An Analysis of Section 24G of the National Environmental Management Act

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1 Introduction:

Section 24 of the Constitution of South Africa[1] (Constitution) entrenches the right to an environment which is not harmful to health or wellbeing, as well as, the right to have that environment protected by reasonable legislative measures. In the Supreme Court of Appeal case of *Director: Mineral Development (Gauteng region) v Save the Vaal Environment*[2] it was held that the Constitutionally entrenched environmental rights are equal to any other rights entrenched in the Bill of Rights:

> By including environmental rights as fundamental justiciable human rights, the Constitution, by necessary implication, requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in South Africa. Together with the change in the ideological climate brought about by the adoption of the Constitution must also come a change in the legal and administrative approach to environmental concerns.[3]

Section 24 of the Constitution is enabled by the National Environmental Management Act,[4] specific Environmental Management Acts, and related legislation that affect the environment. This paper is limited to considering how section 24G of NEMA functions to enable the objectives of section 24 of the Constitution by addressing the previously intractable problem of how to deal with prohibited activities that have been commenced with unlawfully.

2 NEMA's Two Regimes:

A key element in the South African Framework for Environmental Governance is the management of activities which either have had, are having, or may have a significant negative impact on the environment.

Two regimes are established by NEMA for dealing with such activities namely; the prohibition without prior authorisation of activities listed in terms of Sections 24(2)(a) and (d) of NEMA, and the imposition of a general environmental duty of care by Section 28(1) of NEMA.

2 1 Section 24 of NEMA: Listed Activities:

[1] The Constitution of the Republic of South Africa, 1996.
[2] 1999 (2) SA 709 (SCA).
[3] Para 107.
[4] National Environmental Management Act 107 of 1998. Hereafter NEMA.

Section 24(2)(a) of NEMA provides for the identification of activities that may not commence without prior authorisation. The list of such activities is contained in the "Listing Notices" which are included in the Regulations that are published in terms of Sections 24(5), 24M and 44 of NEMA.[5] Section 24(2)(b) of NEMA provides for the listing of activities contemplated in NEMA, while Sections 24(2)(a) and 24(2)(b) allow that certain activities may commence without an environmental authorisation, but these activities must still comply with the prescribed norms or standards. No such norms or standards have yet been published with the result that no activities have yet been identified in terms of Section 24(2)(b) of NEMA..

The 2010 NEMA EIA Regulations prescribe specific mandatory assessment processes that must be undertaken when applying for authorisation to undertake any listed activity. These environmental impact assessment (EIA) processes prescribed by Regulation GN R543 of 18 June 2010 apply only to the applications in respect of activities listed in the listing notices contained in GN R544, GN R545 and GN R546 of 18 June 2010.

2 2 Section 28 of NEMA: Duty of Care:

Section 28(1) of NEMA establishes a general environmental duty of care in the following terms:

> *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, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.*

The environmental duty of care imposed by Section 28(1) is not limited to any particular set of activities and includes *anything* that; has, does or may cause significant pollution or degradation of the environment. The requirements for discharging an environmental duty of care in terms of Section 28(1) of NEMA are set out in Section 28(3) of NEMA while Section 28(4) confers the powers necessary to ensure that the Section 28(1) duty of care is discharged on the competent authority.

3 Filling of a *Lacunae:*

[5] NEMA 2010 EIA Regulations GN R543 of 18 June 2010, Listing Notice 1: GN R544, 2: GN R545, 3: GN R546 of same date.

The Environment Conservation Act[6] which preceded and was repealed by NEMA contained no provisions on how to deal with listed activities that had been commenced with unlawfully. The relevant provisions of the ECA were limited to ordering the cessation of such activities, the prosecution of offending parties and the restoration of the environment. When NEMA was initially promulgated, it also contained no provision for managing the unlawfully commenced listed activities. To make matters worse, it also did not provide for environmental offences or penalties. These shortcomings were, however addressed in subsequent amendments to NEMA and particularly Section 24 thereof.

