

THE ROLE OF GOOD ENVIRONMENTAL GOVERNANCE IN THE SUSTAINABLE DEVELOPMENT OF SOUTH AFRICA *

LA Feris**

1 Introduction

Environmental governance has been the subject of numerous scholarly writings and the concept is now firmly established both in international¹ and domestic law. Yet environmental decisions of administrators are constantly challenged, which suggests that their decisions do not always amount to good environmental governance. We are increasingly seeing opposition to decisions regarding projects or activities that may impact on the environment.² This is demonstrated not only by way of public protest action led by non-governmental groups, but it can also be seen in the growing number of court cases raising challenges to environmental decisions.³

* This contribution is based on a paper delivered at the Konrad-Adenauer Foundation's Colloquium on "Good Governance as a Mechanism to Promote Sustainable Development in Southern Africa" in collaboration with the North-West University (Potchefstroom Campus), held at Maropeng, Cradle of Humankind, Johannesburg, on 21 August 2009.

** Loretta Feris. BA LLB (Stell) LLM (Georgetown) LLD (Stell). Associate Professor, Faculty of Law, University of Cape Town.

1 See for example Burnstein 2004 *Journal of International Law and International Relations* 139. Esty 1999 (74) *New York University Law Review* 1495, Bray 2005 *THRHR* 357 for work relating to the international law dimension. See also Bray 1999 *SAJELP* 1 and Kotzé *A Legal Framework*.

2 The most vocal and forceful opposition to new development has arisen in the mining sector with controversy surrounding the mining of Xolobeni, along the Wild Coast after the Department of Minerals and Energy, now the Department of Mining, granted an Australian company mining rights to a portion of land situated in a highly sensitive coastal marine area. See for example Van der Merwe 2008 www.miningweekly.com

3 Quite a number of challenges relate to filling stations. They include *BP Southern Africa(Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W), *Capital Park Motors CC and Fuel Retailers Association of SA (Pty) Ltd v Shell SA Marketing (Pty) Ltd* (Unreported TPD case No 3016/05, 18 March 2005), *Sasol Oil (Pty) Ltd & another v Metcalf* 2004 (5) SA 161 (W), *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* (368/2004) (2005) SCA 76 and most recently *Fuel Retailers Association of Southern*

These challenges to environmental decision-making have the potential to contribute to good governance imperatives such as transparency and accountability, as they highlight not only the substance of decisions, but also the process and procedures followed, especially the issue of consultation of interested and affected parties.⁴ At the same time these challenges raise a wider concern as they highlight the value choices employed by officials in making decisions. These are often choices that seem to elevate economic or wider developmental considerations at the expense of the environment.

This raises the further question: how are decisions which enhance good environmental governance made? What are the value choices underlying these decisions, and what role does sustainable development play in informing decisions for good environmental governance? This article seeks to analyse good governance decision-making through an understanding and interpretation of the relationship between good environmental governance and sustainable development in the South African context. It also critically assesses recent case law in an attempt to understand the way in which our courts are evaluating these decisions.

2 Governance for the Environment

Governance is a function of public administration which has been defined as

Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC). In the mining and energy sector challenges include *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) and *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156.

4 One of the main points of critique in awarding mining rights in Xolobeni is the fact that not all interested and affected parties were consulted. See Van der Merwe 2008 www.miningweekly.com

...the use of managerial, political and legal theories and processes to fulfil legislative, executive and judicial governmental mandates for the provision of regulatory and service functions for the society as a whole or for some segments of it.⁵

It has also been described as all processes, organisations and individuals (the latter acting in official positions and roles) that are associated with carrying out laws and other policy measures adopted by the legislature or the executive and interpreted by courts.⁶ It essentially involves a process of decision-making, i.e. decisions relating to managerial, political and legal processes, and that grant privileges and powers. Good governance depends on how these decisions are made, implemented and executed. Section 195 of the Constitution⁷ is instructive in this regard. It requires that public administration be governed by the democratic principles and values enshrined in the Constitution and that it be *inter alia* accountable, transparent, and efficient and that it should involve public participation. Section 195 thus sets a yardstick for decision-making from a good governance perspective.

The values referred to in section 195 of the Constitution include the values enshrined in the Bill of Rights. The nexus between section 195 and the Bill of rights is created in section 8(1) of the Bill of Rights, which binds the legislature, the executive, the judiciary and all organs of state, and section 7(2) of the Bill of Rights, which provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". These two sections confirm that governance should accord with the Bill of Rights.

