

GREENING THE JUDICIARY*

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1 Introduction

Much of South Africa's environmental law is relatively new. Most of South Africa's judges received their formal legal educations before promulgation of the major part of our environmental law and almost certainly before environmental law was taught at universities.¹ In recent years, there have been increasing instances of cases involving environmental matters coming to the courts. How are judges performing in these cases? It would appear that the judges' performance is rather 'chequered' in environmental cases, which suggests that the judiciary needs to become more attuned to environmental law. I call this process, for purposes of this note, 'greening the judiciary'. What I mean by this is not that judges must decide all environmental cases in a way that favours the environment, but that they must correctly consider, interpret and apply the relevant environmental law, and give environmental considerations appropriate deliberation. This note aims to identify, in admittedly somewhat general terms, the current state of environmental decision-making by judges and to suggest what needs to happen for such decisions to be improved.

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1 Environmental law has been taught at some South African universities since the early 1990s. By 2006, most universities are teaching it.

2 An overview of decided cases

In 1999, the Supreme Court of Appeal in the case of *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*² stated that:

Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication, requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.

Environmental lawyers heralded this decision as a beacon to light the way to future environmental decisions.

Two years later, these same lawyers may have been forgiven for thinking that the court in the SAVE case had been issuing its pronouncements in a vacuum. The reason for this observation is two decisions: one by the Constitutional Court in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*³ and the other by the Durban and Coast Local Division in *Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs and others*.⁴

In Kyalami, the Constitutional Court, in probably the first significant case in which the *National Environmental Management Act (NEMA)*⁵ required consideration, got it plain wrong. First, the court (per Chaskalson P) suggests that *NEMA* revolves around the environmental implementation and management plans, ignoring the fact that these are one of many components of

2 *Director: Mineral Development, Gauteng Region and Sasol Mining v SAVE* 1999 2 SA 709 (SCA). (Hereafter: SAVE case).

3 *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC). (Hereafter: Kyalami case).

4 *Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs* Unreported case no 2691/01 (D). (Hereafter: Merebank case).

5 *National Environmental Management Act* 107 of 1998.

the Act which are not any more important than the other components, which the court describes as 'various other provisions'.⁶ The court goes on to find that the environmental management principles in section 2 are not directed at "controlling the manner in which organs of state use their property". As I have argued elsewhere –

...that the principles *are* directed at the manner in which organs of state use their property and, indeed, do anything that could affect the environment, could not be clearer from the wording of section 2(1).⁷

Further flawed interpretation by the court of section 2 of *NEMA* includes the failure to find that the principles can be applied in a dispute –

...between members of the public and the government concerning activities that are not regulated by environmental implementation plans or other provisions formulated under [*NEMA*]...

– and the finding that section 2 applies to activities that 'will' significantly affect the environment, rather than those that *may* do so, which is a critical difference.

It could have been that the court deliberately misconstrued *NEMA* in order to ensure that its decision was the socially and politically appropriate one to reach in the circumstances. Whether this was the explanation or whether the flawed interpretation was due to plain and simple judicial error is not clear, but one expects a lot more from the highest court in the land.

Expectations from a single judge in the Durban and Coast Local Division, on the other hand, may not be as high, but one still expects a judge to know what the law is. In the Merebank case, the court (Magid j) completely ignored section 32 of *NEMA* insofar as it applied to both the applicant's *locus standi* and the

6 Ch 3 of *NEMA* provides for co-operative governance in the sphere of the environment, requiring government departments to submit environmental implementation plans (those plans to be submitted by departments exercising functions which may affect the environment) or environmental management plans (those plans required by departments exercising functions involving the management of the environment). The submission, scrutiny and status of these plans is addressed by ch 3 alone, which is one of ten chapters in the Act.

7 Own emphasis, Kidd 2001 *SAJELP* 119-127.

award of costs.⁸ Bearing in mind that *NEMA* has been in force since 1 January 1999, this is also inexcusable. There is, of course, the possibility that the relevant section was not brought to the court's attention by counsel. We will return to this issue later.

More recently, several judgments have begun to claw back the gains made by SAVE that were subsequently pegged back in *Kyalami and Merebank*.⁹ For example, in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,¹⁰ CJ Claassen j, in a clear and well-reasoned decision, reaches the conclusion that it is 'abundantly clear' that the consideration of socio-economic factors is an integral part of the respondent's

8 S 32 of *NEMA* reads:

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources —
 - (a) in that person's or group of person's own interest;
 - (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
 - (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
 - (d) in the public interest; and
 - (e) in the interest of protecting the environment.
- (2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.
- (3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act or any other statutory provision concerned with the protection of the environment, a court may on application —
 - (a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and
 - (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.

