessment

## **KEYWORDS**

Sustainable development; Ecological; Social ;Economic; Section 24G; IEM; EIA; SIA; Upliftment; Legacy



## **CHAPTER 1: INTRODUCTION**

### **1.1. INTRODUCTION**

Sustainable development is a concept which is easily thrown around as a catchphrase, yet can be difficult to pin down. This dissertation aims to provide a nuanced understanding of sustainable development and orientate the reader as to how sustainable development should be understood in South Africa. By establishing how sustainable development should be contextualised to South Africa's unique situation, it is necessary to observe what hinders sustainable development. In light of attempting to identify such a hindrance, this study will look at the retroactive authorisation of unlawful activities, as provided for in section 24G of the National Environmental Management Act.<sup>1</sup> If abused, the section can work contrary to the goal of an anticipatory form of an environmental system, by allowing for those who have contravened the law, to bring their illicit activity back into the realm of legality.

By analysing how section 24G operates and assessing relevant literature and case law, it will be possible to establish how this section detracts from or adds to sustainable development in South Africa.

### **1.2. AIMS AND OBJECTIVES**

This dissertation aimed to concisely describe a more nuanced and contextualised understanding of sustainable development in South Africa and how section 24G of NEMA impacts on this understanding.

In order to achieve this aim, the objectives of this dissertation were firstly to ascertain a contextualised meaning of sustainable development in South Africa in terms of current academic writing and, secondly, to establish how section 24G operates in the context of South Africa's legal system. The cumulative effect of

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<sup>1</sup> Act 3 of 1998. Hereafter referred to as "NEMA".

these two objectives thus provides the link between sustainable development and the impact of section 24G on sustainable development.

### **1.3. RESEARCH QUESTIONS**

#### *1.3.1. Primary Question*

How does retroactive authorisation of listed activities impact on sustainable development in South Africa?

#### *1.3.2. Secondary Questions:*

- a) What is the meaning of sustainable development in the South African legal context?
- b) What is the purpose of and, how does section 24G operate and how is it implemented?
- c) How does section 24G of NEMA impact on sustainable development in South Africa?

### **1.4. RESEARCH METHODOLOGY**

This study is based on a desk-top, qualitative evaluation of local legislation, court cases, governmental notices, scholarly literature, directives and regulations, all of which were consulted and critically analysed to reach a comprehensive conclusion on the nature and objectives of section 24G of NEMA and the understanding of sustainable development in South Africa.

### **1.5. PARAMETERS**

While there is substantial literature on the definition of sustainable development and its role in international and foreign law, for the purposes of this study, only a definition within the South African context will be defined. International sources shall be considered to understand the definition of sustainable development, but this study shall be narrowed into the South African understanding. No international instruments have been analysed for the purposes of this study.

## **1.6. LIMITATIONS**

This study has been curtailed with regards to the commentary on the Regulations of Environmental Impact Assessments issued in 2017. Due to an insufficient time lapse between the completion of this study and time for implementation and examples of use of the Regulations, the true effect of these Regulations remains to be seen.

Extensive research has been undertaken to ascertain the implementation of these Regulations through desktop-based research, giving particular consideration to obtain provincial department publications and / or supporting information found on governmental websites pertaining to the implementation of the Regulations.

Further issues on obtaining incidences of poorer communities being directly affected by unlawful developments proved difficult to find due to the fact of non-disclosure agreements being signed and limiting the information available in the public discourse.

## **1.7. RELEVANCE OF THE STUDY**

Apartheid's legacy can still be seen today with a substantial number of the population still being excluded from developmental decisions. In the new democratic dispensation, South Africa continues to look for new ways in which to address this legacy.

While aspirational goals of job creation and poverty eradication are spoken of frequently, a different perspective is needed when guiding policy and debates on the manners in which to tackle development.

It is submitted that a form of contextualised sustainable development should be used as a tool to effectively address developmental issues. By orienting the goal of sustainable development to focus on taking cognisance of the legacy of Apartheid, sustainable development will be able to be used to guide development.

However, one needs to consider deterrents from sustainable development. Section 24G of retroactive authorisations has been identified as a possible deterrent, as the section has been subject to abuse by developers. By finding and

analysing the flaws of section 24G, it will be possible to identify structural issues that hinder sustainable development in South Africa.

## **1.8. OVERVIEW OF CHAPTERS**

Chapter 1 introduces the dissertation by providing a brief outline of the goals of the study, a broad overview of the following chapters, the limits and challenges faced with research and how these problems were addressed.

Chapter 2 moves on to providing a background on current literature of sustainable development and the different views of sustainable development. These different views provide a brief overview of what each different view purports to be guiding factors when considering development.

Subsequent to the discussion above, a brief overview of the legislative context of Section 24G of NEMA is provided in Chapter 3. This will contextualise how the section is triggered and what other pieces of relevant legislation play a role and why. Section 24G will also be discussed in relation to the Integrated Environmental Management system (IEM), Environmental Impact Assessments (EIAs) and Social Impact Assessments (SIAs).

Having addressed the two-fold analysis, Chapter 4 focus on bringing the two parts of discussion together. This chapter will analyse how section 24G impacts on sustainable development in South Africa. This will further entail a brief discussion on the latest 2017 Regulations and how these Regulations fail to address the problems presented by section 24G.

In the final Chapter, the conclusions of the previous chapters will be used as the stepping stones to answer the primary question initially posed for research. Recommendations as to how the Section should be improved will also be provided.

## CHAPTER 2: DEFINING SUSTAINABLE DEVELOPMENT IN THE SOUTH AFRICAN CONTEXT

### 2.1. INTRODUCTION

Sustainable development is a widely discussed topic, which has infiltrated mainstream media, such that the term has become something of a catchphrase.<sup>2</sup> Despite the ‘universality’ of the term, a question arises of ‘what is sustainable development?’<sup>3</sup> and more specifically, ‘what does it mean in South Africa?’ As a starting point for this entire discussion, identifying what is sustainable development and its localised meaning in South Africa, is of paramount importance.

### 2.2. THE SOUTH AFRICAN RIGHT TO A HEALTHY ENVIRONMENT AND NEMA

#### 2.2.1. *The Constitution*

The Constitution of the Republic of South Africa, 1996 guarantees a right to a healthy environment to every person living in the Republic.<sup>4</sup> The right does not just provide for current citizens’ right to a healthy environment, but also states that the

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<sup>2</sup> For example, see J Allard, The Guardian ‘Raising the steaks: the Seattle Crowdfunding sustainable beef’ <https://www.theguardian.com/sustainable-business/2017/feb/21/cow-crowd-sustainable-beef-organic-food-seattle> (accessed 20 March 2017); The Guardian ‘Sustainable development’ <https://www.theguardian.com/environment/sustainable-development> (Accessed 20 March 2017); The Economic Times ‘Sustainable Development’ <http://economictimes.indiatimes.com/topic/sustainable-development> (Accessed 20 March 2017); The New York Times ‘Sustainable Development’ <https://www.nytimes.com/topic/subject/sustainable-development> (accessed 20 March 2017); Cock J ‘How the environmental justice movement is gathering momentum in South Africa’ <http://theconversation.com/how-the-environmental-justice-movement-is-gathering-momentum-in-south-africa-49819> (accessed 27 July 2018).

<sup>3</sup> For a ‘global’ understanding of sustainable development as part of the wider global dialogue, see Kates R, Parris T, Leiserowitz A ‘What is sustainable development?’ (2005) 47.3 *Environment* 8.

<sup>4</sup> Sec 24 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as ‘the Constitution’) states: Everyone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

rights of the future generations must also be protected.<sup>5</sup> This forward looking approach indicates that this right leans towards well-thought out development that can still protect the environment of future generations.

### *2.2.2. NEMA and its interaction with the right to a healthy environment*

NEMA was enacted to give effect to the constitutional right to a healthy environment. The Preamble of NEMA states that the State must implement the constitutional right to a healthy environment and take into account the need for intergenerational equity<sup>6</sup> through 'the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generation'.<sup>7</sup> The Preamble outlines the concept of protecting future generations, which is then reiterated through the definition of sustainable development provided for in section 1 of NEMA.<sup>8</sup>

NEMA recognises the current situation of many South Africans who live in conditions detrimental to their health, against which the State has the responsibility to protect these citizens.<sup>9</sup> Section 2 of NEMA points out the lingering effects of Apartheid and the brunt of the environmental injustices which still fall squarely on the shoulders of the poor.<sup>10</sup> By recognising this, the South African government needs to 'strive to meet the basic needs of previously disadvantaged

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<sup>5</sup> *Ibid.*

<sup>6</sup> Preamble NEMA.

<sup>7</sup> Preamble NEMA.

<sup>8</sup> S 1 NEMA states that sustainable development means 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.'

<sup>9</sup> Preamble NEMA. For a fuller discussion on the impacts of a crowded environment on those dwelling in such an informal and crowded environment, see Govender T, Barnes JM & Pieper CH 'The Impact of Densification by Means of Informal Shacks in the Backyards of Low-Cost Houses on the Environment and Service Delivery in Cape Town, South Africa' 2011(5) *Environmental Health Insights* 23.

<sup>10</sup> Sec 4(c) of NEMA states 'Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons [...] (d) Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.'

communities'.<sup>11</sup> This includes the right and the fundamental need to live in a healthy environment.

### **2.3. ORIENTING SUSTAINABLE DEVELOPMENT: HOW CAN DIFFERENT UNDERSTANDINGS OF SUSTAINABLE DEVELOPMENT VARY?**

Having identified that NEMA addresses the right to a healthy environment, it is necessary to address the question of how sustainable development should be understood. Harris identifies three main 'perspectives' to view of sustainable development.<sup>12</sup> Each perspective has a different 'driving factor' behind sustainable development, and therefore identifies different issues that should be given priority over other matters.

#### *2.3.1. Economic perspective*

The first perspective is the economic perspective, which focuses on human economic welfare.<sup>13</sup> An economically sustainable system must be able to produce goods and services on a continuous basis for the population.<sup>14</sup> A sustainable system must be able to maintain stable levels of government and avoid extreme sectoral imbalances which damage agricultural and industrial production.<sup>15</sup> The ultimate guiding factor is that the resources should be utilised to maximise personal wealth.<sup>16</sup>

A criticism which should be addressed herein, is that 'economic sustainable development' should simply be called 'efficient allocation of resources to maximise utility from consumption.'<sup>17</sup> Should one choose to focus on this particular line of development, it denotes that there is very little incentive for forward looking

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<sup>11</sup> Preamble NEMA.