Environmental governance should therefore adhere to values such as transparency, accountability, public participation in decision-making and freedom of association. These are values that are indispensable in

5 Rosenbloom *Public Administration* as quoted in Kotzé *Legal Framework*.

6 Gordon and Milakovich *Public Administration* 6. It is essentially through public administration that institutions are created and where individuals work to achieve the stated objectives by means of available public funds, human capacity and proper procedures. Mfene 2009 *Journal of Public Administration* 210.

7 *Constitution of the Republic of South Africa*, 1996. Hereafter the Constitution.

implementing and enforcing substantive environmental law as they ensure that citizens are aware and involved in the abovementioned decision-making processes and have the ability to effectively advocate for environmental protection.⁸

Environmental governance should also involve a social element. The aspiration towards establishing a society based on social justice is clearly envisioned in the South African Constitution. The Preamble notes that the aim of the Constitution is to "heal the divisions of the past and establish a society based on democratic values, *social justice* and fundamental human rights" (author's emphasis). Keeping in mind that "environmental problems are also social problems, both in their causes and their effects", and that the effects of environmental degradation are felt most acutely by people who are also already subject to socio-economic disadvantage,⁹ environmental governance should be responsive to equity and justice concerns, especially amidst the deep-seated socio-economic divides that persist in South African society. This notion of environmental justice was legally recognised and included in South African law for the first time by way of the *National Environmental Management Act*.¹⁰ Section 2(4)(c) 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.

However, the clearest mandate for environmental governance in the South African context may be found in section 24 of the Constitution, the environmental right. Section 24 provides:

Everyone has the right –
(a) to an environment that is not harmful to their health or well-being; and

8 In *Director: Mineral Development Gauteng Region v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) the court held that before a permit is issued interested parties should have an opportunity to raise their objections. At 710G.

9 Hayward "Introduction 1.

10 107 of 1998 (hereafter NEMA).

- (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.

Whilst subsection (a) operates in general, subsection (b) specifically mandates the state to take certain measures in order to realise the guarantee proclaimed in the first part of the section.¹¹ Subsection (b) furthermore places a duty on the state to ensure sustainable development by (i) protecting the environment for the benefit of present and future generations; and (ii), in doing so, taking measures that "secure ecologically sustainable development...". Section 24(b) thus places a positive obligation on the state to "make decisions" that would ensure the protection of the environment and to execute this governance function in a manner that would ensure sustainable development. Consequently a clear nexus is established between good environmental governance and section 24 of the Bill of Rights. Giving effect to section 24 is therefore part of good environmental governance. Arguably, every decision that may impact on the environment must be considered against the dictates of section 24.

In view of sections 24's particular emphasis on sustainable development, one can further argue that good environmental governance will take into account the requirements for sustainable development. This link between environmental governance and sustainable development is an important one and Nel and Du Plessis¹² consequently include sustainable development in their definition of environmental governance:

The collection of legislative, executive and administrative functions, processes and instruments used by government to ensure sustainable behaviour by all as far as governance of environmental activities, products, services, processes and tools are concerned.

11 Feris "Environment" 521 and 522. See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (WLD).

12 Nel and Du Plessis 2004 *SA Public Law* 181.

Kotzé¹³ explains the connection between environmental governance and sustainable development as follows:

A management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and conditions) at international, regional, national and local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future interests human beings hold in the environment.

In order to be able to measure whether or not environmental governance takes sustainable development into account, one needs to fully understand the concept of sustainable development. The next section thus explores the concept of sustainable development and focuses specifically on the origin and development of the concept as well as its normative value.

3 The Origins, Development and Meaning of Sustainable Development

It has been argued that sustainable development is by no means a modern concept and Weeramantry J noted in the *Gabčíkovo-Nagymaros* case¹⁴ that

[t]he concept of reconciling the needs of development with the protection of the environment is ... not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.¹⁵

Yet, as is widely known, modern conceptualisation and understanding began to surface only in the early 1970s when the Stockholm Declaration linked social and economic development. Article 8 states as follows:

13 Kotzé *Environmental Compliance* 107-108.

14 *Case Concerning the Gabčíkovo-Nagymaros Project* ICJ Reports 7 (Separate Opinion of Vice-President Judge Weeramantry). Hereafter referred to as the *Gabčíkovo-Nagymaros* case.

15 *Gabčíkovo-Nagymaros* case 6. Weeramantry links the concept to ancient irrigation practices in Sri-Lanka, sub-Saharan cultures, and practices in China and South America and Europe.