3 1 The Absence of Provisions Controlling Unlawful Activities:

The problems that arose around dealing with listed activities that had commenced unlawfully were essentially practical. While there was no uncertainty about the wrongfulness of the unlawful commencement of a listed activity without prior authorisation, it was rarely clear what the most environmentally accountable response to such unlawful activities should be.

In some instances where an activity would have been denied authorisation even if application for such authorisation had been made, the impacts of the already undertaken actions may be such as to render rehabilitation either non-viable or potentially more harmful to the environment than the *status quo*.

In other instances, however, where it was likely that had application properly been made, the unlawfully commenced activity would have been authorised it is counterproductive and potentially more harmful to the environment to require that an activity already commenced with albeit unlawfully, must be “undone” only to be redone after a new application for authorisation had been approved.

The absence of any provision in NEMA for managing or rectifying the consequences of listed activities that had been unlawfully commenced left a lacunae in our legal system which, apart from anything else, resulted in contradictory decisions being made by the courts. Section 24G was inserted by Section 3 of Act 8 of 2004 to fill the lacunae.[7]

[6] Environment Conservation Act 73 of 1989.
[7] Section 3 of the National Environmental Management Amendment Act 8 of2004 and substituted by Section 6 of the National Environmental Management Amendment Act 62 of 2008.

3 2 Conflicting Case Law: A Brief Summary:

Up until the introduction of Section 24G by the Amendment Act,[8] *ex post facto* authorisation of an unlawful activity was not provided for in our legislation concerning environmental law. The general view was as Van der Linde said that if you read Section 21 of the ECA with Section 24(1) of NEMA an Environmental Impact Assessment is required before the listed activity is started.[9]

However, the interpretation of the requirements in the ECA and NEMA resulted in two different views regarding *ex post facto* EIA authorisation for listed activities. In the case of *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*[10] and *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others*[11] the view of the courts were that *ex post facto* authorisation was not allowed. In contrast in the case of *Eagles Landing Body Corporate v Molewa NO and Others*[12] the Court "permitted retrospective authorisation".[13]

The case of *Silvermine* involved using land to plant vineyards and to construct dams on the designated property. The applicant approached the court seeking an order to enforce the EIA requirements in terms of the ECA or the provisions as envisaged in NEMA for the planting of vineyards.[14] The applicants were a group of non-governmental organisations who were opposed to the respondents, the lessor and lessee of the property's, decision to plant the vineyards on land that was previously used for mining.

The applicant had requested the respondents to commence with an EIA prior to the commencement of the planned planting of the vineyards, with failure to do so resulting in legal action.[15] The respondents reacted by informing the applicant firstly, that they were entitled to carry out the planned planting of the vineyards and

[8] Section 24G inserted by Section 3 of Act 8 of 2004.
[9] M van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 205 193-221.
[10] 2002 (1) SA 478 (C). (Hereafter: *Silvermine*).
[11] 2004 (2) SA 393 (E). (Hereafter: *Hichange*).
[12] 2003 (1) SA 412 (T). (Hereafter: *Eagles Landing*).
[13] M van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 207 193-221.
[14] The order sought at p480 of *Silvermine*: that first respondent be ordered to commission a full and independent environmental impact assessment (EIA) process in terms of the regulations issued under s 21 of the Environmental Conservation Act 73 of 1989 (ECA); alternatively in terms of the general environmental policy determined pursuant to s 2 of the said Act; alternatively in terms of the provisions of s 24 of the National Environmental Management Act 107 of 1998, in respect of the planting of a vineyard and construction of dams on Farm 1000 and Farm 1404, Simons town.
[15] *Silvermine* page 481.

secondly, that they had already commenced. The applicant then applied to the court "to compel [the] developer to conduct an EIA in respect of the activities which had been commenced".[16]

The Court upon looking at the application was of the meaning that Section 24(1) only applies to EIA authorisation before the commencement of an activity and does not envisage the commissioning of an EIA once the activity for which authorisation is required has already taken place as it would serve no legal purpose.[17]

The Court at this point looked what Section 24 of NEMA was intended for, holding that it was intended to aid an authorising official to reach a decision on whether to grant an authorisation or not. However, if no authorisation had been acquired prior to the commencement of the activity, the person who undertook the activity acts unlawfully.[18] To this Davis J stated:

> For such conduct there may be civil remedies and criminal prosecution might well be initiated, but an EIA would only be required for the process of authorisation. The investigation cannot be wrenched from the rest of the legislative process. If a person elects to ignore the process, the remedy to curb the unlawful conduct lies in a battery of other remedies, but not in the relief as set out in applicant's notice of motion.[19]

Kidd is of the opinion that the *Silvermine* case is significant for two reasons. Firstly, Firstly, by pointing out the difficulties that arise when activities are not identified with sufficient clarity for it to be clear whether authorisation is required or not.[20] Secondly, in holding that a statutory EIA is intended for and can only be used to assess the potential impacts of an activity before it is commenced with and not thereafter.[21]

In *Hichange* the Court had to decide an application concerning the on-going pollution caused by a tannery which was having detrimental effects on the surrounding community and environment. The applicant wanted to compel the relevant authorities to force the respondent to investigate, evaluate and assess the impact of specific activities and report thereon.[22] This report called for by the applicant was, however, not the same as that in *Silvermine*, as the Court held that

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[16] R Paschke and J Glazewski "Ex Post Facto Authorisation in South African Environmental Assessment Legislation: A Critical Review" (2006) 9 *PELJ* 145 120-150.
[17] *Silvermine* page 479 .
[18] Page 479.
[19] Page 490.
[20] M Kidd *Environmental Law* (2008) 197.
[21] Kidd Environmental Law 197.
[22] *Hichange* para 2.

Section 22 of the ECA and Section 24 of NEMA "specifically state that activities which may have an effect upon the environment can only be authorised once an environmental impact report has been considered".[23] This application was in terms of Section 28(12) of NEMA calling for a directive in terms of Section 28(4) which applies when there is failure to comply with Section 28(1). The Court held:

> An environmental impact assessment under s 28 may therefore be required to prevent pollution continuing or recurring, and is not designed solely to enable prior assessment for authorisation to be granted.[24]

The effect of the High Court judgement was to confirm that environmental impact assessment in terms of Section 28 is different from the statutory environmental impact assessment process prescribed for listed activities in that it is intended not only to enable prior assessment for authorisation but also assessment after an activity has commenced or has even been completed.

The case of *Eagles Landing* involved an application which opposed the construction of a peninsula that formed part of a golf estate. The applicant approached the High Court for a review of a decision in which authorisation was granted to an unlawful activity after it had begun. The respondent had begun construction of the peninsula prior to having authorisation to do so and was ordered to cease the activity and furnish an EIA. In turn the respondent compiled and delivered an EIA to the North West Provincial Department of Environmental Affairs, who then granted authorisation. The applicant appealed unsuccessfully against the decision and thereafter approached the High Court seeking to have the refusal of the appeal set aside on review.

It was argued in the case by the respondents that if the order that the applicants wanted had to be enforced, that the developer would first be obliged to remove what he had constructed and only thereafter apply for authorisation before commencing *de novo* with the construction.[25] Further it was argued not to have been the intention of the legislature when contemplating the provision to allow for a situation that would oblige a person to remove to remove a structure and then to apply for authorisation. Counsel for the respondent said:

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[23] para 1.
[24] para 414.
[25] *Eagles Landing* para 101.

> The proper approach in such circumstances would be to regard the completion of the construction as the 'proposed' activity and, provided that the authorisation thereof was otherwise valid, that would comply with the spirit and objectives of the legislation.[26]

Kroon J agreed with the argument of the respondent on this point stating that:

> Provided that the authorisation for the completion of the partially undertaken activity is the result of a proper compliance with the provisions, and the environment protection and preservation objectives, of the environmental legislation, it will, in my judgment, constitute a valid authorisation. The circumstance that an unauthorised partially undertaken activity would thereby in effect be legitimated would be no more than an incidental result of the authorisation granted.[27]

This judge found that retrospective authorisation of unlawful activities was possible, as long as the objectives of the environmental legislation was upheld and implemented. As an aside, the Court did not deal with the absence of an empowering provision which appears to render the decision of the competent authority to grant an *ex post facto* authorisation *ultra vires* the competent authority's powers.