<sup>12</sup> J Harris for Global Development and Environmental Institute, Tufts University 'Working Paper 00-04: Basic Principles of Sustainable Development' (2000) 6. In this model, Harris's three perspectives are highly integrated, interdependent and overlap one another. It is necessary to state, Harris's description of different perspectives discusses individual 'indicators' of measurement as to whether sustainable development has been achieved or not.

<sup>13</sup> *Ibid* 7.

<sup>14</sup> *Idem* 5-6.

<sup>15</sup> *Idem* 6 & 22.

<sup>16</sup> *Idem* 8 – 9.

<sup>17</sup> *Idem* 9.

policies. Consumption should merely be maximised from the item produced.<sup>18</sup> Other questions arise as to how 'natural capital' is to be defined, whether such natural capital can be equated to other forms of capital, and whether the needs of the present generation are unduly weighted in comparison to the needs of future generations.<sup>19</sup> While it can be beneficial for the focus in development to be maximising of resources to the maximum, there is no focus on maximising the wealth for all citizens. This would leave one to believe that distribution would inherently remain unequal, as those with more sources at their disposal can afford to take steps to further maximise a resource's use.

### 2.3.2. *Environmental perspective*

A second approach, namely the environmental perspective, argues that an environmentally sustainable system, which considers ecological limits, should be considered paramount.<sup>20</sup> An ecological system must maintain a stable resource base by avoiding over-exploitation of renewable resource systems. This perspective further focusses on environmental sink functions and depleting non-renewable resources.<sup>21</sup>

An environmental perspective demands lowered consumption and a capped global population.<sup>22</sup> Due to the reduced ecological resilience by way of human consumption, human consumption should be dictated by 'the requirements of ecosystem integrity and species diversity'.<sup>23</sup> Resources should be allocated 'in such a fashion that they threaten neither the system as a whole nor the key

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<sup>18</sup> *Ibid.* Harris poses the 'question of whether sustainability has any validity as an economic concept.' Harris further delves into an extensive debate between a neo-classical and modern understanding of 'natural capital'.

<sup>19</sup> *Idem* 6 – 10. With respect to the matter of pitting the needs of the current generation as opposed to the future generations, alludes to the concept of 'inter-generational equity', which shall be unpacked below.

<sup>20</sup> *Idem* 13.

<sup>21</sup> *Idem* 6. An environmental sink function is 'the capacity of the environment to absorb the unwanted by-products of production and consumption; exhaust gases from combustion or chemical processing, water used to clean products or people, discarded packaging and goods no longer wanted. OECD *Glossary of Statistical Terms* <https://stats.oecd.org/glossary/detail.asp?ID=6569> (accessed: 14 October 2018.)

<sup>22</sup> *Idem* 12.

<sup>23</sup> *Idem* 14. Ecological resilience refers to the "bounce-back" capacity which enables a system to respond to disturbances or damage.'

components of the system'.<sup>24</sup>

A problem arises where the practical implementation of capping global population rates would be extraordinarily difficult to implement. Another concern is that the needs of human consumption inherently outweigh the capabilities of the surrounding habitat. Humans desalinate sea water to be able to live in the desert, import foreign foods from across the globe all year round and, import fuel daily from across the globe for heating and transport purposes.

### 2.3.3. *Social perspective*

The final perspective is a socially-oriented view of sustainable development. A socially sustainable system must require the achievement of distributional equity, the adequate provision of social services such as health care and education, gender equity, political accountability and participation.<sup>25</sup> This perspective fundamentally differs from that of the economic perspective, as the latter focuses on 'wealth maximisation', whilst the former focuses on only basic needs being met by all humans.<sup>26</sup>

This perspective also comes with significant challenges. When considering the global economy is based on that of capitalistic ideals, a main factor being that of maximising of personal wealth, the social perspective would struggle to take hold of an economy which is run by capitalistic ideals.<sup>27</sup>

## 2.4. TRADE OFFS

The above identified perspectives merely indicate that there are consistent competing priorities as to which considerations should be given priority when considering development. Inevitably, when one has differing priorities from others, certain items will move down the list of guiding considerations for development.

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<sup>24</sup> M Common & C Perrings "Towards an Ecological Economics of Sustainability" 1992 6 (1) *Ecological Economics* 12.

<sup>25</sup> Harris (*supra* n 12) 5-6.

<sup>26</sup> *Idem* 15.

<sup>27</sup> It is to be stated outright that this dissertation does not discuss specific economic systems nor shall a certain system be advocated for.

The above-described perspectives imply potential ‘trade-offs’ between prioritising different goals.<sup>28</sup> It is important to note that these three perspectives are not independent of each other, but rather work symbiotically.<sup>29</sup> This apparent interdependence alludes to ‘integration’ of goals of sustainable development.<sup>30</sup>

As an example of this trade-off being recognised in South Africa, in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,<sup>31</sup> the Constitutional Court acknowledged that there had been an evolution of the term sustainable development.<sup>32</sup> In accordance with this said ‘evolution’, the Court confirmed that there are multiple considerations within sustainable development<sup>33</sup> and reiterated that sustainable development should be seen as a balance between social and environmental considerations.<sup>34</sup>

The above identified perspectives indicate three main viewpoints from which one could approach sustainable development. These differing viewpoints have different cases as to what areas of society should be the guiding hand of sustainable development.

## 2.5. THE LEGACY OF APARTHEID

Having identified various perspectives of sustainable development, it is time to turn the attention to contextualising factor for South Africa: Apartheid. At this juncture in South African democracy, one must acknowledge that Apartheid left a

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<sup>28</sup> Harris (*supra* n 12) 5. For example, when clearing of a portion of land for agricultural purposes, there is a trade-off between a loss of biodiversity and the production of more food which can benefit poorer communities or food.

<sup>29</sup> *Idem* 7.

<sup>30</sup> L Feris ‘Sustainable development in practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*’ (2008) 1 *Constitutional Court Review* 235 236 . The balancing needs of socio-economic development and environmental considerations was also recognised in 2007 (6) SA 4 (CC) (7 June 2007) para 41.

<sup>31</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (7 June 2007) (hereafter *Fuel Retailers*). In this matter before the Constitutional Court, the main issue present was the Mpumalanga Provincial Department approving a petrol filling station without having properly considered the socio-economic impact of the construction of the station. See para 5.

<sup>32</sup> *Idem* paras 44 – 50.

<sup>33</sup> *Idem* para 51.

<sup>34</sup> *Idem* para 1.

deep chasm in South Africa's environmental law.<sup>35</sup> The Constitution, which allowed for a new environmental right to be enacted into law, 'steered [South Africa] on a path of [...] reconstruction'.<sup>36</sup>

Due to Apartheid laws, the majority of the country's population was forced into designated areas, locating them into a smaller geographical area than that of other races.<sup>37</sup> In some instances, these relocations placed them in close proximity to harmful circumstances, including coal electricity power stations and mines.<sup>38</sup>

This continuing legacy of Apartheid's environmental laws, as well the legacy of poor and underfunded schooling, socio-economic factors and many other considerations,<sup>39</sup> poor and rural communities remain the most vulnerable to environmental change and environmental degradation.<sup>40</sup> Policy creation should 'promote justifiable economic and social development'.<sup>41</sup> Sustainable development should entail 'eradicating poverty and improving the quality of life for citizens in developing countries'.<sup>42</sup>

Legislation for the protection of environmental rights is a reaction to South Africa's Apartheid legacy.<sup>43</sup> It is estimated that by 1980, '10.5 million black people lived in the homelands that comprised less than 13 per cent of South Africa's total

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<sup>35</sup> P Steyn 'The lingering environmental impact of repressive governance: The environmental legacy of the apartheid era for the new South Africa' (2011) 2 *Globalizations* 396 - 398.

<sup>36</sup> Bray E 'Towards Sustainable Development: Are we on the Right Track?' (1998) 5 *South African Journal of Environmental Law and Policy* 9. The environmental right will be further explored and discussed in Chapter 3.

<sup>37</sup> The following laws worked in conjunction with one another to ensure the majority of the South African population suffered from environmental degradation: the Group Areas Act 41 of 1950; the Natives Land Act 27 of 1913; the Separate Amenities Act 49 of 1953.

<sup>38</sup> Steyn (note 25 above) 397 – 398.

<sup>39</sup> *Idem* 399. Further see Daily Maverick 'South Africa: where 12 million live in extreme poverty' <https://www.dailymaverick.co.za/article/2015-02-03-south-africa-where-12-million-live-in-extreme-poverty/#.WV9kheuGPIU> (accessed 7 July 2017). This article details how the poor in South Africa continue to live in close proximity to mines, electricity power stations and other developmental structures which are harmful to their health.

<sup>40</sup> Conserve Africa 'Environment and Poverty in Africa' <http://www.conserveafrica.org.uk/sustainable-development-and-local-communities-in-africa/environment-and-poverty-in-africa/> (accessed 7 July 2017) and The Guardian 'Climate change: the poor will suffer' <https://www.theguardian.com/environment/2014/mar/31/climate-change-poor-suffer-most-un-report> (accessed 7 July 2017).

<sup>41</sup> Bray (*supra* n 36) 9.

<sup>42</sup> *Idem* 5.

<sup>43</sup> Department of Environmental Affairs and Tourism 'Fifteen Years: A review of the Department of Environmental Affairs and Tourism' (2009) 15 argues that the Department (of Environmental Affairs) was created after democratic elections in to 'coordinate the country's policy response' to environmental issues.

land surface'.<sup>44</sup> A slowly degraded environment, in which the majority of the poor lived, was an issue which needed to be tackled by the African National Congress when the party came into power in the democratic elections in 1994.<sup>45</sup> When one refers back to the preamble of the Constitution, it 'recognises the injustices of [the] past'<sup>46</sup> which must also include the environmental injustices experienced by those living in the previous homelands, outside of 'white South Africa'.<sup>47</sup> Through this recognition of environmental injustices, or legacy of Apartheid, NEMA was enacted to redress this legacy of a degraded environment through 'justifiable economic and social development'.<sup>48</sup>

By taking cognisance of South Africa's history of Apartheid and its legacy, development can take place whilst being considerate to persons and communities who were disempowered during the Apartheid era, which still continues today. By considering the voices and needs of local communities, development will be forced to become more socially conscious and give due consideration to the basic needs of the community which would be impacted by a potential development.

