

ENVIRONMENTAL LAW

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ABSTRACT

The highlights of this issue are discussion of two new cases, one (the *Swartland* case) dealing with the relationship between minerals legislation and provincial land use planning legislation and the other (the *Sea Front for All* case) dealing with a review of an environmental authorization. Also particularly noteworthy is the publication of a draft national strategy for sustainable development.

1. INTRODUCTION

This issue will discuss developments during the period 17 April 2010 to 21 May 2010.

2. NEW LEGISLATION

There was no new legislation during the review period.

3. PROVINCIAL LEGISLATION

There is no new provincial legislation. The commencement date of the KwaZulu-Natal Planning and Development Act 6 of 2008 was published as 1 May 2010, except for Chapters 6, 10 and 11, item 15 of Schedule 2 and Schedule 5 of the Act and Chapters 1, 8, 9, and 12 and Schedule 1 of the Act in as far as it relates to the alteration, suspension and deletion of restrictions relating to land; the KwaZulu-Natal Planning and Development Appeal Tribunal and provincial planning and development norms and standards, that came into operation on 1 March 2009; the repeal of Chapter 1 of the Town Planning Ordinance 27 of 1949 relating to the KwaZulu-Natal Planning and Development Commission which will come into operation on 7 November 2010; section 89(3), 161(1) and the repeal of the provisions of the Town Planning Ordinance 27 of 1949 relating to applications for special consent as contemplated in section 67*bis* of the Ordinance (PN 54 in PG 424 of 22 April 2010).

4. BILLS

The Free State Nature Conservation Bill has been published for comment (PG 23 of 7 May 2010). On an initial perusal, the Bill contains no surprises and deals with the

following issues: provincial protected species; captivity, keeping and protecting of wild animals; alien and restricted species; fish; hunting; professional hunting; damage-causing animals; specialized utilization of biodiversity (which deals with rehabilitation, sanctuary of wild animals and handling etc of raptors); conservation of biodiversity and voluntary collective management of the environment (which contains a variety of provisions including conservation of wetlands and facilitation of collective management efforts); and enforcement.

5. ENVIRONMENTAL LAW CASES

Swartland Municipality v Louw NO and others unreported Case 13703/9 (WC)

Judgment in this case was delivered on 21 December 2009 (La Grange J). The central issue in this was whether the issue of mining rights in terms of the Minerals and Petroleum Resources Development Act (MPRDA) resulted in the owners of the land being exempt from applying for a change in land use in terms of the Western Cape Land Use and Planning Ordinance (LUPO). The applicant sought an interdict preventing the fifth respondent (Elsana Quarry (Pty) Ltd) from continuing mining activities on a farm within the applicant's jurisdiction that had not been properly rezoned from Agricultural I to Industrial III (which permits mining) in terms of the relevant scheme under the LUPO.

From the facts it appeared that Elsana had submitted a rezoning application, but had withdrawn this when advised (in effect) by the Department of Minerals that this was unnecessary, since (in the LUPO's ability to regulate mining as a land use is constitutionally impermissible.

Applicant's view was that LUPO was 'relevant law' applying to mining operations, which was thus required by the MPRDA to be observed (see sections 23(6) and 25(2)(d), which subject the holder of a mining right to observe any relevant law. The argument of the respondents was that the functional area of mining and minerals being an area of exclusive national competence, the MPRDA's reference to 'relevant law' did not include LUPO, since LUPO is inconsistent with the MPRDA and Constitution. The Court decided that, in the light of the municipality's responsibilities in respect of municipal

planning, and the fact that the LUPO was in existence at the time that the MPRDA was promulgated, that LUPO was a 'relevant law' as contemplated by the MPRDA.