The *Silvermine* and *Eagles Landing* cases are in direct contradiction of one another. In *Silvermine* it was held that a statutory environmental impact assessment can never be used in respect of an activity that is not specifically listed or one that has already commenced. In *Eagles Landing* it was held that a statutory environmental impact assessment and authorisation can follow the under taking of a listed activity.

The *Hichange* judgement is the only one of these judgements that acknowledges that an environmental impact assessment in terms of Section 28 of NEMA is similar in nature but different in purpose from an environmental impact assessment undertaken in terms of Section 24. The purpose of a Section 28 environmental impact assessment is to determine how best to deal with the discharge or failure to discharge the environmental duty of care in posed by Section 28(1) while a Section 24 environmental impact assessment is meant to determine whether a proposed listed activity should be authorised or not.

4 Retrospective Authorisation: Section 24G of NEMA

Due to these contrasting viewpoints in our Courts, the Legislature introduced Section 24G into NEMA through the Amendment Act, to regulate the rectification of

[26] para 101.
[27] para 102.

unlawful commencement or continuation of listed activities. Section 24G provides as follows:

Rectification of unlawful commencement or continuation of listed activity:

(1) On application by a person who has committed an offence in terms of section 24F (2) (a) the Minister, Minister of Minerals and Energy or MEC concerned, as the case may be, may direct the applicant to-

(a) compile a report containing-

(i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;

(ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;

(iv) an environmental management programme; and

(b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

(2) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (1) and thereafter may-

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary;

or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

(2A) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R1 million and which must be determined by the competent authority, before the Minister or MEC concerned may act in terms of subsection (2) (a) or (b) .

(3) A person who fails to comply with a directive contemplated in subsection (2)

(a) or who contravenes or fails to comply with a condition contemplated in subsection (2) (b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F (4).

4 1 Section 24G(1):

Section 24G(1) sets out the procedure to be followed by anyone seeking authorisation for the rectification of unlawful commencement or continuation of a listed activity.

Crucial to understanding Section 24G is the requirement that authorisation in terms of Section 24G may only be sought by a person who has committed an offence in terms of Section 24F(2). Authorisation in terms of Section 24G is obtained on application to the Minister or MEC as the case may be.

If an Applicant has not explicitly done so previously, in making application for rectification in terms of Section 24G, the Applicant admits, by necessary implication, to having committed an offence in terms of Section 24F(2).

On receipt of an application in terms of Section 24G(1) the Minister or MEC *may* require the Applicant to compile an EIA Report or undertake such studies and provide such information as is deemed necessary.

4 2 Section 24G(2):

Section 24G(2) provides for the consideration of an application in terms of Section 24G. The Minister or MEC may direct the Applicant to cease the activity and rehabilitate the environment or issue an environmental authorisation to the Applicant on such conditions as the Minister or MEC deems appropriate. Section 24G(2) must be read with Section 24G(2A) in order to consider the application as the decision that has to be taken is dependent on the payment of an administrative fine. Section 24G(2A) allows for the payment of an administrative fine that does not exceed R 1 million. The administrative fine is to be determined by a competent authority.

4 2 1 Section 24G(2A): The Administrative Fine:

To understand how Section 24G works a proper understanding of what is meant by the *administrative fine* prescribed in Section 24G(2A) is necessary and a distinction needs to be drawn between the *administrative fine* and the *penal sanctions* as provided for in Section 24F(4) of NEMA.

No definition for an administrative fine is provided in either NEMA or the NEMA EIA Regulations, but there are several interpretations that can have an effect on how one is to deal with the question of an administrative fine.

When one interprets legislation, a fundamental requirement is to give effect to the intention of the legislature.[28] Where that intention is not immediately evident from the legislation in question there are specific rules that govern how that intention is to be established. Through a purposive interpretation one can determine the meaning of a section based on the purpose of its enactment.[29]

Section 24G(2A) states that an administrative fine is required to be paid before the Minister or the MEC can consider an application in terms of Section 24G. The maximum fine that may be imposed is R 1 million by the competent authority. M van der Linde states that this fine is intended as a criminal sanction.[30]

That is so because administrators by interpreting the administrative fine as an administrative fee would lead to situations that are contradictory and that are unlawful. In essence being similar to *autrefois convict* "the criminal law principle that a party cannot be convicted for the same offence twice".[31] Van der Linde is clearly wrong as will be explained more fully below.