## **2.6. COMMUNITY ENGAGEMENT AND ITS IMPORTANCE**

As part of development tackling the legacy of Apartheid, it would by necessity entail that local communities that would be impacted by a proposed development, should be consulted or engaged. It is impossible to establish specific programmes of development without considering the basic needs of the local communities. It is only possible to ascertain these specific needs with in depth community engagement.<sup>49</sup>

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<sup>44</sup> Steyn (*supra* n 35) 7.

<sup>45</sup> *Idem* 2.

<sup>46</sup> Preamble of the Constitution.

<sup>47</sup> Steyn (*supra* n 35) 6 – 8.

<sup>48</sup> Preamble NEMA.

<sup>49</sup> Community engagement entails developers obtaining information as to the current issues and needs of the community which could be impacted by a development. SIAs include the following considerations: 'aesthetic impacts, archaeological and heritage impacts, community impacts, cultural impacts, demographic impacts, development impacts, economic and fiscal impacts, gender assessment, health impacts, indigenous rights, infrastructural impacts, institutional impacts, political impacts, poverty assessment, psychological impacts, resource issues, tourism impacts and other impacts on societies' See Department of Environmental Affairs and Tourism 'Integrated Environmental Management Information Series 22: Socio-Economic Impact Assessment (2006) 4. SIAs will be discussed in detail below.

In addressing the above, NEMA's Preamble states that '...law should facilitate the enforcement of environmental laws by civil society'.<sup>50</sup> In furtherance of this goal, 'negotiations or consultations with the community is required'.<sup>51</sup> In Chapter 2 of NEMA, a 'community' is defined as 'community shall include the members or part of the community directly affected by prospecting, mining, exploration or production on land occupied by such members or part of the community'.<sup>52</sup> These two definitions read in conjunction with each other indicate that any individual person impacted by the development should be consulted prior to that development taking place.<sup>53</sup> This engagement should further ensure that steps are taken to address all concerns and suggestions are taken under serious consideration during the planning process of the development.

## **2.7. CULTURAL AND HISTORICAL CONSIDERATIONS AS PART OF SUSTAINABLE DEVELOPMENT**

South Africa is a country with a culturally rich and diverse country. With an abundance of different ethnic groups and cultures living in one country, it is possible for numerous religious, cultural and other significant symbols and items in nature to be protected.<sup>54</sup> As a social sustainable development is focussed on meeting the basic needs of citizens, this would consider the spiritual, cultural and historical importance to surrounding communities. As part of a more integrative and holistic legal system, the inclusion of previously marginalized groups and their previously disregarded cultural and heritage rights need to be considered in development.<sup>55</sup> Certain streams, forests or mountains may contain significant cultural, spiritual and historical meaning to the local communities.<sup>56</sup> This implies that preservation of these geographical features should be protected in order to

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<sup>50</sup> Preamble NEMA.

<sup>51</sup> Preamble NEMA.

<sup>52</sup> Sec 1(d) NEMA.

<sup>53</sup> Further see Secs 2(4)(c), (d), (f), (h) & (o) NEMA.

<sup>54</sup> AA Du Plessis & C Rautenbach 'Legal Perspectives on the role of culture in sustainable development' (2010) 13:1 *Potchefstroom Environmental Law Journal* 27 - 32. Further see *Oudekraal Estates (Pty) Ltd v The City of Cape Town* (25/03) 2009 ZASCA 85 for how culture can influence decisions on development.

<sup>55</sup> 'Sustainable development may not be achieved without sustained and legally mandated efforts to ensure that development planning is participatory.' See T Murombo 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment (EIS) Law and Sustainable Development' (2008) 3 *Potchefstroom Electronic Law Journal* 106 109 - 110.

<sup>56</sup> Du Plessis & Rautenbach (*supra* n 54) 41 – 42.

protect the affected or surrounding communities' cultural and historical beliefs.<sup>57</sup> By considering the above, development would not only become more socially sustainable, but more considerate and holistic in nature.<sup>58</sup>

Sustainable development should further be a forward-looking concept, in that in order to achieve development that is ecologically sustainable, one is meant to consider potential harm to the environment before the harm is felt.<sup>59</sup>

## **2.8. CONCLUSION**

Sustainable development can be interpreted through several perspectives. These differing perspectives shape the focus of development and place different considerations as paramount, while in essence lowering the importance of other considerations.

An ecological perspective places environmental needs and protection at the forefront of considerations. This would entail controlling population counts, protecting wider areas of natural habitat and reducing man's needs to of secondary importance. This will allow for the habitat to regenerate itself adequately after exploitation.

An economic viewpoint focuses on the natural habitat only insofar as its ability to provide resources for man. The focus is to maximise one's wealth by maximising the utility of natural resources. In this, the focus would be on avoiding significant sectoral imbalances and placing control of resources in governmental control to obtain equitable distribution of resources.

A social perspective focuses on the basic needs of the many and argues that utilisation of natural resources should be used to meet the basic needs of the population, and not necessarily to 'maximise wealth,' (and therefore the resources consumed,) as argued for in the economic perspective. The key difference

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<sup>57</sup> *Idem* 42.

<sup>58</sup> *Idem* 43

<sup>59</sup> T Meyer 'Valuing the potential environmental benefits of the Environmental Impact Assessment Process: The Mooi River Mall Case Study' (2007) North-West University 2.

between the social and economic perspectives appear to be the focus on community needs, as opposed to an individual's needs.

By considering South Africa's unique history of Apartheid, and in line with the goal of developing socially sustainably, in which all citizens enjoy development, it is submitted that a social perspective is necessary for sustainable development in South Africa. A social perspective of development in South Africa would encourage policy and decision makers to have a more considerate approach to those who were disregarded by the South African government during Apartheid and are still disregarded today. Socially sustainable development focuses on the recognition of the fundamental right to healthy environment in the new democratic dispensation.<sup>60</sup>

In the case that a social perspective is focussed on meeting basic needs as opposed to merely 'maximising wealth', it is logical that this perspective would make allowances for and, accommodate, issues such as historical and cultural considerations.

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<sup>60</sup> Bray (*supra* n 36) 15.

## **CHAPTER 3: THE CURRENT STATE OF AFFAIRS: THE LEGISLATIVE FRAMEWORK IN WHICH SECTION 24G OPERATES**

### **3.1. INTRODUCTION**

Chapter 2 lays out how sustainable development in South Africa does have a cognisance of the legacy of Apartheid and the importance of cultural and historical considerations within this context. This suggests a preponderance towards the social interpretation of sustainable development in South Africa. This social perspective takes cognisance of the fact that the poor in South Africa continue to bear the brunt of environmental degradation.

This chapter focuses on the mechanics of section 24G, its supporting legislative sections and regulations and the broader environmental system in which it operates. This discussion begins with an overview of the IEM system and its purpose in supporting the environmental right in South Africa. How EIAs and SIAs act as mechanisms in support of the IEM system will then be discussed. Finally, section 24G and its other relevant supporting pieces of legislation will be discussed. By understanding the mechanics of the applicable legislation, it will be possible for one to determine if section 24G promotes or hinders sustainable development.

### **3.2. THE PURPOSE OF NEMA AND ITS OBJECTIVE IN THE WIDER SCHEME OF ENVIRONMENTAL RIGHTS**

NEMA was promulgated to effect the rights provided for in section 24 of the Constitution by providing a legislative framework.<sup>61</sup> This aim/intention was further confirmed in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*.<sup>62</sup> The court commented that the purpose for the binding of State actions to the principles espoused in NEMA, was for the implementation of

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<sup>61</sup> *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) para 24. Further see M Kidd 'Environmental Law' (2015) Juta: Cape Town 35 – 36.

<sup>62</sup> *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA). Hereafter referred to as *Sasol Oil*.

sustainable development within the country. The binding of the State's actions requires the consideration of social, economic and environmental impacts of its actions.<sup>63</sup> This supports the position of the court to recognise, not only environmental facets in decisions, but economic and social elements as well. *Sasol Oil* provides an example of the broadening South African understanding of what is encompassed in the multiple facets of sustainable development.<sup>64</sup>

While this approach adopted by the Court may not inherently be socially sustainable, it is nevertheless an encouraging approach, insofar as it recognises the burden on the State to realise the right to a healthy environment. From the language used, the approach taken by the court can't be said to be inherently 'poor-community centric', but it is a promising step towards protection of the poor's environmental rights.

NEMA calls for consideration of not only environmental, but of social and economic impacts of activities, as well as assessing the disadvantages and the benefits of such activities.<sup>65</sup> NEMA draws special attention to the need to protect previously disadvantaged people, and places a duty on the state to ensure that these communities do not bear the brunt of adverse environmental impacts.<sup>66</sup> Such principles appear to be oriented toward a social understanding of sustainable development where the basic needs of citizens are considered paramount.

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<sup>63</sup> *Idem* para 15. Further see sec 2(1)(a) & (c) NEMA.

<sup>64</sup> Several other wider ranging cases have commented on the need for a strengthened legislative framework to and more political will to protect environmental rights. 'In *Biowatch Trust v Registrar Genetic Resources and Others*, the Constitutional Court held that "the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest.'" See para 19 of *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC) and GoLegal *Environmental Law: Sustainable development and planning* <https://www.golegal.co.za/sustainable-development-planning/> (accessed: 2 October 2018). In the case of *Fuel Retailers*, the Constitutional Court further recognized that 'sustainable use and exploitation of natural resources are at the core of the protection of the environment' para 45.

<sup>65</sup> Sec 2(4)(i) NEMA.

<sup>66</sup> Sec 2(2) & Sec 2(4)(c) NEMA. It is recognised that the founding principles of NEMA also advocate for the protection of the environment through a multitude of different measures. See Sec 2(4)(a) NEMA. It must be noted that for the purposes of this dissertation, focus shall be given to a social understanding.