[e]conomic and social development are essential for ensuring a favourable living and working environment for man and for creating conditions on earth that is necessary for the improvement of the quality of life.¹⁶

Whilst Article 8 recognises the inter-action between social and economic needs to ensure the quality of life, it does not, however, recognise the important third ingredient, i.e. the environment.¹⁷ This inter-action was formally recognised only in 1987 with the publication of the report of the World Commission on Environment and Development (WCED), "*Our Common Future*".¹⁸ The report called for the overall transformation of policy and law based on the concept of sustainable development, which it defined as "development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs."¹⁹ It explained sustainable development as:

A process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspirations.²⁰

The Brundtland Report was followed in 1990 by the Rio Declaration, which affirmed the concept of sustainable development and in Principle 4 recognised that in order to achieve sustainable development, environmental protection must constitute an integral part of the development process.²¹

16 *Declaration of the United Nations Conference on the Human Environment* (Stockholm) 16 June 1972, A/CONF. 151/26 (Vol I). Hereafter referred to as the Stockholm Declaration.

17 Article 11 of the Stockholm Declaration gave recognition to the environment and called on States not to take any steps to promote environmental protection without duly taking into account the effects on development policy.

18 Brundtland Report 1987 www.un-documents.net

19 Brundtland Report 1987 www.un-documents.net 8.

20 Brundtland Report 1987 www.un-documents.net 46.

21 *Rio Declaration on Environment and Development* 1992. UN Doc A/Conf.151/26. Ten years after the United Nations Conference on Environment and Development (the Rio conference) the 2002 Johannesburg World Summit on Sustainable Development (WSSD) was held. It added little in terms of the development of the concept, focusing instead on the now more challenging matter of implementation.

The publication of the Brundtland Report is widely viewed as the moment in environmental history at which sustainable development became a broad policy objective or at least an aspirational goal,²² and its main concept has been endorsed by governments, international organisations and non-governmental actors alike. Despite this general acceptance of the principle, divergence continues to exist over its meaning and what has been termed its "core normative content".²³

Sands²⁴ takes the approach of identifying the "legal elements" of sustainable development as reflected in international agreements. They consist of the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use); the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); and the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational equity).²⁵ South African environmental law generally also avoids a definition of sustainable development and instead "describes" it by way of a set of principles.²⁶ These principles apply to the

22 Voigt *Sustainable Development* 15.

23 See Field 2006 SALJ 409.

24 Sands P *Principles of International Environmental Law* (Cambridge University Press Cambridge 2003) 253.

25 Sands *International Environmental* 253.

26 S 2(4)(a) of NEMA. According to this sustainable development requires the consideration of all of the relevant factors including

(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

actions of all organs of state that may significantly affect the environment.²⁷ It follows that these principles are the guiding principles for environmental governance in the South African context.

Field notes that in trying to capture a pithy definition of sustainable development, the principle of integration is most often emphasised.²⁸ Principle 4 of the Rio Declaration captures the integration principle and states:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.²⁹

It has been argued that the principle of integration is central to the attainment of sustainable development and indeed it forms the backbone of sustainable

(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

27 S 2(3) of NEMA states that "[D]evelopment must be socially, environmentally and economically sustainable." S 2(4)(a) delineates a number of requirements for sustainable development. It states:

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

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

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions;²⁷ and

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."

28 Field 2006 SALJ 413.

29 *Rio Declaration on Environment and Development* 1992.

development.³⁰ It is concerned with ensuring that environmental issues are considered alongside aspects of the development process that have traditionally had more influence on economic and political decision-making.³¹ It applies to governance at all levels and should ideally influence the composition and implementation of specific measures, while at the same time it should impact on the creation and realisation of policy.³² Whilst principle 4 does not define "development" it has been argued convincingly that integration should extend beyond economic and environmental factors to include also social and cultural considerations, as sustainable development is concerned not only with environmental protection but also with wider issues of social development and cultural advancement.³³

As we shall see further on, scholars disagree on how exactly the three (or four) pillars of integration should relate to one another and how the balancing with regard to decision-making should occur. For the purpose of this contribution, however, it seems important to consider the relationship between integration and governance and how decision-making for good environmental governance is situated in the interstices of integration.

30 French *International Law* 54 quoting from Paper No 3: Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva Switzerland 26-28 September 1995) prepared by the Division for Sustainable Development for the fourth session of Commission on Sustainable Development 18 April-3 May 1996, New York.