9 Note that it is not the intention of this note to comment on every decision which could be labeled 'environmental' – only those which assist in supporting the argument raised in this note.

10 *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (T). (Hereafter: BP case).

environmental responsibility.¹¹ In reaching this conclusion, the court considers the requirements of the *Constitution of the Republic of South Africa*¹² (particularly section 24), and the relevant legislation. Significantly, it does not follow the Constitutional Court's narrow conception of the *NEMA* principles, holding that the respondent must:

...promote sustainable development, which requires consideration of all relevant factors, including a minimisation of degradation of the environment if it cannot altogether be avoided, a risk-averse and cautious approach about the future consequences of decisions and actions taking account of the limits of current knowledge.¹³

This decision was followed by the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*.¹⁴ In this judgment the court emphasised that:

...of particular importance is *NEMA*'s injunction that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles. At the heart of these is the principle of 'sustainable development' which requires organs of state to evaluate the 'social, economic and environmental impacts of activities'.¹⁵

There are still decisions, however, where the courts appear to be strangers to relevant environmental legislation. In *All the Best Trading CC t/a Parkville Motors and Others v SN Nayagar Property Development and Construction CC and Others*,¹⁶ Patel J considers the *locus standi* of the applicants and holds, in essence, that an applicant seeking to protect its commercial interest may not rely upon environmental legislation in order to do so.¹⁷ This would appear to fly in the face of the finding in the BP-case that socio-economic considerations are

11 At 151E.

12 *Constitution of the Republic of South Africa* 1996. (Hereafter: the Constitution).

13 At 150H-151A.

14 *MEC for Agriculture, Conservation, Environment and Land Affairs v SASOL* Unreported case no 368/04 (SCA) judgment delivered 16 September 2005. (Hereafter: SASOL case).

15 Par [15].

16 *All the Best Trading CC t/a Parkville Motors v SN Nayagar Property Development and Construction* 2005 3 SA 396 (T). (Hereafter: All the Best case).

17 In this case the applicant, a filling station owner, was opposing the development of what would be a competing filling station nearby.

an integral part of environmental decision-making. What is of most concern about this judgment, however, is that the issue of the applicant's *locus standi* is decided with no reference whatsoever to section 32 of *NEMA*. That section provides that:

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

(a) in that person's or group of person's own interest...¹⁸

The section does not refer to a person's own *environmental* interest, and it would appear, therefore, on an interpretation of the plain language of the Act, that an applicant seeking to protect a commercial interest who was applying to the court for review of a decision authorised by environmental legislation ('any statutory provision concerned with the protection of the environment or the use of natural resources') would have *locus standi* on the basis of this section. This interpretation also accords with the purposive context of the Act. Even if this interpretation is wrong, the fact that the court completely ignored a provision which could be directly in point is unacceptable.

A similar accusing finger could be pointed at the judgment in *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd*¹⁹ Claassen j finds differently to the court in *All the Best* in essentially the same factual situation, holding that an applicant seeking to challenge the development of a competitor (again a filling station) does have *locus standi* to challenge the development on environmental grounds due to the inclusion of socio-economic considerations in *NEMA* and the *Environment Conservation Act*.²⁰ Yet, despite finding, correctly, in favour of the applicant, such a decision could have been

18 Emphasis added.

19 *Capital Park Motors v Shell South Africa Marketing* Unreported case no 3016/05 (T). (Hereafter: *Capital Park Motors* case).

20 *Environment Conservation Act* 73 of 1989. Par [17].

made far quicker by reliance on section 32 of *NEMA*, which, once again, was not considered at all.

It is not only the failure to consider environmental provisions which is apparent in certain decisions, but there are others where the relevant provision has been considered but misinterpreted. In *Bareki NO and Another v Gencor Ltd and Others*,²¹ section 28 of *NEMA*, an important (albeit flawed), provision relating to the duty of care in respect of the environment was judicially considered for the first time. Unfortunately, the court got it wrong. It is beyond the scope of this note to analyse this judgment in detail (and I am sure that, given its importance, the judgment will receive critical analysis by others). In short, the court held that the duty of care required by the section (and the liability which flows from failure to comply with that duty), does not operate retrospectively (that is, before the date on which the Act came into effect). Most environmental lawyers were shocked by this decision, since it seems perfectly clear that the section does operate retrospectively. Not only does this interpretation (that is, the one which the court did not reach) rest on the plain meaning of the words used by the legislature –

...every person who causes, *has caused* or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring...²²

– but it can be argued compellingly that the national environmental management principles set out in section 2 of *NEMA* would require such an interpretation. These principles include (at least) the following principles which would support this approach:

- The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health

²¹ *Bareki v Gencor* 2006 1 SA 432 (T). (Hereafter: Bareki case).