### 3.3. DEFINING THE IEM SYSTEM IN SOUTH AFRICA'S ENVIRONMENTAL REGIME

The IEM system was implemented to 'promote the application of appropriate environmental management tools'<sup>67</sup> to 'guide South Africa on a path to sustainable development'.<sup>68</sup> The IEM system provides guiding objectives which are to

*"...identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions, [...] risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits and promoting compliance with the principles of environmental management set out in section 2.*<sup>69</sup>

In addition to this, the IEM system 'is designed to ensure that the environmental consequences of development proposals are understood and adequately considered in the planning process.'<sup>70</sup> Furthermore, the IEM system assists with the implementation of activities that build toward sustainable development. One of the founding IEM objectives, is to 'ensure effects of activities [...] receive adequate consideration before actions are taken'.<sup>71</sup> The IEM system allows for this by calling for adequate opportunity for public participation to be conducted before actions are taken.<sup>72</sup>

The above indicates that the IEM system consists of a variety of tools, with the view of promoting a practically implementable system of development which mitigates unnecessary environmental harm. The identified principles indicate that the entirety of the IEM system is geared towards prevention of damage with development instead of remedying it.

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<sup>67</sup> Sec 23(2) NEMA. Further see Department of Environmental Affairs *National Environmental Impact Assessment and Management Strategy (EIAMS)* [https://www.environment.gov.za/documents/strategies/eiams\\_environmentalimpact\\_assessmentmanagement](https://www.environment.gov.za/documents/strategies/eiams_environmentalimpact_assessmentmanagement) (accessed: 12 October 2018).

<sup>68</sup> Department of Environmental Affairs and Tourism DEAT Overview of Integrated Environmental Management of the Integrated Environmental Management Information Series 0' (2004) 4.

<sup>69</sup> Sec 23(2)(b) NEMA.

<sup>70</sup> Department of Environmental Affairs and Tourism 'Integrated Environmental Management Information Series 22: Socio-Economic Impact Assessment (2006) 5.

<sup>71</sup> Sec 23(2)(c) NEMA.

<sup>72</sup> Sec 23(2)(d) NEMA. Further see DEA (*supra* n 68) 4 -8 for a more in-depth discussion on the IEM system in South Africa.

### 3.4. EIAS AND THEIR PURPOSE IN THE IEM SYSTEM

EIAs, introduced through NEMA were created to implement the objectives of the IEM system and sustainable development as a whole.<sup>73</sup> An EIA is defined as:

*“... in relation to an application to which scoping must be applied, means the process of collecting, organising, analysing, interpreting and communicating information that is relevant to the consideration of that application.”<sup>74</sup>*

EIAs are meant to be anticipatory in its assessment of impacts on the environment. They are meant to be conducted prior to development, ensuring that potential impacts can be prevented and if not, to mitigate and control damage as far as possible.<sup>75</sup>

Further, the purpose of an EIA is to allow the person considering the application to understand and weigh the benefits, versus the detrimental consequences against each other to make a more informed decision. EIAs must be compiled into a report, which is attached to an application for a listed activity.<sup>76</sup>

### 3.5. SIAS AND THEIR PURPOSE IN THE IEM SYSTEM

In a most succinct manner, SIAs essentially ‘identify the intended and unintended impacts that proposed projects or developments are likely to have on a community or individuals and suggest mitigation measures to prevent these impacts and enhance the positive impacts.’<sup>77</sup> An SIA is essentially a tool which is used to identify the needs of the community prior to a developmental project begins.

SIAs, as with the EIAs, are meant to be anticipatory in its assessment of impacts

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<sup>73</sup> Regulations regulating environmental impact assessments were passed in 1997 in terms of the Environment Conservation Act, 1989.’ The regulations were given more teeth in 2006 which made these EIAs easier to enforce. See DEA (*supra* n 68).

<sup>74</sup> Reg 22 NEMA Regulations, 2006.

<sup>75</sup> Sec 2 NEMA Regulations, 2006.

<sup>76</sup> A listed activity is defined as ‘3. (1) The activities listed in Appendix 1 are identified in terms of section 24(2) (a) of the Act as activities that may not commence without an environmental authorisation from the competent authority.’ See Listing Notice 1: List of Activities and Competent Authorities in terms of Sections 24(2) and 24D (2004) No. R. 983 in GG No. 38282.

<sup>77</sup> L Hildebrandt ‘The significance and status of Social Impact Assessment (SIA) in a South African context’ (2012) North-West University 3. It must be noted that, while Social and Labour Plans (SLPs) are related to SIAs, for the purposes of this dissertation and in an effort to narrow the scope of the discussion, only SIAs will be referred to.

on people, specifically, the local or impacted community.<sup>78</sup> They are meant to be conducted prior to development. This will allow for the identification of 'current social and economic environment and use it as a baseline for predictions and measurements'.<sup>79</sup> The predictions and baselines refer to estimates of potential damage that could be suffered by the communities as a result of a proposed development.

### **3.6. OTHER RELEVANT SECTIONS IN NEMA AND THEIR RELATIONSHIP TO SECTION 24G**

Section 24(2) forbids the commencement of any listed activity from commencing without authorisation from the relevant authority.<sup>80</sup> Continuance of the unauthorised activity or development constitutes a criminal offence.<sup>81</sup> Another offence under this section occurs if an offender fails to comply with or contravene the conditions applicable to any environmental authorisation granted for a listed activity or specified activity.<sup>82</sup> The maximum penalty for contravention for this section is R5 million fine or ten years' imprisonment or both.<sup>83</sup>

#### *3.6.1. Listed Activities*

Listed activities require an EIA be conducted due to the nature of the activities, which have potential be extremely environmentally harmful.<sup>84</sup> These assessments

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<sup>78</sup> Sec 1(vi) NEMA states: 'community means any group of persons or a part of such a group who share common interests and who regard themselves as a community'.

<sup>79</sup> DEA (*supra* n 49) 6.

<sup>80</sup> Sec 24(2)(a) NEMA states: 'The Minister, and every MEC with the concurrence of the Minister, may identify- (a) activities which may not commence without environmental authorisation from the competent authority.'

<sup>81</sup> Sec 24F NEMA states: '(1) Notwithstanding any other Act, no person may (a) commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister of Minerals and Energy, as the case may be, has granted an environmental authorisation for the activity or (b) commence and continue an activity listed in terms of section 24(2)(d) unless it is done in terms of an applicable norm or standard. (2) It is an offence for any person to fail to comply with or to contravene— (a) subsection (1)(a); (b) subsection (1)(b);(c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity; (d) any condition applicable an exemption granted in terms of section 24M; or (e) an approved environmental management programme."

<sup>82</sup> Sec 24F(2) NEMA.

<sup>83</sup> Sec 24F(4) NEMA. It is recognised that fines have been considered to be rather ineffective in deterring section 24G applicants. For the purposes of this dissertation, the shortcomings of the fine system will only be discussed in Chapter 4 below.

<sup>84</sup> Sec 3(a) of Listing Notice 1 of 2010 states: The activities listed in Appendix 1 are identified in terms of sec 24(2)(a) of the Act as activities that may not commence without an environmental authorisation from the competent authority'.

must be submitted to the relevant authority for consideration and authorisation.<sup>85</sup> However, when a person has commenced an illegal activity, that person may apply for retroactive authorisation through the operation of section 24G. Section 24G of NEMA was introduced in the National Environmental Management Amendment Act 8 of 2004. The NEMA Amendment Act 8 of 2004 provided an overhaul of section 24.<sup>86</sup>

### 3.6.2. Section 24G's operation

Section 24G provides that the Minister or MEC concerned may direct the applicant (who has committed an offence in terms of section 24F(2)(a) to compile a report as part of the application.<sup>87</sup> This report must contain various items *inter alia*: 'an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects'.<sup>88</sup> The report should further include a 'description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity',<sup>89</sup> and an environmental management plan.<sup>90</sup> Finally, in line with a socially-oriented understanding of sustainable development, the report should contain a description of the public participation process followed as well as comments received from interested and affected parties.<sup>91</sup>

In addition to this report, the transgressor must provide any other relevant information or undertake further studies that may assist the Minister or MEC in reaching a decision.<sup>92</sup> These further studies or additional information are

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<sup>85</sup> Gauteng Department of Agriculture, Conservation and Environment 'Section 24G, Guideline No. 1: Information on the process and requirements related to an application to rectify unauthorized commencement or continuation with activities identified in the Environmental Impact Assessment Regulations of 1997' 2004/2005.

<sup>86</sup> This overhaul included 18 new sections being added to Section 24, which extensively narrowed the scope of activities that needed various authorisations. The 2004 changes further brought in a new title for the Section, changing the title from 'Implementation' to 'Environmental Authorisations'. For further discussion, see Kidd (note 61 above) 239.

<sup>87</sup> Sec 24G(1)(a) NEMA.

<sup>88</sup> Sec 24G(1)(a)(i) NEMA.

<sup>89</sup> Sec 24G(1)(a)(ii) NEMA.

<sup>90</sup> Sec 24G(1)(a)(iv) NEMA.

<sup>91</sup> Sec 24G(1)(a)(iii) NEMA.

<sup>92</sup> Sec 24G(1)(b) NEMA.

determined by the Minister or MEC.<sup>93</sup>

Section 24G also details how the Minister or the MEC must consider any information submitted,<sup>94</sup> and thereafter may direct the person, wholly or partially, to cease the activity, and may direct the applicant to rehabilitate the environment.<sup>95</sup> In the alternative, the Minister or the MEC may issue an environmental authorisation to the applicant subject to any conditions deemed necessary.<sup>96</sup>

Furthermore, section 24G makes provision for an administrative fine which may be charged for the process of reviewing an application.<sup>97</sup> The amount of the fine may be determined by the competent authority, but may not exceed R1 million.<sup>98</sup> Section 24G imposes an additional fine where a person:

*“...fails to comply with a directive contemplated in subsection (2)(a) or who contravenes or fails to comply with a condition contemplated in subsection (2)(b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F(4).<sup>99</sup>*

This fine is only applicable should the person transgress a directive from the competent authority when being ordered to either cease the activity or to authorise the activity subject to conditions.

Thus, section 24G is ‘triggered’ once there is a breach in the law by unlawful development or commencement of a listed activity without authorisation, and the person may apply to the Minister or the MEC for *ex post facto* authorisation. An activity is said to have ‘commenced’ once there is any physical activity in furtherance of the listed activity, including site preparation.<sup>100</sup> This excludes an investigation or feasibility study, or actions related to an investigation.