31 French *International Law and Policy of Sustainable Development* 54.

32 French *International Law and Policy of Sustainable Development* 55.

33 French *International Law and Policy of Sustainable Development* 56. Elsewhere this author argued that whereas the three pillars of integration are usually referred to as the environmental considerations, economic considerations and social considerations, culture should not be ignored in general debates and decisions dealing with sustainable development as culture often influences social behaviour. Du Plessis and Feris 2008 (15) *SAJELP* 157. Other authors have furthermore argued:

"However, the four considerations – environmental, economic, social and cultural – are not separate issues, but are inter-related and interdependent. These considerations should be regarded in a balanced manner and always in relation to environmental issues. Purely social or purely economic issues should not sway a decision in a particular direction – the same could be said of purely environmental issues. Social and economic issues should be linked as socio-economic issues in order to ensure that the correct issues are addressed regarding a project. Sustainability rests on four pillars ... if one of the pillars is not taken into account, sustainability may not be achieved. If governance and decision-making are skewed, sustainability will never be achieved." Du Plessis and Britz 2007 (2) *Journal of South African Law* 263 and 275.

4 Sustainable Development and Environmental Governance

In considering the relationship between sustainable development and environmental governance one needs to consider how decision-making would in practice incorporate the principle. A starting point is the definition of sustainable development as set out in the Brundlandt Report, i.e. "development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs." This could be viewed as the aim of sustainable development i.e. that which we want to achieve. This aim operates in acknowledgement of the fact that whilst human beings are driven by their developmental needs to use, exploit and even exhaust natural resources, this can and may not happen in a limitless way. Thus, as noted by Field, sustainable development could be described as the "conceptual vehicle chosen by a diverse range of actors to negotiate the tensions arising from the need for social and economic development on a planet with finite resources".³⁴ From an environmental governance perspective, it represents the objective of decision-makers; i.e. making decisions in the present that would not instil undue environmental burdens on future generations.

As noted above, this earlier definition has been elaborated upon by more recent authors through the identification of different elements of the concept of sustainable development. I would suggest that these elements can, in turn, be viewed as the "means to achieve the end". These means would therefore include sustainable utilisation of natural resources, the pursuit of equity in the use and allocation of natural resources, and the integration of environmental protection and economic development.³⁵ These elements attempt to give

³⁴ Field 2006 *SALJ* 411.

³⁵ See Sands *International Environmental Law* 253. Field notes that some scholars refer to a wider range of elements and include elements such as "observance of the rule of law in international relations"; the "duty to co-operate towards global sustainable development"; and "the observance of human rights". Field 2006 *SALJ* 412. The three elements noted

concrete existence to a concept that may be viewed as elusive and impractical, largely because the concept involves competing considerations or normative impulses.

Of the three elements, the principle of integration has been identified as the most important. However, this element remains open to contestation. Winter, for example, argues that the sense in which the term 'integration' is used by the Brundtland Commission implies that socio-economic development has to be sustained, i.e. bearable, supported by its basis, the biosphere. As a result, the biosphere is the vital ingredient, as it can exist without humans but humans cannot exist without the biosphere - and this makes the economy and society the weaker partners.³⁶ He suggests that the appropriate way of viewing integration in the context of the Brundtland report is not that it is one of three pillars, but rather that it is a foundation supporting two pillars.

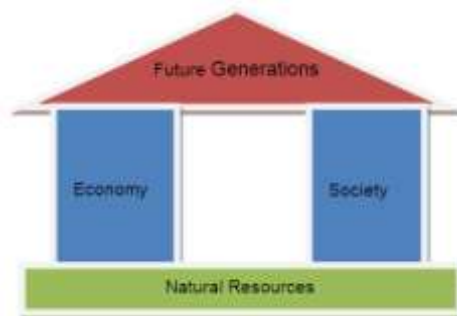


Figure 1: Winter "Two Pillars"

He suggests in the three-pillar version, in contrast, that the term "sustainable" loses its reference to this material basis and merely means that the three factors should coexist as equivalent entities. In the event of conflict they are to be balanced, mutual consideration must be given to them, and a compromise found.

by Sands are, however, the most widely recognised elements of sustainable development.

36 Winter "A Fundament and Two Pillars" 24 27.

The above paradigm is often illustrated by way of three intersecting circles with the "sustainable development solution" integrated amongst the three circles.



Figure 2: Winter "Two Pillars"

Winter critiques this three-pillar approach and argues that it could easily lead to mock compromises. Prevailing short-term economic or social interests might lead to the sacrificing of the environment, with results that would be detrimental to the economy and society in the long run.³⁷ He illustrates his argument by referring to the annual decision of the EC Council to set fishing quotas that are regularly larger than the reproduction rate of certain fish species. This type of governance decision is justified by references to job and food security considerations. However, as entire fish populations may eventually be lost through over-fishing, this short-term compromise could rebound on humans in the long run.