²² S 28(1), emphasis added.

effects must be paid for by those responsible for harming the environment.²³

- Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.²⁴
- 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.²⁵

3 Environmental decision-making by the courts in future

These judicial shortcomings are, in all likelihood, not solely the fault of the judges however. It is probable that the reason why these provisions were not considered is that counsel did not bring them to the courts' attention. In light of this, I would argue strongly that the greening of the judiciary is not achievable, certainly not in any comprehensive sense, unless legal practitioners also are more closely exposed to the burgeoning body of environmental law, which is beginning to permeate many more 'traditional' areas of law.

The situation at present then, is that, despite the appearance of several recent decisions which are disappointing from an environmental perspective, there are other cases where favourable decisions are being reached. But where do we go from here? The greening of the judiciary can be likened to a computer game where the player has to master successfully one level in order to proceed onto the next, more challenging, level.²⁶ The first level in the 'game' of greening the judiciary will be achieved once there is more consistency in the courts' correctly

23 S 2(4)(p).

24 S 2(4)(e).

25 S 2(4)(c).

26 This analogy ought not to be interpreted as suggesting that the judging of cases is a trivial pastime – far from it!

considering, interpreting and applying environmental law. As illustrated above, there still are examples where this is clearly not happening.

Once this stage is reached, what, then, will the more challenging next level entail? One could reasonably expect that the next level would involve decisions in matters other than the authorisation of service stations.²⁷ More seriously though, in order to determine the nature of the next level, let us consider the nature of the cases that are currently being decided. It is evident that the vast majority of cases that could be classified as environmental law cases in recent years have been decided on the basis of administrative law principles. In several, the environmental context is peripheral. In *South Durban Community Environmental Alliance v Head of Department: Department of Agriculture and Environmental Affairs, KwaZulu-Natal and Others*,²⁸ the decision of the Department was grossly defective, from the point of view of formal compliance with the empowering legislation. The fact that the impugned decision concerned an environmental authorisation was incidental.

Similarly, in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*,²⁹ a highly controversial decision on an environmental authorisation was set aside on the basis of failure of *audi alteram partem*. The environmental nature of the administrative decision was not germane to the court's decision. This was also highlighted in *Lloyd and Others v The Premier, Eastern Cape Province and Others*,³⁰ where Froneman J decided the case on administrative law grounds, finding it unnecessary to –

27 These cases all concern the authorisation of service stations: *All the Best Trading CC t/a Parkville Motors v SN Nayagar Property Development and Construction* 2005 3 SA 396 (T); *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (T); *MEC for Agriculture, Conservation, Environment and Land Affairs v SASOL* Unreported case no 368/04 (SCA); and *Capital Park Motors v Shell South Africa Marketing* Unreported case no 3016/05 (T).

28 *South Durban Community Environmental Alliance v Head of Department: Department of Agriculture and Environmental Affairs, KwaZulu-Natal* 2003 6 SA 631 (D).

29 *Earthlife Africa (Cape Town) v Director-General: DEAT* 2005 3 SA 156 (C).

30 *Lloyd v The Premier, Eastern Cape Province* Unreported case no 333/2004 (E). (Hereafter: Lloyd case).

...express any views on many of the interesting novel and environmental issues raised and debated by counsel in argument.³¹

One would hope that administrators will, over time, become more *au fait* with the requirements of administrative justice. The consequence of this is that persons aggrieved by their decisions will not be able to challenge them as easily. It may be, however, that this is a naïve expectation and that some administrators will inevitably fail to comply with the letter of the law, or fail to provide everybody an opportunity to be heard, or reach an invalid decision on the basis of whatever other failure of administrative legality. When these cases come to the courts, these will, in my view, always be part of the first level of the game.

Where, however, the administrators become more astute at complying with the requirements of administrative justice, those people wishing to challenge the decisions will need to become more creative and will be entitled to expect the courts to be operating at the next level as well. I will use a real-life example to illustrate where this thesis is heading. In the case of the N2 toll road through Pondoland, the Minister of Environmental Affairs and Tourism was faced with numerous appeals against the decision to authorise construction of the road in a highly sensitive environment.³² It is clear that many of the grounds of appeal were based on the merits of the decision, which would have involved environmental considerations of a scientific, technical kind. The Minister decided to set the decision aside because a member of the team who carried out the impact assessment, required to be independent by the applicable legislation, was a director of the company who would build the road. This was a shrewd decision because it did not require any consideration of the merits, allowing the developers a second chance to go through the authorisation process. The Minister essentially set the decision aside on review rather than allowing an appeal.