### **3.7. CONCLUSION**

The IEM system is the environmental management system, which promotes

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<sup>93</sup> *Ibid.*

<sup>94</sup> Sec 24G(2) NEMA.

<sup>95</sup> Sec 24G(2)(a) NEMA.

<sup>96</sup> Sec 24G(2)(b) NEMA.

<sup>97</sup> Sec 24G(2A) NEMA.

<sup>98</sup> *Ibid.*

<sup>99</sup> Sec 24G(3) NEMA.

<sup>100</sup> Chapter 5 of NEMA 2008: ‘commence’, when used in Chapter 5, means the start of any physical activity on the site in furtherance of a listed activity’.

the consideration of environmental impacts prior to development taking place. In doing so, the system advocates for the consideration of multiple factors, which include consultations with and the inclusion of surrounding and local communities.

As a tool of the IEM system, EIAs are meant to be conducted prior to development in order to mitigate unnecessary harm to the environment. As a preventative measure in force, EIAs can aid the wider goal of socially sustainable development in South Africa.

Finally, section 24G of NEMA cannot be viewed in isolation from the supporting sections of NEMA.

The Minister and MECs may identify activities that will require governmental authorisation prior to that activity commencing.<sup>101</sup> Should a person commence such an activity without the relevant authorities, this will constitute an offence.<sup>102</sup> When a listed activity is undertaken by any developer, whether commercial or otherwise, without the necessary authorisations for that development, this illicit action then triggers section 24G.

When section 24G is triggered, the unlawful activity must be halted and the transgressor must apply for retroactive authorisation from the relevant authority. Once the application is submitted, the relevant authority may grant the necessary authorisation or direct the applicant to wholly or partially rehabilitate the environment.

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<sup>101</sup> *Supra* n 93.

<sup>102</sup> *Supra* n 94.

## **CHAPTER 4: DISCUSSION AND RECOMMENDATIONS**

### **4.1. Introduction**

The right to a health environment is enshrined in the Constitution and sustainable development is a means through which to achieve this right. In consideration of contextualising sustainable development to South Africa, one must consider the lingering impacts of Apartheid and its plethora of discriminatory laws, and if these impacts are being adequately addressed.

Chapter 2 provided the basis for a nuanced manner in which to consider sustainable development. In short, sustainable development should be viewed from a social perspective, in which development is used as a means to provide for the basic needs of communities who are still feeling the impacts of Apartheid and its discriminatory laws.

Chapter 3 then outlines the manner in which Section 24G is triggered and how it works in tandem with its supporting legislative sections.

The following discussion will indicate how Section 24G hampers the goal of social sustainable development in South Africa.

### **4.2. Sustainable development and its role in redressing issues of the past**

The lingering effects of Apartheid's discriminatory laws which produced degraded environments for all non-white citizens are experienced everyday by the most vulnerable in society.<sup>103</sup> Sustainable development should be viewed as a means to address this legacy.

By viewing sustainable development through a social perspective, the focus then, according to the argument set out above, turns to meeting the basic needs of communities and persons who still feel the effects of Apartheid's laws. Such a focus would give a voice to those who previously have been ignored when it comes

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<sup>103</sup> Steyn (*supra* n 35) 6 – 8.

to environmental and developmental policy.<sup>104</sup> By allowing those who have been disregarded previously to have a say in development, basic needs such as healthcare, hygienic waste disposal, water supply infrastructure, farming developments and more would be built with the surrounding communities in mind.

### **4.3. Sustainable development and the environment**

With the above in mind, this is not to say that environmental considerations should be disregarded. Inherently, the right to health environment for humans would entail an environment not impacted by coal mining dust, fumes from factories, litter prevalent and contaminated water sources. While focussing on the redressing of the injustices of the past and the basic needs of the human, development should also be considerate of the environment.<sup>105</sup> It would be entirely contradictory for development to be completely focussed on human needs without considering how the natural environment would react to the development in question. This recalls the discussion above in paragraph 2.3.3 above, wherein an environmental perspective of sustainable development was discussed, where the ability of the ecosystem to regenerate is of paramount importance. A natural habitat which is not able to regenerate itself to keep up with the consumption of humans, will inherently lead to a degraded environment that is to the detriment of or, in the extreme, inhospitable to human settlement.

Further referring to the discussion of trade-offs in the previous chapter, the balance between addressing the needs of the poor and vulnerable would need to be struck. One cannot argue that redressing the issues of the past would have been achieved if communities continued to be shunted by developers and their socio-economic situation renders them 'negligible'.<sup>106</sup> Working contrary to a constitutionally guaranteed right would be in hindrance of sustainable development.

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<sup>104</sup> National Planning Commission 'Our Future – Make it Work: National Development Plan 2030 - Executive Summary' (2009) 48 states: 'Direct and immediate measures to attack poverty: [...] reduce the acute effects of poverty on millions of South Africans...'

<sup>105</sup> Feris (*supra* n 30) 236 & 240.

<sup>106</sup> Examples of this will be provided below.

#### 4.3.1. How does NEMA integrate into the goal of sustainable development?

NEMA provides that sustainable development demands the integration of social and economic considerations wherein surrounding or impacted communities benefit from the proposed development.<sup>107</sup> The idea that NEMA was enacted in order to implement reasonable legislative measure to work towards the larger goal of environmental protection when there is development, stands alongside the State's responsibility to 'prevent pollution and ecological degradation;<sup>108</sup> promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'<sup>109</sup>

These underpinnings in NEMA which consider the environment and to a greater extent, development which is mindful of human beings and their health, underscore the creation of an integrated framework in South African law in which human needs are not just interwoven, but somewhat trump ecological environmental protection.

As briefly explained above,<sup>110</sup> sustainable development includes public participation through consultation with local and affected communities, which links with the importance of grassroots level engagement, identifying the local needs of communities.<sup>111</sup> By taking the time to understand the specific needs of the local communities, it will be possible for sustainable development to be truly considerate of the communities that have historically been left behind.<sup>112</sup> This enhanced understanding of sustainable development is supported by the understanding placed in NEMA, which place people and their needs at the forefront of multiple considerations.<sup>113</sup>

Sustainable development should therefore 'reflect a holistic and integrated perception [of the] environment and development'.<sup>114</sup> This holistic approach to

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<sup>107</sup> R Gibson 'Beyond the pillars: Sustainability assessment as a framework for effective integration of social, economic and ecological considerations in significant decision making' (2006) 8 *Journal of Environmental Policy and Management* 259 259.

<sup>108</sup> Sec 24 of the Constitution states: 'Everyone has the right— [...] 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...'.  
<sup>109</sup> Sec 24 of the Constitution.

<sup>110</sup> See above paragraphs 2.6 and 2.7 above.

<sup>111</sup> Murombo (*supra* n 55) 23 – 24.

<sup>112</sup> See above paragraph 3.5 above for discussion on SIAs.

<sup>113</sup> Kidd (*supra* n 61) 36. Further see NEMA Sec 2(1) and (2).

<sup>114</sup> Bray (*supra* n 36) 9.

development would entail the redistribution of environmental wealth and access to resources.<sup>115</sup>

#### 4.3.2. Section 24G as a hindrance of sustainable development

The National Environmental Compliance and Enforcement Report<sup>116</sup> illuminates that the most common unlawful activities are the unlawful commencement of listed activities.<sup>117</sup> Considering this is the most common form of breach in legislation, it should be investigated if 'retroactive authorisation aids sustainable development, or whether it contributes to environmental damage and thus exacerbates environmental injustice for South Africa's poor.

It is argued that a provision like section 24G undermines the very purpose of environmental assessment and therefore sustainable development.<sup>118</sup> It is further argued that section 24G should be declared unconstitutional as it goes against the principles of the rule of law, and administrative legality in that a lawful activity can follow from unlawful administrative conduct.<sup>119</sup>

The provisions of section 24G allow for legal circumvention and consequently evasion of the proper EIA process.<sup>120</sup> Such examples of this section being used in practice can be seen in *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd*<sup>121</sup> in which the applicant had used the process to 'engineer non-compliance with the court orders and 'to compound illegal activity.'<sup>122</sup>

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<sup>115</sup> *Idem* 5. Further see R Wynberg 'A decade of biodiversity conservation and use in South Africa: tracking progress from the Rio Earth Summit to the Johannesburg World Summit on Sustainable Development' (2002) 8 *SA J of Sciences* 233 234- 236.

<sup>116</sup> Department of Environmental Affairs 'National Environmental Compliance and Enforcement Report' 2010/2011.

<sup>117</sup> *Ibid.*

<sup>118</sup> M Van der Linde 'National Environmental Management Act 107 of 1998 (NEMA)', in HA Strydom and ND King (eds.) *Fuggle and Rabie's Environmental Management in South Africa* (2009) Juta Law: Cape Town.

<sup>119</sup> *Ibid.* Further see L September 'A Critical Analysis of the Application of S24 Provisions of the National Environmental Management Act (NEMA): The Gauteng Experience (2012) North-West University 2.

<sup>120</sup> September (*supra* n 119) 2.

<sup>121</sup> *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd* (2008) JOL 22537 (T). Hereafter 'Kiepersol.'

<sup>122</sup> *Idem* para 50(h).

In *Kiepersol*, the respondent had successfully applied for a prohibitory interdict to compel the applicant to desist from its illegal activities.<sup>123</sup> Having ignored the court order, the applicant continued with its activities and once aware of section 24G, hastily lodged a rectification application with the department and paid the applicable fine.<sup>124</sup> *Kiepersol* is an example of how developers can use section 24G as a quick loophole to bring their ill-intentioned actions within the realm of law.<sup>125</sup>

To further this illustration, one can look at an actual section 24G application, entitled '24G Rectification of Cultivation of Farmland on Portion 7 of Farm StockenstromKop no 77, Norvalspont.'<sup>126</sup> In this Application, one of the listed activities for which retroactive authorisation was applied, included the approval for use of the local stream for irrigation purposes of the maize farm.<sup>127</sup> At this point, it is important to highlight the volume of water consumed by a single maize plant. A maize plant will consume approximately 250 litres of water in its lifetime.<sup>128</sup> When this is taken into consideration, it follows that, dependent on the property size, a maize per season.