Whilst Winter is correct in claiming that short-term compromises, where the environment is concerned, will eventually lead to long-term problems or even disasters, not all governance decisions based on a three-pillar approach have these extreme outcomes. Furthermore, a three-pillar approach may sometimes come closer to true compromise. Consider the following example: If a waste site is situated close to a residential area, where that site generates an income

³⁷ Winter "A Fundament and Two Pillars" 28.

not only for the managing company but also for the residents that live nearby, should that site be closed down to accommodate environmental health considerations or should it be allowed to remain open in order to accommodate social and economic considerations? How does one integrate these three contesting considerations, if at all? One could argue that integration is the "happy medium" or compromise where one tightly regulates the operations of the waste site so as to minimise the exposure of the nearby residents while still ensuring that the site contributes to the economy and provides a source of income for the community.

This "happy medium" represents in actual fact a choice among values made by the decision-maker concerned. In this instance the decision-making is primarily driven by socio-economic considerations. Requiring strict operating conditions, however, means that the third pillar, the environment, remains part of the overall decision-making process and is not sacrificed in the name of social and economic development. Thus, whilst the diagram suggests that optimal overlap is always possible, a sense of the reality of matters suggests otherwise, and there may be many cases where there is very little overlap and where the emphasis will be primarily on one of the circles. In other words, it must be acknowledged that the three elements, environmental sustainability, economic sustainability and social sustainability, do not always carry equal weight in decision-making.

For example, a burning issue in South Africa currently is that of land restitution and its relationship with sustainable development.³⁸ A number of current land claims include claims to land that have been declared protected areas. This includes both private and state-owned land, and includes claims for land situated in the Kruger National Park, for example. In making a decision on whether or not to award such claims, decision-makers would have to take into account the possibility that claimants may not utilise the land for conservation

38 For a more detailed discussion see Du Plessis 2006 *PER* 1.

purposes, but rather to engage in strictly commercial ventures such as farming. This would clearly promote an economic and social goal as opposed to an environmental goal. However, whilst the environmental aim of preserving our natural heritage may weigh very heavily, the idea of restoring land to people who were unjustly deprived of it in the past may weigh equally heavily with the decision makers.

It is a truism, of course, that the integration principle could be used equally effectively by diverse groups with conflicting aims, i.e. environmentalists, as against those pursuing economic development aims.³⁹ Tladi argues that sustainable development is inherently a flexible concept which would have the effect that for those advocating economic growth the emphasis would fall on the economic growth value of sustainable development. As such, sustainable development could mean: lasting economic growth, the aim being to sustain economic growth.⁴⁰ This effectively dilutes and detracts from the original aim of requiring that development be sustainable, which, if one considers the other two elements, the sustainable use of natural resources and the equitable utilisation of natural resources, was to attempt to safeguard the environment against unbridled economic development.

Decisions motivated by socio-economic considerations can, therefore, potentially be disguised as decisions prompted by environmental concerns. This was, in fact, the argument by the applicants in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*.⁴¹ The applicant sought the review and setting aside of a decision by the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (GDACE) to refuse the applicant's application in terms of s 22(1) of the ECA for authorisation to develop a filling station on one of its properties. The Department based its refusal, *inter alia*, on environmental concerns. The

39 Tladi *Sustainable Development* 75.

40 Tladi *Sustainable Development* 75.

41 2004 (5) SA 124 (W).

applicant contended, however, that its application was refused not because the new filling station itself posed a danger to the environment, but rather because of the fact that there were already two other filling stations within three kilometres of applicant's site and the Department regarded it as unacceptable to allow the proliferation of filling stations where existing filling stations were economically vulnerable to more competition. It argued that under the guise of "environmental concerns", the department was seeking to regulate the economy on the basis of what were essentially economic considerations unrelated to the environment.

In scenarios such as the above, good governance practice provides, of course, for the review of decisions, and it would be up to senior decision-makers (such as in the case of an internal review) or the courts (in the case of judicial review) to measure the decision against the requirements for sustainable development and test whether good faith decisions were or were not in fact made.

In practice, when a decision-maker, whether an administrative official or a judicial officer, takes into account sustainable development in the decision-making process, he or she inevitably makes a value-based judgement. While this judgment is informed by the values of environmental, social or economic sustainability as part of the integration process, one (or sometimes two) of these values may trump another. Tladi therefore suggests a more nuanced approach in the application of sustainable development, one that provides three variations of integration based on the value that is the preferred one in cases of conflict. In the economic growth-centred variation, economic growth takes centre stage, whilst in the environment-centred variation, the natural environment triumphs. Finally, in the human needs-centred (or social needs centred) variation the social needs of humans are placed at the forefront.⁴² He argues that such a varied approach allows decision-makers to decide which

42 Tladi *Sustainable Development* 80. His idea is not that placing one value centre stage would obliterate the others, but rather that this would reinforce the other two.

variation best serves the aims of sustainable development.⁴³ In essence this suggests that decisions relating to sustainable development are inevitably value driven. Decision-makers decide in advance which of the values they prefer to advance, and whilst still taking into account the other two values, base the decision primarily on the preferred value.