The Court then turned to the question as to whether there was a conflict between the MPRDA and LUPO, requiring resolution in terms of s 146 of the Constitution. The Court considered that the planning role of the Municipality (as regulated by LUPO) is required by the Constitution, and hence there was no question of LUPO being unconstitutional. The Court also held that LUPO does not unlawfully intrude into the area of national competence – viz. mining. Rezoning, according to the Court (para 38) -

'can ... not be regarded as a matter connected to the issuing of mineral rights to such an extent that it is also regulated thereby and in fact renders provincial and municipal planning legislation as provided for constitutionally, superfluous. The MPRDA is silent on the issue of rezoning. The MPRDA can therefore not be read as impliedly having repealed legislation with LUPO's character and aim'.

The Court also indicated that, 'given the fact that the object and focus of the MPRDA and LUPO are not the same, as well as the fact that provincial and local spheres of government are given considerable constitutional latitude to regulate areas of interests, the impact of which can only be locally determined, the MPRDA cannot be regarded as water-tight to the exclusion of relevant zoning legislation' (at para 41).

Consequently, the Court granted the interdict. In my view, this judgment cannot be faulted. Unfortunately, the facts set out in this judgment are indicative of an apparent trend on the part of the Department of Mineral Resources (as it now is) to regard the MPRDA as trumping all other legislation. This case goes some way to disabusing the department of that view, but there is much still to be done in this regard.

Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government unreported Case 15974/07 (WC)

Judgment in this case was handed down on 26 March 2010 (per Fourie J, S Desai J concurring). It concerned a review of an environmental authorization (in terms of the Environment Conservation Act requirements) of the proposed redevelopment of the Seapoint Pavilion site in Cape Town, such development incorporating a hotel and retail

centre that would extend onto the beach. There was a favourable decision (ROD) in 2007, which was taken on internal appeal to the MEC, who upheld the decision. There were five grounds of review (para [12]):

- The MEC failed to consider alternatives to the proposed development, as the ECA required her to do.
- The MEC relied on an expert report co-authored by a party, Commlife Properties, which had an undisclosed financial interest in the approval sought.
- The MEC's decision was based on information that was in material respects out of date.
- The MEC took her decision on the basis of materially incorrect information, concerning the extent of loss of open space and the consequences of the proposed development for traffic and parking.
- The MEC failed to undertake the balancing exercise required of her in terms of the ECA, namely to weigh up the need for the proposed development against any adverse impact on the environment, particularly the loss of open space.

Before considering the grounds of review, the Court decided that the appeal decision to the MEC was a wide appeal, essentially a hearing *de novo*, and that consequently the decision under challenge was the MEC's decision on the appeal, not the original ROD. This finding accords with the wealth of opinion of which I am aware on the nature of the appeal provided for in the ECA.

The first ground of review concerned the alleged failure of the MEC to consider alternatives to the proposed development. The Court proceeded on the basis that it was a mandatory requirement (in terms of s 22(2) of the ECA and the relevant regulations) to consider the alternatives to the development, including the so-called 'no-go' option. On the facts, it appeared that the relevant reports did not consider all alternatives, except for three design options provided by the developer. The 'no-go' option was not considered at all. The Court highlighted the importance of public open space (which the land in question was), which in turn emphasized how important consideration of the no-go option is. Consequently the Court decided that the decision be set aside as the MEC had failed to

comply with a material and mandatory condition of the ECA (the consideration of alternatives) and that her decision had been influenced by an error of law, in that the MEC had misunderstood her obligation to consider information and reports on alternative land uses.

Although this would be determinative of the matter, the Court dealt with two of the other grounds of review. The first was the reliance on the Commlife report (Commlife having an interest in the outcome of the process). One of the legal requirements (in terms of the relevant regulations) is that a developer appoints an independent consultant to conduct the environmental impact assessment (in the wider sense of the expression) process and prepare the necessary reports. Although Commlife (a property specialist) was not the primary consultant, it prepared an economic report upon which the consultant relied in the scoping report. On the facts, the Court held that Commlife did not have the requisite degree of independence. In reaching this decision, the Court decided that the independence requirement did not apply only to the consultant, but also to any specialist that the consultant utilized. This was, consequently, another material and mandatory condition that had not been complied with.