The stream involved in the above mentioned case is the Orange River, a major tributary to the Gariiep Dam in the Free State and Eastern Cape provinces. The Gariiep Dam provides several tourist destination 'getaways', which provides a small

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<sup>123</sup> Kohn L 'The Anomaly that is Section 24G of NEMA: AN Impediment to Sustainable Development' (2012) 19 *SA J of Environmental Law and Policy* 1 13. These illegal activities included the construction of chicken houses and the running of a chicken breeding, rearing, egg-laying and packing business on land zoned for agricultural use (grazing), in the absence of the necessary environmental authorisations.

<sup>124</sup> *Kiepersol* (note 121 above) paras 27 – 29.

<sup>125</sup> This type of activity was also seen in *The Noordhoek Environmental Action Group v Wiley NO and Others*.<sup>125</sup> In *Noordhoek*, the Respondent for the section 24G had illegally erected a parking lot. This was despite having a court order to compel the Defendant to demolish the parking lot. Through the use of delay tactics, the Applicant applied for retroactive authorisation and was granted same. For additional examples, see other case law in which there is use and abuse of the section 24G process is *Magaliesberg Protection Association v MEC, Department of Agriculture, Conservation, Environment and Rural Development, North- West Provincial Government and Supersize Investments 11 CC v The MEC of Economic Development*.

<sup>126</sup> Section 24G Application submitted by Van Der Merwe Boerdery Trust. Submitted June 2018. Available at: <https://www.sahra.org.za/sahris/sites/default/files/additionaldocs/Stockenstromskop%20Norvalspont%2024G%20Application%20Report%20%2025.06.2018%20for%20distributionr.pdf> (accessed: 28 September 2018). Hereafter 'the Application'.

<sup>127</sup> *Idem* 10. In this particular Application, the applicant had an expired water use license in terms of the National Environmental Management: Water Act 59 of 2008. See pages 74 – 84 of the Application. At the time of this Application, the applicant's water license had expired and was no longer registered. See page 84 of the Application.

<sup>128</sup> Pg 3 of J du Plessis for the Department of Agriculture, Republic of South Africa *Maize Production* (2003) <http://www.arc.agric.za/arc-gci/Fact%20Sheets%20Library/Maize%20Production.pdf> (accessed: 14 October 2018).

income to the surrounding communities who work in this small tourism industry.<sup>129</sup> Such 'getaways' can include boating, water skiing, tubing, rowing and kayaking and other water based activities.<sup>130</sup>

Lowered water levels for those who do not have the luxury of receiving pumped and treated water from the Gariiep Dam, will be directly and negatively affected by this illicit and uncontrolled use of water by the above applicant.<sup>131</sup> Lowered dam levels in an already dry area<sup>132</sup> would inherently mean that as farms further downstream go out of business as they have access to less water, are forced to retrench farm labourers,<sup>133</sup> domestic cleaners from the surrounding tourism areas or indeed local business owners may have to close shop as the tourism attraction of the dam water dries up.

Thus, by having multiple business and or persons commence listed activities without the necessary compliance checks and the relevant authorities, it could have an extreme direct and / or indirect impact on those who are most vulnerable.<sup>134</sup> The purpose of the environmental assessment is to understand and assess the potential impact the proposed development will have on the environment. EIAs are the choice tool across many countries for implementing compliance and implementing informed decision making.<sup>135</sup> The purpose then for

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<sup>129</sup> For examples of the small tourism industry surrounding Gariiep Dam, see GariiepDam.Com *Gariiep Dam* <https://www.gariiepdam.com/> (accessed: 11 January 2019); LekkeSlaap *Gariiepdam Akkomodasie* [https://www.lekkeslaap.co.za/akkomodasie-in/gariiepdam?ppc=AdWords\\_LSROAS-Gen1\\_g&AdPosition=1t2&qclid=CjwKCAiA4OvhBRAjEiwAU2FoJWZxc\\_Tf0o3gICdx06-YeQPYY5UVQBZSFa\\_ol-yu3VrnHmwwyQHBoCldcQAvD\\_BwE](https://www.lekkeslaap.co.za/akkomodasie-in/gariiepdam?ppc=AdWords_LSROAS-Gen1_g&AdPosition=1t2&qclid=CjwKCAiA4OvhBRAjEiwAU2FoJWZxc_Tf0o3gICdx06-YeQPYY5UVQBZSFa_ol-yu3VrnHmwwyQHBoCldcQAvD_BwE) (accessed: 10 January 2019); Traveller24 *10 Things to do around Gariiep Dam* (2015) <https://www.traveller24.com/Explore/UltimateBraaiMaster/10-things-to-do-on-and-around-the-Gariiep-Dam-oasis-in-the-Free-State-20150918> (accessed: 6 January 2019).

<sup>130</sup> *Ibid.*

<sup>131</sup> *Supra* n 126 & n 127 above regarding the expired water use license. At this stage in the discussion, it must be remembered that the applicant had already started illicit pumping of water from the Orange River for irrigation purposes and was in contravention of the requirements of holding a valid water use license and further being in contravention of a listed activity in terms. This is the cause for the applicant's section 24G Application.

<sup>132</sup> Mail&Guardian *The other water crisis: Eastern Cape is in serious danger* 29 January 2018 <https://mg.co.za/article/2018-01-29-the-other-water-crisis-eastern-cape-is-in-serious-danger> (accessed: 6 January 2019).

<sup>133</sup> *Ibid.* The article states: 'if the farms closed down it would impact the towns of Humansdorp, Loerie, Patensie and Hankey – which he estimates have between 50 000 to 80 000 people working directly or indirectly in the agriculture industry.'

<sup>134</sup> *Ibid.* The article states: 'the Orange River and Gariiep dam have pipes going to Port Elizabeth – but rural areas don't have access to that water...'

<sup>135</sup> September (*supra* n 119) 6.

the EIA, is to provide the relevant decision maker to have a holistic view of the applicant's requests and make a decision that will bear the least unnecessary environmental harm.

Environmental assessment is fundamentally anticipatory in nature and consequently, it is difficult to justify condoning environmentally harmful activities that have been commenced illegally. The principle of retroactive authorisation seemingly flies in the face of the precautionary principle, which requires an EIA to be completed *prior* to development. It can thus be argued that section 24G is a 'dubious addition' to the NEMA legislation.<sup>136</sup> This is because the objectives of the section remain somewhat unclear, aiming to halt the unlawful activities and simultaneously sanction non-compliance using an administrative fine.<sup>137</sup>

Section 24G aims at 'restoring compliance' and thus brings certain activities back within the parameters of the law.<sup>138</sup> But merely bringing an activity back into legality is contrary to one of the fundamental principles of sustainable development: the precautionary principle.<sup>139</sup>

#### **4.4. Recent developments with section 24G**

As indicated in above, there are vital flaws in the application of Section 24G which can open the Section up to consistent abuse. However, in light of these flaws, NEMA Regulations, which were released in 2017,<sup>140</sup> make the initial step towards addressing these loopholes in the section. The 2017 Regulations target

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<sup>136</sup> Kohn (note 123 above) 8.

<sup>137</sup> September (note 119 above) 8.

<sup>138</sup> *Idem* 49.

<sup>139</sup> The precautionary principle encourages policies that protect human health and the environment in the face of uncertain risks.' See D Kriebel *et al* 'The Precautionary Principle in Environmental Science' 109(9) (2001) *Environmental Health Perspectives* 871 871 - 872. This principle is further emphasised in *The Body Corporate of Dolphin Cove v Kwadukuza Municipality* (8513/10) [2012] ZAKZDHC 13 (20 February 2012) paras 40 & 41. In this case, the Court stated 'Section 24G is not an invitation to commit offences so that they can be corrected later'.

<sup>140</sup> The Regulations consist of: The Listing Notice No. 326 in Government Gazette No 40772, Amendment of the EIA Regulations Listing Notice 1 No 327 of GG 40772, Amendment of the EIA Regulations Listing Notice 2 No 327 of GG 40772 and Amendment of the EIA Regulations Listing Notice 3 No 327 of GG 40772. For the purposes of this dissertation, the regulations will be referred to collectively as 'the 2017 regulations' and will be specified individually for discussion purposes as required. The 2017 Regulations were published in the Government Gazette on 7 April 2017 and came into force on 20 July 2017. Hereafter all will be collectively referred to as 'the 2017 Regulations'.

some issues which have allowed the Section to be systemically abused, as will be indicated below.<sup>141</sup>

#### 4.4.1. The Fine Committee and fines

Research has indicated that the previous limit of fines lacked any real strength in deterring section 24G applicants.<sup>142</sup> The Centre for Environmental Rights (CER) has released various reports which detail instances of when developers do not review the fines as real deterrents.<sup>143</sup> It is argued that, prior to the new Regulations which increased the fine limit, the

*'fines [were] too small even to require disclosure to shareholders, and certainly do not compensate for the time and profit gained by the violator through its illegal activity by by-passing the environmental impact assessment requirements...'*<sup>144</sup>

In light of the ineffectiveness of fines previously, the below outlines an encouraging step to bolstering the impact of fines.

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<sup>141</sup> For the purposes of this discussion, the complete 2017 Regulations will not be discussed in full and only specific regulations will be discussed.

<sup>142</sup> Centre for Environmental Rights 'Written Comments on the Draft Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of Section 24G' 2015 [https://cer.org.za/wp-content/uploads/2017/08/CER-comments-on-draft-regulations-relating-to-section-24G-fines\\_Final.pdf](https://cer.org.za/wp-content/uploads/2017/08/CER-comments-on-draft-regulations-relating-to-section-24G-fines_Final.pdf) (accessed: 26 January 2019). This was a letter from the CER addressed to the Minister of Environmental Affairs with comments relating to the proposed NEMA regulations.