Whilst the integration process is a value-driven process, the preference for a value cannot be without a legitimate basis. In other words, a decision-maker's decision should be grounded in law and there should be some justifiable base in law for the preference. Such a basis may be found in a legal or policy instrument, for instance.

It is useful to consider in this respect Sachs J's dissent in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*.⁴⁴ The applicant in this matter objected to an authorisation that was granted by the Mpumalanga provincial environmental authorities for the establishment of a filling station in White River in Mpumalanga. The applicant argued that the Director-General in his decision to issue a record of decision in terms of section 21 of the *Environment Conservation Act 73 of 1989* (ECA) had not considered socio-economic issues. The Director was of the opinion that the "need and desirability" (in this case for a filling station in the area) had been considered during the rezoning application in terms of the *Town-Planning and Townships Ordinance 15 of 1986* (T).⁴⁵ The High Court confirmed the Director's decision in the light of the principle of cooperative governance,⁴⁶ and the Supreme Court of Appeal (SCA) held

43 Tladi *Sustainable Development* 82.

44 2007 (6) SA 4 (CC). For a more detailed discussion of this case see Feris 2008 *Constitutional Court Review* 235. See also Kidd 2008 *SAJELP* 85-102, Couzens 2009 *SAJELP* 23-56, Bray 2009 *SAJELP* 3-22, and Kotzé and Retief 2009 *SAJELP* 139-155.

45 14C-J.

46 15C-F.

similarly.⁴⁷ The SCA further rejected the applicant's arguments based on environmental considerations (for example that filling stations may become derelict in future, causing an environmental hazard) as mere speculation.⁴⁸

The majority decision in the Constitutional Court set aside the decision of the environmental authorities of Mpumalanga on a number of bases, including the failure of the department to take into account socio-economic conditions. In this respect the Court argued that the "nature and scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment."⁴⁹ In essence it was the Court's position that a failure to consider socio-economic considerations amounted to a failure by the environmental authorities of Mpumalanga to make a decision that was grounded in sustainable development. The Court thus treated sustainable development as a checklist consisting of three elements. A failure by the decision-makers to consider each of these elements amounted in the Court's opinion to a failure to adhere to the dictates of the Constitution.

Sachs J, however, departed from the majority decision with respect to the materiality of the failure to consider socio-economic considerations. In essence he provides us with the application of the abovementioned "variation" approach to the integration element of sustainable development and takes NEMA as his "legitimising base". With regards to the application of the preamble and principles of NEMA he notes that "economic sustainability" is not treated as an independent factor to be evaluated as a discrete element in its own terms, but rather that the focus is on the inter-relationship between economic sustainability

47 16A-C; *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga* 2007 (2) SA 163 (SCA) 168A-171A.

48 169B-C.

49 Para 71.

and environmental protection.⁵⁰ Accordingly, he argues, NEMA does not envisage that social, environment and economic sustainability should proceed along separate tracks, with each being assessed separately and only considered together at the end of the decision-making process. It is his contention that economic sustainability takes on significance only to the extent that it implicates the environment. As such, it is only "when economic development potentially threatens the environment that it becomes relevant to NEMA" and it is only at this point that it should be considered within the context of the sustainable development requirements of NEMA.⁵¹ Sachs bases this argument on the factual elements that "all environmental controls were in place and that any potential deleterious effect of over-trading was speculative and remote."⁵²

Sachs thus situates his position within the dictates of sustainable development as required by NEMA. The overall aim of NEMA is, first and foremost, to ensure environmental protection. NEMA thus chooses the environment-centred variation of sustainable development, which would require that in situations of conflict between economic, social and environmental considerations, the latter must be preferred. Given that NEMA operates within this model Sachs's argument that social and economic considerations are only "triggered" once the environment is implicated makes sense. Thus, there was no need for the environmental authorities of Mpumalanga to consider socio-economic considerations as their sustainable development decision-making is driven by the mandates of NEMA, which places the protection of the environment centre-stage.