The third ground considered by the Court was that relating to changed circumstances. The MEC's decision was taken three years after the issuing of the original ROD, and it was based on the scoping report that had been completed more than four years before. The applicants argued that it was incumbent on the MEC to decide the case on the basis of current information relating to social, economic and environmental impacts and not outdated information. On the MEC's own version, she did not consider any new information. In deciding whether there were material changes in conditions, the Court had regard to a report by the developer's experts to the effect that there had been noteworthy socio-economic changes (what could be described as urban renewal) in the area, and decided that the MEC was remiss in not considering the changes in circumstances. The Court concluded that (para [75]):

In the absence of information regarding the current socioeconomic environment in Sea Point, [the MEC] could not decide whether the proposed redevelopment of the site would, in fact, serve a

socioeconomic need. Therefore, she was unable to balance the socio-economic consequences of the development against the (negative) environmental consequences.

The Court held that this was another fatal flaw to the decision in that the MEC had failed to comply with s 6(2)(e)(iii) of the Promotion of Administrative Justice Act (failing to take into account relevant considerations).

The judgment is an interesting one due to the various aspects of the environmental authorization process covered. Despite the fact that this was a decision in terms of the ECA, the principles raised in this case are also relevant to the environmental authorization process in terms of NEMA. In respect of each of the three grounds of review dealt with by the Court, its approach was, in my view, correct.

6. GOVERNMENT NOTICES

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

The Minister has prohibited the use of ‘Agricultural Remedy containing Chlorpyrifos as an active ingredient in household, home garden and domestic’ (*sic*). The intention to prohibit was published in *Sibergramme* 4-2009, although the draft notice had a more circumscribed prohibition. As was stated in that issue, Chlorpyrifos is highly toxic, and its commercial version Dursban was prohibited for household use in 2001. It has, however, been widely used in agriculture. See <http://is.gd/cAQAD> for further information about the ban.

National Environmental Management: Biodiversity Act 10 of 2004

In the last issue, the promulgation of the CITES (Convention on International Trade in Endangered Species) Regulations was mentioned. In terms of reg 3(3) of those regulations, the Minister is the authority responsible for the issuing of permits or certificates relating to import, export and re-export of any species listed in Appendices I, II and 1. The Minister has delegated that power to the Director-General of the Department or any functionary acting in that position. The delegation expressly includes the power to sub-delegate.

Review of legislation administered by Department of Agriculture, Forestry and Fisheries

The Department of Agriculture, Forestry and Fisheries has issued a notice informing the public about the review process of all Acts administered by the Department. The main object of the review is ‘to revitalize, repeal and/or amend Legislation which are archaic and do not speak to the current mandate as well as the international obligations of Government and the department specifically’ (GN 347 in GG 33139 of 30 April 2010). The list of legislation can be found on the Department’s website – www.daff.gov.za

Draft National Strategy on Sustainable Development and Action Plan 2010-2014

The Minister of Water and Environmental Affairs has published for comment the Draft National Strategy on Sustainable Development and Action Plan 2010-2014 (GN 393 in GG 33184 of 14 May 2010). This document (NSSD) provides the Strategy and Action Plan to support the implementation of the National Framework for Sustainable Development (NFSD). It provides the ‘roadmap for the development path that needs to be followed’ if South Africa is to achieve the vision of a sustainable society (the concepts of sustainability and sustainable development are discussed in detail in the introductory sections of the NSSD). It is intended to provide guidance to public and private sector organisations in their own long-term planning and to the development of sector- or subject-specific strategies and action plans, which must all be consistent with the NSSD.

According to the NSSD, it sets out what is needed to shift South Africa onto a new development path. The three key elements of this are directing the development path towards sustainability; changing behaviour, values and attitudes; and restructuring the governance system and building capacity.