<sup>143</sup> *Ibid.* See further CER 'Annual Report 2012/2013' <https://cer.org.za/wp-content/uploads/2013/09/CER-AR-2012-13.pdf> (accessed: 26 January 2019) pgs 9 – 11; 13; 15 & 19. Such an example to be identified is the mining company, Exxaro, which illegally mined in a wetland in Mpumalanga without the necessary authorities. This mining drained the water from the wetland and destroyed the natural local habitat. Exxaro was also found guilty of diverting natural water courses, using natural water sources without a water licence, storage of contaminated water in an open pit as opposed to a controlled dam and more. See Parliamentary Monitoring Group 'Question No. 927', Date of publication in internal question paper: 23 March 2010, [https://pmg.org.za/question\\_reply/175/](https://pmg.org.za/question_reply/175/) (accessed: 27 January 2019); Parliamentary Monitoring Group 'Question No. 2114', Date of publication in internal question paper: 17 August 2012, [https://pmg.org.za/question\\_reply/417/](https://pmg.org.za/question_reply/417/) (accessed: 27 January 2019) and Parliamentary Monitoring Group 'Question No. 1716', Date of publication in internal question paper: 19 September 2014, <https://www.dwa.gov.za/communications/Q&A/2014/NA%201716.pdf> (accessed: 27 January 2019). Further see Rainharvest.co.za 'South Africa: Mining Giant accused of destroying Mpumalanga wetlands' 2012 <http://www.rainharvest.co.za/2012/05/south-africa-mining-giant-accused-of-destroying-mpumalanga-wetlands/> (accessed: 27 January 2019).

<sup>144</sup> CER 'Full Disclosure' 2015 <https://fulldisclosure.cer.org.za/2015/download/CER-Full-Disclosure.pdf> (accessed: 27 January 2019) 5.

Regulation 3(1) allows for every competent authority to form a specific fine committee by 18 October 2017.<sup>145</sup> The Fine Committee is 'the committee established in terms of Regulation 3 that is required to make a recommendation on the fine quantum to the competent authority.'<sup>146</sup>

The Fine Committee then has the ability to make a recommendation in terms of the fine calculator<sup>147</sup> to determine a fine to be paid by the applicant in terms of application for retroactive authorisation of listed activities. The fine relates to the punitive fine; not the administrative fine which is paid in any event for processing of the Section 34G application. The fine committee has the prerogative to call upon other experts who have experience in any deemed relevant sector with any skill set deemed valuable to the determination of the fine.<sup>148</sup>

Regulations 3(1) and 4(4) allow for the fine committee to determine the size of the fine to be drawn against the applicant who is applying for the retroactive authorisation.<sup>149</sup> These regulations further allow for the committee to make recommendations to the competent authority regarding the quantum to be fined using the fine calculator.<sup>150</sup>

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<sup>145</sup> Regulation 3(1) of July 2017 Regulations. What should be borne in mind is the fact that the regulation allows for the competent authority to formulate the committee, not compelled to do so. At the time of writing this dissertation, no research has indicated that any said committees had yet been formed.

<sup>146</sup> Reg 3(1) of July 2017 Regulations.

<sup>147</sup> "fine calculator" means the fine calculator approved by the Minister which incorporates the factors listed in Regulation 4 and includes a formula for the determination of an appropriate fine. See 'Regulations relating to the procedure to be followed and the criteria to be considered when determining an appropriate fine in terms of section 24 G.

<sup>148</sup> Reg 3(3) of July 2017 Regulations. states: 'The members of the fine committee may call upon any other person with relevant technical, specialist or local knowledge to advise the fine committee as and when deemed reasonably necessary by the fine committee.'

<sup>149</sup> Reg 3(1) July 2017 Regulations states: Each competent authority must establish a fine committee within 90 days of the publication of these regulations to consider all applications made in terms of section 24G with a view to making a recommendation to the competent authority on the quantum of the fine to be imposed on an applicant. Reg 4(4) of Listing Notice 3 states: When calculating the proposed quantum of the fine or the fine, as the case may be, the fine committee and the competent authority must use the calculator approved by the minister.

<sup>150</sup> It is important to note that at this stage, the fine calculator has not been promulgated as of yet. Further, no mention is made of when the fine calculator will be promulgated.

#### 4.4.2. *Fine Considerations*

Regulation 4 read with Annexure 1 list the factors included in making the decision regarding the quantum.<sup>151</sup> Such examples include taking cognisance of the impacts of the activity and importantly, compliance history of the developer since 7 January 2005.<sup>152</sup> What is interesting to note here that this compliance history also includes the actions of past directors.<sup>153</sup> By holding a past director's actions to account, the insinuation is that compliance is a continuous action. It further means that by piercing the corporate veil, one cannot claim to be held unaccountable on account of a previous director's actions.<sup>154</sup>

Regulation 7 makes provision for mandatory record keeping. These records range from all Section 24G applications received<sup>155</sup> to the fines imposed.<sup>156</sup> The creation of this database then allows for the red-flagging of companies that have records for non-compliance. In this consideration of the applicant's history, the fine committee further considers the legal personality of the applicant.<sup>157</sup> Through this consideration, it is inherent that the fine committee will also look at the financial means of the applicant. By looking at the history and legal personality of the applicant, it is possible to apply a fine on a proportionate level that is relative to the income and power of the applicant. This proportionality provides the opportunity for companies to be penalised more heavily than that of individual applicants as well as established companies as opposed to 'new-entrants' into the

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<sup>151</sup> Reg 4(1) July 2017 Regulations states: the fine committee, when determining the proposed quantum of the fine, as well as the competent authority when determining the fine in terms of section 24G, must take the following considerations into account...".

<sup>152</sup> This is the date on which the National Environmental Management Amendment Act 8 of 2004 came into effect.

<sup>153</sup> Reg 4(1)(e) July 2017 Regulations deals with the compliance history of the applicant insofar as it states: '(i) whether or not administrative enforcement notices, including pre -notices where appropriate, have previously been issued to the applicant in respect of a contravention of section 24F(1) of the Act and/or section 20(b) of the National Environmental Management Waste Act; (ii) whether or not the applicant has previously been convicted in respect of a contravention of section 24F(1) of the Act and /or section 20(b) of the National Environmental Management Waste Act; and (iii) whether or not the applicant has previously submitted a section 24G application in respect of an activity or activities which commenced prior to the activity or activities that are the subject of the current application.'

<sup>154</sup> Reg 4(1)(e)(ii) July 2017 Regulations.

<sup>155</sup> Reg 7(1)(a) July 2017 Regulations.

<sup>156</sup> Reg 7(1)(c) July 2017 Regulations. Various other factors are kept in this database (see Reg 7(1) for the full list), which are then submitted biannually to the DEA (Reg 7(2)).

<sup>157</sup> Reg 4(1)(f) July 2017 Regulations states: 'whether the applicant is a firm or a natural person.'

market/sector.<sup>158</sup> This 'sliding scale' should then be considered as an active step towards redressing socio-economic disparities between applicants, and therefore the legacies of Apartheid.<sup>159</sup>

Further considered are, perhaps most importantly, the actual impacts or potential impacts, of the listed activity(ies).<sup>160</sup> In the spirit of sustainable development, the regulation instructs the consideration of socio-economic impacts,<sup>161</sup> biodiversity impacts,<sup>162</sup> impact on sense of place and/or heritage,<sup>163</sup> and any pollution and/or environmental degradation which has been, is being or may be caused by the activity or activities.<sup>164</sup>

As seen, consideration is given to socio-economic factors. This particular consideration takes cognisance of the fact that development cannot just be sensitive to the surrounding environment but also needs to consider how the development can impact any surrounding communities and their quality of life.

#### 4.4.3. Repeat offenders

Regulation 9 deals specifically with repeat offenders. In the past, repeat offenders did not receive harsher penalties for their continuous offences. In Regulation 9, repeat offenders automatically receive the maximum as prescribed by NEMA.<sup>165</sup> The Regulation implies that, regardless of the circumstances or nature of the action, the applicant 'should have known better'.

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<sup>158</sup> For a comparison on the differences between individual applicants and corporate applicants, see Business Day 'Owner of west coast beach house ordered to pay fine, as seven-year saga drags on' 2019 <https://www.businesslive.co.za/bd/national/2019-01-07-owner-of-west-coast-beach-house-ordered-to-pay-fine-as-seven-year-saga-drags-on/> (accessed: 26 January 2019), wherein the individual applicant was charged R175 000 fine and CER 'Zero Hour' 2016 <https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf> (accessed 26 January 2019) 81 wherein Bosveld Phosphates (Pty) Ltd was fined R1 million for its contravention with NEMA.

<sup>159</sup> When regarding the economic disparities between applicants, considerations such as BBBEE levels cannot be argued to be the sole determining factor. The reason for this, is that, should a heavy-weight mining company be a Level 1 or Level 2 BBBEE status, the applicant should not receive a lower fine on that basis alone, especially if communities who have been negatively affected are also predominantly non-white.

<sup>160</sup> Reg 4(1)(c) July 2017 Regulations states the nature of the impacts to be considered.

<sup>161</sup> Reg 4(1)(c)(i) July 2017 Regulations.

<sup>162</sup> Reg 4(1)(c)(ii) July 2017 Regulations.

<sup>163</sup> Reg 4(1)(c)(iii) July 2017 Regulations.

<sup>164</sup> Reg 4(1)(c)(iv) July 2017 Regulations.

<sup>165</sup> Reg 9(1) July 2017 Regulations states: 'Where an application is submitted by a repeat contravener, the fine committee must, notwithstanding the quantum calculated pursuant to

#### 4.4.4. Public participation

As discussed above, public participation and hearing the voices of the previously disadvantaged is a point of sustainable development that should be considered inherent when dealing with development. When considering development, it is imperative to give an opportunity to the surrounding community to have their voices heard. By hearing the grievances and opinions of the surrounding community, it will provide for the opportunity to give a voice to the previously disadvantaged to ad historically been overlooked.

Regulations 6 and 8 deal with public participation in a substantial way. Before a Section 24G application is made is the relevant authority, the applicant must advertise their upcoming application in a local newspaper<sup>166</sup> and on their own website that they have already commenced with a listed activity without the relevant approval and are in the process of applying for *ex post facto* approval.<sup>167</sup> In addition to this information, in these advertisements, the applicant must provide the activities that have been commenced and which laws have been contravened.<sup>168</sup>

Once the decision of the fine committee has been made and communicated to the applicant, the applicant must inform all interested and affected parties of the decision.<sup>169</sup> It is also stated that all interested and affected parties must be allowed to be informed of the fine and the reasons furnished therein. It must be highlighted that these communications do not have to be made within a specific time frame.

Regulation 10 provides that it is an offence to give false or misleading information or to give information that 'may have an influence on the outcome of a recommendation' of the Fine Committee or the determination of competent

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Regulation 4, recommend to the competent authority that the applicant pay the maximum fine amount as specified in section 24G(4) of the Act.' Currently, the prescribed amount is R10 million.