Sachs could equally have used section 24 of the Constitution as his "legitimising base". Section 24(b)(iii) of the Constitution refers to the need to "secure *ecologically* sustainable development" [own emphasis]. It can be

50 Para 113.

51 Para 113.

52 Para 112.

argued that "ecologically" qualifies the type of sustainable development that is envisioned by the Constitution, i.e. development that retains a preference for the natural or ecological base. It therefore clearly places an emphasis on environmental considerations and as such it places the environmental value centre-stage. Section 24 of the Constitution therefore mandates decision-making that favours the environment-centred variation of sustainable development. Any decision-making regarding sustainable development that is mandated by section 24 should, arguably, be situated within this model.

5 Conclusion

This article has attempted to reflect on the relationship between good environmental governance and sustainable development in the South African context with particular reference to the way in which decision-makers employ considerations of sustainable development in their practical decision-making processes and the extent to which their practice accords with good environmental governance. In this respect it is the writer's contention that decision-makers cannot operate outside of the mandates of the Constitution and that section 24 of the Constitution compels decisions that seek to achieve sustainable development.

Given the centrality of the integration principle the article has sought to highlight the way in which the three pillars of sustainable development are employed in decision-making. The dissenting opinion in the recent *Fuel Retailers* decision provides a good starting point. The Sachs approach could be termed "applied variation," as it gives us some guidance on how to interpret governance instruments at the heart of decision-making, such as legislation and policy that requires sustainable development. In applying the model not only to the majority decision in the *Fuel Retailers* case but also to the decision in the *BP* case, both are exposed as inadequate and ultimately unsatisfying applications of the notion of sustainable development. Whilst both decisions were at first glance "good for the environment", they were really motivated by socio-

economic considerations, and amount to the application of the economic-centred variation of integration.

Ultimately what section 24 of the Constitution and NEMA require is that decision makers employ the environment-centred variation of sustainable development, which in essence entails making a value-laden choice in favour of the environment. It is hoped that the Sachs dissent will provide some food for thought in this regard.

Bibliography

Bray 2009 SAJELP

Bray W "Un-cooperative governance fuelling unsustainable development"
2009 *South African Journal of Environmental Law and Policy* 3-22

Bray 2005 JCRDL

Bray E "Legal Perspectives on Global Environmental Governance" 2005
Journal of Contemporary Roman-Dutch Law 357

Bray 1999 SAJELP

Bray E "Focus on the National Environmental Management Act: Co-operative Governance in the Context of the *National Environmental Management Act* 107 of 1998" 1999 *South African Journal of Environmental Law and Policy* 1

Britz 2007 *Journal of South African Law*

Britz L "The filling station saga: environmental or economic concerns?"
2007 (2) *Journal of South African Law* 263 275

Burnstein 2004 *Journal of International Law and International Relations*

Burnstein S "Legitimacy in Global environmental Governance" 2004
Journal of International Law and International Relations 139

Couzens 2009 SAJELP

Couzens E "Filling station Jurisprudence: Environmental law in South African courts and the judgment in Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Other" 2009 *South African Journal of Environmental Law and Policy* 23-56

Du Plessis and Feris 2008 *SAJELP*

Du Plessis W and Feris L "The dissident Sachs: a Rebellious Step in the Right Direction" 2008 (15) *South African Journal of Environmental Law and Policy* 157

Du Plessis 2006 *PER*

Du Plessis A "Land Restitution through the Lens of Environmental Law: Some Comments on the South African Vista" 2006 *Potchefstroom Electronic Law Journal* 1

Esty 1999 *New York University Law Review*

Esty D "Toward Optimal Environmental Governance" 1999 (74) *New York University Law Review* 1495

Feris 2008 *Constitutional Court Review*

Feris L "Sustainable Development in Practice: Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others" 2008 *Constitutional Court Review* 235

Feris "Environment"

Feris L "Environment" in Currie I & De Waal J (eds) *The Bill of Rights Handbook* (Juta Cape Town 2006) 521 522

Field 2006 *SALJ*

Field T "Sustainable Development versus Environmentalism: Competing Paradigms for the South African EIA Regime" 2006 *South African Law Journal* 409

French *International Law*

French D *International Law and Policy of Sustainable Development* (Juris Publishing Manchester 2005) 54

Gordon and Milakovich *Public Administration*

Gordon G and Milakovich M *Public Administration in America* (St Martins Press New York 1995) 6

Hayward "Social and Legal Perspectives"

Hayward "Introduction: Social and Legal Perspectives on Environmental Problems" in Hayward & O' Neill (eds) *Justice, Property and the Environment* (1997) 1

Kidd 2008 *SAJELP*

Kidd M "Removing the green-tinted spectacles: The three pillars of sustainable development in South African environmental law" 2008 *South African Journal of Environmental Law and Policy* 85-102

Kotzé *Environmental Compliance*

Kotzé, L in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (Juta Cape Town 2009) 107-108