4 2 2 Interpreting the Administrative Fine by Interpreting Other Legislation:

The intention of the Legislature with the administrative fine provided for in Section 24G(2A) of NEMA was not to impose a penalty as such, but rather to give effect to the principle that "*the polluter pays*" also in respect of the additional work occasioned by an offending party's unlawful commencement of a prohibited listed activity.[32] The interpretation that best suits Section 24G(2A) is that the administrative fine is a mechanism to cover the administration costs to the competent authority, Minister and/or the MEC of the application in terms of Section 24G. This application stands to be distinguished from an application for authorisation properly made in terms of NEMA and the Regulations because an application in terms of Section 24G would not only have to deal with the potential impacts of a proposed activity that has not yet

[28] Section 1(3) of NEMA.
[29] I Currie and J De Waal *The Bill of Rights Handbook* 5ed (2005) 148-150.
[30] M van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 207 193-221.
[31] M van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 207 193-221.
[32] Section 2(4)(viii) of NEMA.

commenced but also with *inter alia* the actual impacts that have become manifest, the rehabilitation of the site and how to achieve a balance between the unlawfulness of the commencement and the public interest.

There are other instances in South African law where administrative fines are provided for, but those stand to be clearly distinguished from the administrative fine provided for in NEMA primarily because they are clearly penal in nature or imposed *in lieu* of other penalties.

Firstly, as an extreme example, the Companies Act[33] in Section 175 provides for administrative fines. Section 175 provides as follows:

(1) A court, on application by the Commission or Panel, may impose an administrative fine-
    (a) only for failure to comply with a compliance notice, as contemplated in section 171 (7); and
    (b) not exceeding the greater of-
        (i) 10% of the respondent's turnover for the period during which the company failed to comply with in the compliance notice; and
        (ii) the maximum prescribed by subsection (5).

(2) When determining an appropriate fine, the Competition Tribunal must consider the following factors:
    (a) the nature, duration, gravity and extent of the contravention;
    (b) any loss or damage suffered as a result of the contravention;
    (c) the behaviour of the respondent;
    (d) the market circumstances in which the contravention took place;
    (e) the market circumstances in which the contravention took place;
    (f) the level of profit derived from the contravention;
    (g) the degree to which the respondent has co-operated with the Commission or the Panel; and

(3) For the purpose of this section, the annual turnover of any person, is the amount determined in the prescribed manner.

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

(5) The Minister may make a regulation prescribing the maximum amount of an administrative fine, which amount must be not less than R1 000 000.

This Section allows a Court on application to impose a fine. The legislature also sets out how the fine is to be determined and when the fine is paid, that it is to be paid to the National Revenue Fund.

[33] Companies Act 71 of 2008.

Secondly, the Competition Act[34] also provides for administrative fine in Section 61 which is similar to that of the Companies Act Section 175:

(1) The Competition Tribunal may impose an administrative penalty only—

(a) for a prohibited practice in terms of sections 4(l)(b), 5(2) or 8(a), (b) and (d);

(b) for a prohibited practice in terms of sections 4(1)(a), 5(1), 8(c) or 9(1), if the 35 conduct is substantially a repeat by the same *frim* of conduct previously found by the Tribunal to be a prohibited practice; or

(c) if the parties to a merger have—

(i) failed to give notice of the merger as required by section 13;

(ii) proceeded to implement the merger in contravention of a decision by the 40 Competition Commission or the Competition Tribunal to prohibit that merger;

(iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Commission in terms of section 14, or the Tribunal in terms of section 15; or 45

(iv) proceeded to implement the merger without the approval of the Commission or the Tribunal.

(2) An administrative fine imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

(3) When determining an appropriate fine, the Competition Tribunal must consider the following factors:

(a) the nature, duration, gravity and extent of the contravention:

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent:

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention:

(f) the degree to which the respondent has co-operated with the Competition Commission and the Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act.