31 Par [7].

32 The original authorisation was made in terms of s 22 of the *Environment Conservation Act* 73 of 1989.

Had the decision not been tainted by this defect (and assuming there were no other administrative law grounds of review relating to lawfulness or procedural fairness present), and the Minister had not been swayed by the arguments on the merits, disallowing the appeal, where could the opponents of the road go next? Were they to challenge the decision on review in the High Court, the distinction between appeal and review, which is still very much part of our law,³³ would mean that the court could not decide whether the decision was incorrect on the merits. The opponents would be confined to challenge the reasonableness or rationality of the decision. This is well illustrated in the case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and others*,³⁴ where Leach J states that:

Pollution is therefore a complex, technical and scientific issue, which raises questions that can only be answered properly with insight into detailed scientific knowledge and information. It is presumably for this reason that certain functionaries, who hopefully are possessed of the necessary scientific background, have been appointed by the Legislature in order to weigh up all the relevant information necessary to enable them to take informed decisions on matters of scientific import, including the issue of a certificate for a scheduled process and the conditions which should apply thereto. Indeed the Legislature in s 6(3) of [the *Atmospheric Pollution Prevention Act 45 of 1965*] prescribes the [Chief Air Pollution Control Officer] to be a person ' . . . who (is) technically qualified to exercise control over atmospheric pollution by virtue of (his) academic training in the natural sciences or engineering and (his) practical experience in industry together with a knowledge of the problems concerning atmospheric pollution related thereto'. These functionaries are pre-eminently the persons who should take the decision which the applicant has now called upon this Court to make, viz whether the first respondent should be obliged to stop its operations. Without it being shown that the functionaries concerned have not exercised the discretion vested in them by the Legislature reasonably and properly, this Court would probably not be prepared to interfere by granting an order effectively usurping their powers and functions.³⁵

33 *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) par [45]: "Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies."

34 *Hichange Investments v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E).

35 At 412.

Whilst deciding whether a decision is reasonable or rational is not the same as deciding whether it is correct on the merits, the merits nevertheless play a very important role in the determination of reasonableness or rationality.

If the courts are to make a decent fist of deciding such matters, judges will have to appreciate the many, and often complex, scientific aspects of these decisions. They are not being asked to do so yet, because almost inevitably, there is a ground of review other than reasonableness or rationality present.³⁶ Environmentally sound decisions, based on appreciation of the scientific merits, will require judges to 'graduate' to the next level of the game, where the further challenge will be to augment their legal skills with the skills necessary to grasp the essence of the relevant science.

But is this really necessary? It may be argued that the very reason for the distinction between review and appeal is that judges are experts in law and not in the subject matter of administrative decision-making. As Justice Stevens states in the recent United States Supreme Court decision of *Rapanos v United States*:

...one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present case (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law.³⁷

Nor are judges expected to be experts in that subject matter. While this may be true up to a point, the danger of taking this view too far is that we run the risk of judges inevitably deferring to administrative decisions when they involve technical or scientific elements of any complexity. This would, in many cases, be detrimental to the environment and ultimately undermine the constitutional

36 This is somewhat of a generalisation. In the SASOL case, the SCA considered the rationality of guidelines relating to the siting of service stations and the authorisation of such service stations. The relevant considerations in this case, however, were not of a complex or especially technical nature.

37 *Rapanos v United States* 547 US (2006).

right in section 24 and the principles of sustainable development. My argument is not that the judges ought to be asked to decide these cases on the merits, but assessment of whether the decisions are reasonable or rational will entail a certain familiarity with the relevant technical and/or scientific considerations.

4 Conclusion

We must not expect the judges to embark upon, let alone master, the second level alone. They must be guided by argument raised by counsel and it is therefore critical that environmental lawyers embrace the scientific dimensions of environmental decision-making as well. In the Lloyd case, Froneman j observed that –

...it is time for practitioners to realize that a more detailed acquaintance with the [*Promotion of Administrative Justice*] Act [3 of 2000] is needed in applications to review administrative action, and to reflect that acquired knowledge in the manner in which review applications are brought before court.³⁸

Much the same thing could be said about judges and legal practitioners, in respect of both environmental law and, as I have argued, the scientific underpinnings of environmental law. The development of a coherent and robust South African environmental jurisprudence depends on it.

38 *Lloyd v The Premier, Eastern Cape Province* Unreported case no 333/2004 (E) at par [16].

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List of abbreviations

ch	chapter
DEAT	Department of Environmental Affairs and Tourism
NEMA	<i>National Environmental Management Act</i>
PAJA	<i>Promotion of Administrative Justice Act</i>
par	paragraph
s	section