Kotzé and Retief 2009 *SAJELP*

Kotzé J and Retief F "The Lion, the Ape and the Donkey: cursory Observations on the Misrepresentation of Environmental Impact Assessment (EIA) In the Chronicles of Fuel Retailers" 2009 *South African Journal of Environmental Law and Policy* 139-155

Kotzé *A Legal Framework*

Kotzé L *A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province* (Wolf Legal Publishers Nijmegen 2006)

Mfene 2009 *Journal of Public Administration*

Mfene P "A Service Delivery Perspective on Public Administration" 2009
Journal of Public Administration 210

Nel and Du Plessis 2004 *SAPL*

Nel, J and Du Plessis, W "An evaluation of NEMA based on a Generic
Framework for Environmental Framework Legislation" 2004 *SA Public Law*
181

Rosenbloom *Public Administration*

Rosenbloom D *Public Administration: Understanding Management, Politics
and Law in the Public Sector* (Random House New York 1986)

Sands *International Environmental Law*

Sands, P *Principles of International Environmental Law* (Cambridge
University Press Cambridge 2003) 253.

Tladi *Sustainable Development*

Tladi D *Sustainable Development in International Law: An Analysis of Key
Enviro-Economic Instruments* (Pretoria University Law Press Pretoria 2007)
75

Voigt *Sustainable Development*

Voigt C *Sustainable Development as a Principle of International Law*
(Martinus Nijhoff Publishers Leiden 2009) 15

Winter "Two Pillars"

Winter G "A Fundament and Two Pillars: The Concept of sustainable
development 20 years after the Brundtland Report" in Bugge H and Voigt C
(eds) *Sustainable Development in International and National Law* (Europa
Law Publishing Groningen 2008) 24 and 27

Register of cases

BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs 2004 (5) SA 124 (WLD)

Capital Park Motors CC and Fuel Retailers Association of SA (Pty) Ltd v Shell SA Marketing (Pty) Ltd (Unreported TPD case No 3016/05, 18 March 2005)

Case Concerning the Gabčíkovo-Nagymaros Project ICJ Reports

Director: Mineral Development Gauteng Region v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA)

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156

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)

Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga 2007 (2) SA 163 (SCA) 168A-171A

MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another (368/2004) 2005 SCA 76

Sasol Oil (Pty) Ltd & another v Metcalf 2004 (5) SA 161 (W)

Register of Internet resources

Brundtland Report 1987 www.un-documents.net

United Nations 1987 *Brundtland Report of the World Commission on Environment and Development: Our Common Future* <http://www.un-documents.net/wced-ocf.htm> (accessed 12 February 2010)

Van der Merwe 2008 www.miningweekly.com

Van der Merwe C 2010 *Xolobeni appeal hearings cancelled* www.miningweekly.com/article/mrc-granted-right-to-mine-along-sas-wild-coast-2008-08-04 (accessed on 12 February 2010)

Register of legislation

Constitution of the Republic of South Africa, 1996

Declaration of the United Nations Conference on the Human Environment (Stockholm) 16 June 1972 A/CONF. 151/26 (Vol I)

Environment Conservation Act 73 of 1989

National Environmental Management Act 107 of 1998

Rio Declaration on Environment and Development 1992 UN Doc A/Conf.151/26

Town-Planning and Townships Ordinance 15 of 1986 (T)¹

THE ROLE OF GOOD ENVIRONMENTAL GOVERNANCE IN THE SUSTAINABLE DEVELOPMENT OF SOUTH AFRICA *

LA Feris**

SUMMARY

This article seeks to analyse good governance decision-making in the environmental context through an understanding and interpretation of the relationship between good environmental governance (evidenced *inter alia* by decision-making by public authorities) and sustainable development in South Africa. It critically assesses recent case law in an attempt to understand the way in which our courts are evaluating authorities' environmental decisions. In reaching its objectives, this article considers also how environmental decisions are made in the first place and asks the question: what are the value choices underlying government's decisions and what role does sustainable development play in informing decisions for good environmental governance.

Keywords: environmental law, environmental governance, sustainable development, environmental decision-making, good governance

* This contribution is based on a paper delivered at the Konrad-Adenauer Foundation's Colloquium on "Good Governance as a Mechanism to Promote Sustainable Development in Southern Africa" in collaboration with the North-West University (Potchefstroom Campus), held at Maropeng, Cradle of Humankind, Johannesburg, on 21 August 2009.

** Loretta Feris. BA LLB (Stell) LLM (Georgetown) LLD (Stell). Associate Professor, Faculty of Law, University of Cape Town.