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

Finally the Financial Institutions (Protection of Funds) Act[35] in Section 10 provides as follows:

(1) A person who contravenes or fails to comply with any provision of this Act is guilty of an offence and on conviction liable to a fine or imprisonment for a period not exceeding 15 years.

[34] Competition Act 89 of 1998.
[35] Financial Institutions (Protection of Funds) Act 28 of 2001.

(2) A court may, in addition to any penalty it may impose in terms of subsection (l), order that such person-

(a) pay the institution or principal concerned any profit he or she made; and

(b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.

(3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit.

In all three of the above instances the administrative fine is intended to be used in situations where there has been contravention of a provision in the Act being considered or where there has been failure to comply with a requirement in the relevant Act. What is also notable from these three provisions is the fact that a Court or a Tribunal or an Institution created by the Act imposes the fine, and not an administrator.

The difference in Section 24G(2A) an official imposes a fine and Section 24F imposes it through a court. The imposition of a fine in terms of Section 24G is mandatory. Section 1 of NEMA gives a definition of what a competent authority is[36] and it is clear from the definition that it is not a Court or a Commission. The Head of Department is deemed to be the competent authority. Section 24F of NEMA is a conventional offences and penalties provision in that it sets out what offences may be committed in terms of NEMA and what penalties may be imposed on offending parties. Determining guilt and imposing penalties in respect of offences committed in terms of Section 24F is *ultra vires* the statutory powers of the competent environmental authorities established by NEMA and falls to the criminal justice system.

The administrative fine provided for in Section 24G(2A), on the other hand, is an entirely different type of provision in that it seeks to hold the offending party liable for the administration costs that flow from an application in terms of Section 24G which would have been completely unnecessary had no offence been committed in the first place.

[36] Section 1: competent authority, in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity.

The principles set out in Section 2 of NEMA are important for the sustainability of the environment as they apply throughout South Africa[37] and serves as guidelines and frameworks with which any decision or implementation of plans regarding the environment must be applied.[38] Kotze describes achieving sustainable results through the use of sustainable principles[39] such as those found in Section 2(4) of NEMA.[40]

In practice the environmental authorities have developed a formula for determining the actual amount of the administration fine to be imposed in each instance. The Mentorskraal Familie Trust, by way of example, was required to pay an administration fine of R78 500,00 for unlawfully commencing with the construction of a filling station near Jeffreys Bay in the Eastern Cape. Attached in the Appendix is the example of Mentorskraal Familie Trust.

Some authors have suggested that the administration fine imposed in terms of Section 24G(2A) is *in lieu* of the criminal sanction provided for in Section 24F of NEMA.[41] This is incorrect as the position has been made clear by the publication of General Guidelines by the Minister or the MEC; read together with Section 24J of

[37] LA Feris "The Role of Good Environmental Governance in the Sustainable Development of South Africa" (2010) 13 *PELJ* 80 73-99.
[38] CC de Villiers "Threatened Biodiversity, The NEMA EIA regulations and Cultivation of Virgin land: More of The Sorry Same?" (2007) 10 *PELJ* 47 28-68.
[39] LJ Kotzé "Improving Unsustainable Environmental Governance in South Africa: The Case for Holistic Governance" (2006) 9 *PEJL* 99 75-118.
[40] Section 2(4): 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; 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.
[41] (4) A person convicted of an offence in terms of subsection (2) is liable to a fine
not exceeding R5 million or to imprisonment for a period not exceeding ten years, or
to both such fine and such imprisonment.

NEMA[42] regulates this position after it was inserted by the 2008 Amendment Act. This section is to be read together with Section 5.15 of the Department of Environmental Affairs and Tourism Guideline 3.[43] Section 5.15[44] states that applications will only be considered upon the payment of the administrative fine and that it is separate from any criminal penalty that may be impose. It can for this reason be accepted that the intention of the administrative fine is to cover the costs of the application.

As is shown above, the fines provided for by Sections 24F(4) and 24G(2A) are also different in nature with the former being imposed by the judiciary in respect of an offense and the latter being determined by the competent environmental authority in response to an application for rectification. The use of the term "administrative fine" also distinguishes the fine to be imposed in terms of Section 24G from an "ordinary" fine in terms of Section 24F.