<sup>166</sup> Reg 8(1)(a) July 2017 Regulations.

<sup>167</sup> Reg 8(1)(b) July 2017 Regulations.

<sup>168</sup> Regs 6 & 8 July 2017 Regulations.

<sup>169</sup> *Ibid.*

authority.<sup>170</sup> This would, by intention, include any omission of relevant information that could have a similar impact on the Fine Committee or the competent authority.

#### **4.5. Discussion**

The above indicates a variety of promising steps which have been taken in order to address systemic issues with Section 24G. By having dedicated teams to analyse the applicant's financial means, access to resources such as legal advice and financial capital, it will allow for the relevant authority to make better informed decisions.

The improved methods of public participation which has been provided for, is encouraging. Rigorous and comprehensive systems are necessary in order for previously disadvantaged communities to have their voices heard and have a meaningful impact on developmental issues. By ensuring consultation with local communities, development can begin to properly the environmental legacies of Apartheid.

It is therefore pleasing to see that the 2017 Regulations have indeed taken a step in the right direction with addressing public participation. Through these regulations which have enforced information to be at the disposal of the public, including previous offences, speaks to the inclusion of communities which could be impacted by the granting of retroactive authorisation. Furthermore, by compelling applicants to disclose all prior offences will further assist with transparency for the general public.

##### *4.5.1. Critiques and suggestions*

An issue must be raised with the 'automation' of this fine. While there is 'no excuse' for contravening the law, a potential issue must be raised that R10 000 000.00 may simply be too large a fine for most companies, even exceptionally large companies and /or developers.

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<sup>170</sup> Reg 10(1)(b) of July 2017 Regulations states: '... provides incorrect or misleading information in any form, including any document submitted in terms of these Regulations to a competent authority or omits information that may have an influence on the outcome of a decision of a competent authority.'

Further issues to be raised with the automatic fine, is that the regulations do not provide for how this would be paid. In the instance of 'once off' payments, this could potentially force a business to close its doors, or have retrenchment rollouts. In the instance of a construction company, would the retrenchment of a labourer who is uneducated, not in itself be contrary to sustainable development? Should a fine be contrary to economic growth, this could, by extension, be contrary to sustainable development. Furthermore, should the fine applicable be paid in instalments, would this debt then be considered a regular debt owed to the Department of Environmental Affairs (DEA), and therefore include interest on the debt?

As a recommendation, manuals and / or guidelines need to be made available on the national and all provincial environmental department websites, wherein it is made explicit of how fines are to be treated and / or paid by the applicant.

Another question arises when compensation of communities are taken into consideration. In other words, when a fine is paid, do the negatively impacted communities receive any form of compensation for the damage suffered?

However, the problem remains that these regulations do not go to the heart of the problem – the issue of preventable damage having been inflicted on the environment unnecessarily. These regulations further fail to address how poorer communities are negatively impacted permanently by a situation wherein the damage has already been inflicted. Thus, the problem still remains that the activity itself has still caused environmental harm and thereby inflicted on the environment of the local community.

#### **4.6. Conclusion**

Section 24G brings illicit activities back into the realm of legality. Currently, Section 24G still allows for systemic exploitation by developers as a quick fix for their illicit activities.

Millions of rural South Africans rely on the natural resources at their disposal to act 'as a buffer against poverty'.<sup>171</sup> The protection of these natural resources is imperative for the sustained livelihood of many South Africans. But when we have

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<sup>171</sup> Wynberg (*supra* n 115) 234.

illicit development which received the equivalent of a slap on the wrist for offences, it hinders the right to a healthy environment for these poorer communities. By allowing for retroactive authorisation, this brings uncertainty to those who are reliant on natural resources for their livelihoods.

Examples of this can be seen from actual applications submitted to the Department of Environmental Affairs. In the example provided above, the illegal use of tapping into the Orange River for farming irrigation purposes, can dire consequences on an already water-scarce environment.

Relevant authorities cannot make informed decisions if their decisions are made on the understanding of a certain scenario is present before them. Such an example could be made from the application used above regarding the irrigation facilities. Should a neighbouring farm upstream or downstream decide to apply for water licenses for his or her irrigation purposes, the relevant authority may erroneously grant the relevant licenses and authorities on the incorrect belief that no other farmer is also using water.<sup>172</sup> This then would lead to an over use of the river's freshwater resources. Over use of the resource could negatively impact small communities which rely on the dam for a source of not only water, but income.<sup>173</sup>

This is merely to demonstrate that illicit activities can have a severe impact if the relevant authority is not fully aware of the true situation before him or her.

Several encouraging regulations have been passed which will improve the status of the Section. For example, the Regulations provide for far more transparency and public participation. By bringing in community engagement and public participation, and even further compelling the applicant for full disclosure to

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<sup>172</sup> In an instance of 'first-come, first-serve basis; this would not necessarily be the recommended option. In an instance of 'first come, first-serve basis, such a mind-set would be easily abused in order for the status quo to be entrenched. By allowing for 'new comers' to apply for developmental rights (in this instance, water uses), this would be mindful of young developers who have only recently found the necessary capital to 'set up shop'. It is acknowledged, however, that it cannot be logically argued that the granting of certain licenses and authorisations should be refused on the premise of 'potential future applicants'. Such a refusal would be irrational and economically unfair on current applicants.

<sup>173</sup> Should a community's right to water be compromised, this will impact on the right to water in terms of Section 27 of the Constitution.

the public, positively reinforces the idea that the voices of those who previously had no say in developmental issues, are now heard.

The further creation of the specific fines committee is an encouraging step. The fact that there will be a dedicated committee to review the applications will ensure that larger developers who have access to financial capital, legal advice and such will receive heavier fines. In a view of equity, it is beneficial for applicants to not be treated the same.

Furthermore, the creation of an automatic R10 million fine acts as a good hindrance to those who wish to not comply with the law initially for a second time. This has the potential to act as an excellent deterrent for those who are inclined to contravene the law.

Certain issues regarding the matter of the automation of the fine, the amount for the automatic fine and the lack of compensation received by the affected communities have been identified as current issues with Section 24G and its new regulations.

## **CHAPTER 5: CONCLUSION**

### **5.1. Introduction**

This study set out to focus on understanding sustainable development in a more nuanced manner. By focussing on the unique situation of South Africa, and its particular history of Apartheid, this dissertation aimed to establish a more historically and socially conscious understanding of sustainable development – with a particular focus on the legacy of Apartheid’s destructive environmental laws.

By establishing how sustainable development should be contextualised to South Africa’s unique situation, it was then necessary to observe what hinders this understanding of sustainable development. Section 24G of NEMA was identified as such a hindrance. The section works contrary to the goal of an anticipatory form of an environmental system, by allowing for those who have contravened the law, to abuse the loophole created, and bring their illicit activity back into the realm of legality.

In a move to answer the primary question posed from the onset of this dissertation, the secondary questions shall now be addressed.

### **5.2. Defining sustainable development in South Africa**

Sustainable development can be interpreted through several perspectives, which were discussed in Chapter 2 above. These differing perspectives include environmental, social and economic views. These differing perspectives can often shape the focus of development by prioritising different considerations at the expense other considerations.

It was submitted that a social perspective of sustainable development be adopted in South Africa. Such a perspective will allow for the proper consideration of South Africa’s unique history of Apartheid and the lingering impacts thereof. It was further submitted that, as part of a social perspective, comprehensive community engagement and grass roots level involvement be considered paramount to development. By conversing in such a manner, development will take into account the environmental and social needs of the surrounding and impacted

communities. By meeting the social needs of the community, the basic needs of the community will be met.

### **5.3. Section 24G and the legislative framework in which it operates**

The IEM system is the environmental management system, which promotes the consideration of environmental impacts prior to development taking place. In doing so, the system advocates for the consideration of multiple factors, which include consultations with, and the inclusion of, surrounding and local communities.

As a tool of the IEM system, EIAs are meant to be conducted prior to development in order to mitigate unnecessary harm to the environment. As a preventative measure in force, EIAs can aid the wider goal of socially sustainable development in South Africa.

Listed activities are those which require governmental authorisation prior to development commencing. To commence such an activity without the necessary authorisations constitutes an offence.

When a developer commences such an activity, section 24G is triggered. Once the application is submitted, the relevant authority may grant the necessary authorisation or direct the applicant to wholly or partially rehabilitate the environment.

As discussed above, it is evident that monetary fines do not act as an effective deterrent for developers from proceeding with developments without the necessary authorisations. Research has indicated that fines were too small to be of consequence to shareholders or were accommodated for in budgets. While the 2017 Regulations have attempted to address these problems, particularly with a 'sliding scale' for fines and creation of the fine committees, it is yet to be seen whether these Regulations will indeed achieve the desired effect.

The recent 2017 Regulations have attempted to address several issues with Section 24G, such as the automatic R10 million fine for repeat offenders, the fine committee, increased focus on transparency for affected communities and

increased public participation, While these steps are indeed improvements, they still do not address the issues of poor communities being negatively impacted.

#### **5.4. Section 24G and its impact sustainable development**

The Constitution provides the right to a healthy environment. This right is effected by the overarching IEM system, which is implemented as an integrated management system which considers multiple factors when dealing with development.

By allowing developers to ignore due process of EIAs and SIAs, section 24G provides an opportunity for developers to ignore the basic needs of the impacted community and to circumvent being held truly for their actions.

#### **5.5. Conclusion**

This study purported to address the question of whether section 24G of NEMA positively or negatively impacted on sustainable development in South Africa.

It was submitted that sustainable development should be used as a means to address the lingering effects of Apartheid legislation, which often resulted in the degradation of environments for the majority of the South African population. Sustainable development should therefore be viewed from a social perspective, wherein the basic needs of the community are addressed when considering developmental issues.

Section 24G allows for developers to evade due process of EIAs and SIAs, and thus disregard environmental protection and consideration to the affected communities' needs. The section perpetuates an unsustainable form of development wherein communities who were shunted by the Apartheid regime, continue to be so.

The lack of addressing the basic needs of these communities infringes of the right to a healthy environment for these community members. This infringement is contrary to a constitutional right and furthermore, developmentally

unsustainable. In conclusion, section 24G of NEMA detracts from the goal of sustainable development in South Africa.

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