The Action Plan has been formulated in the context of the strategy and sets out the strategic goals and interventions required in respect of the strategic priorities identified in the NFSD. This Action Plan has been formulated in the context of the aforementioned Strategy. The strategic priorities given in the NFSD are:

Priority 1: Enhancing systems for integrated planning and implementation;

Priority 2: Sustaining our ecosystems and using natural resources efficiently;

Priority 3: Economic development via investing in sustainable infrastructure;

Priority 4: Creating sustainable human settlements; and

Priority 5: Responding appropriately to emerging human development, economic and environmental challenges (including climate change, rising oil prices, globalisation and trade).

Returning to the three key elements of the strategy, each incorporates specific strategic goals as follows:

Directing the development path towards sustainability: the reduction of resource use as well as the carbon intensity of the economy; the provision of equal access to resources and a decent quality of life for all citizens; and to ensure effective integration of sustainability concerns into all policies, planning and decision-making at national, provincial and local levels.

Changing values and behaviour: the development and promotion of new social and economic goals based on sustainability; the promotion of environmentally responsible behaviour through incentives and disincentives; the building of a culture that recognises that social-economic systems are dependent on and embedded within ecosystems; and the increase of awareness and understanding of the value of natural resources (ecosystem services) to human wellbeing.

Restructuring of the governance system: to ensure effective integration and collaboration across all functions and sectors within government; the demonstration of commitment in changing the development focus to one based on sustainable programmes; the adoption of a long-term view to development planning and implementation that takes cognisance of intergenerational equity; adherence to and exercise of principles of good and ethical governance; and monitoring, evaluation and reporting of performance and progress in respect of sustainability goals.

Each of the five elements of the Action Plan contain detailed matrices setting out the required interventions, targets and indicators, which in some instances require further thought (this is not a criticism but reflects that some of the inputs are clearly still in progress, as indicated by question marks).

The last part of the NSSD sets out the options for institutional arrangements for management of the NSSD. This part describes the responsibilities that will be required in respect of planning, monitoring, reporting and evaluation. The institutional options suggested are a Commission for Sustainable Development; integration into the Presidency; or a unit within the Department of Environmental Affairs.

Overall, the document seems to press most of the right buttons from a sustainability perspective (without over-emphasis on economic development at the expense of the environment). This is clearly a strategy that needs to be at the forefront of all government thinking, not just the Department of Environmental Affairs. Whether it ends up as this (and this might depend on the institutional choices that are made) will be the test that this strategy will need to pass. There are currently many activities (including pronouncements made by government leaders) that fly in the face of much of what is contained in this document, which suggests that it might face a difficult passage forward.

7. PROVINCIAL NOTICES

Gauteng

In terms of the Local Government: Municipal Systems Act 32 of 2000, the Lesedi Local Municipality published, inter alia, amendment to the determination of charges for the: collection and removal of refuse and sanitary services; the provision of sewerage services; and water supply (LAN 528-532 in *PG* 59 of 14 April 2010).

Limpopo

In terms of the Limpopo Environmental Management Act 7 of 2003, the declaration of open season for game has been published (PN 1 in *PG* 1775 of 29 April 2010).

Mpumalanga

In terms of the Mpumalanga Nature Conservation Act 10 of 1998, the Hunting Season for Ordinary Game has been published (ON 1 in *PG* 1797 of 15 April 2010).

Northern Cape

In terms of the Local Government: Municipal Systems Act 32 of 2000, the Ubuntu Municipality has published, inter alia, by laws as follows: Water Services By-law 7 of

2010; Refuse Removal By-law 12 of 2010; Prevention and Suppression of Nuisances By-law 20 of 2010; Unsightly and Neglected Buildings and Premises By-law 24 of 2010; and Nature Reserve By-law 25 of 2010 (GN 47 in *PG* 1414 of 7 May 2010).

Note that all documents (legislation, notices, policies and cases), discussed in this *Sibergramme* are available in electronic format on request from the publisher.