Section 24F(4) provides for extremely onerous penalties (fines not exceeding R5 million and/or imprisonment for no more than 10 years per offense) while Section 24G(2A) provides for an administrative fine of no more than R 1 million. This is further confirmation that the fine imposed in terms of Section 24G(2A) is not intended to be *in lieu* of a fine in terms of Section 24F(4). It follows that having paid an administrative fine in terms of Section 24G(2A) and having made application for rectification is not a defence. A person who makes application for rectification in terms of Section 24G must pay an administrative fine and, additionally, remains liable to prosecution for having committed an offence in terms of Section 24F(1).

4 3 Section 24G(3):

If a person fails to comply with a directive contemplated in subsection 24G(2)(a) or contravenes or fails to comply with a condition contemplated in subsection 24G(2)(b), that person is guilty of an offence in terms of Section 24G(3) and liable on

[42] 24J Implementation guidelines The Minister or an MEC, with the concurrence of the Minister, may publish
guidelines regarding-
(a) listed activities or specified activities; or
(b) the implementation, administration and institutional arrangements of regulations made in terms of section 24 (5).
[43] General Guide to the Environmental Impact Assessment Regulations, 2006.
[44] People who have undertaken an activity without authorisation may apply for rectification in terms of section 24G of NEMA. The consideration of these applications is subject to an administrative fine of up to R1 million. This fine is separate from any criminal penalty that may be imposed.

conviction to a penalty contemplated in section 24F(4). In other words, a person who has admitted to having committed an offence in terms of *Section 24F(1)* (for which that person may be prosecuted and receive a penalty as provided for in terms of Section 24F(4)) would be guilty of a further offence, this time in terms of Section 24G(3) (for which that person may also be prosecuted and receive a penalty as provided for in terms of Section 24F(4)) if that person fails to comply with a directive contemplated in subsection 24G(2)(a) or contravenes or fails to comply with a condition contemplated in subsection 24G(2)(b). In addition to which that person would have had to pay an administration fine imposed in terms of Section 24G(2) for the Minister or MEC to decide on that person's application for rectification in terms of Section 24G of NEMA.

5 Lawfulness, Reasonableness and Procedural Fairness:

An important question that has to be considered is whether the procedure provided for by Section 24G is administratively just and compliant with the requirements of especially Section 33(1) of the Constitution which provides that: "*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*".

5 1 Section 24G and the Constitution:

In considering whether Section 24G of NEMA is administratively just or not, no reference can be had to the Promotion of Administrative Justice Act[45] (PAJA) because NEMA, as an Act of Parliament can only be directly tested against Section 33 of the Constitution.[46] What stands to be considered is whether the procedure followed provided for by Section 24G of NEMA is lawful, reasonable and procedurally fair.

As a procedure properly promulgated as part of an Act of Parliament, the Section 24G rectification procedure is lawful by definition. Determining whether the procedure is reasonable, reference needs to be had to how the Courts have dealt with reasonableness.

[45] Promotion of Administrative Justice Act 3 of 2000.
[46] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 99.

It is highly unlikely that the Section 24G rectification procedure will be found to be unreasonable. In the first place, it is not a mandatory process and a person who has committed an offence in terms of Section 24F(1) of NEMA may elect not to apply for rectification and face the consequences. In the second place, the procedure introduced by Section 24G operates exclusively to the benefit of the offending party in that it creates an opportunity for the possible lawful continuation of an activity that would otherwise have remained unlawful. The administration fine to be paid in terms of Section 24G(2A) is, thirdly, commensurate with the complexity of considering what to do regarding the specific offence in question.

The Section 24G procedure is, furthermore, procedurally fair in that it properly provides for both the applicant and those affected by or interested in the activity for which rectification is sought to make submissions in support of or in opposition to the application before any decision is taken.

Where a person has committed an offence in terms of section 24F section 24G provides for ex post facto environmental impact authorisation to enable the competent authority to decide how the offending behaviour ought to best be managed. When a competent authority considers an application in terms of section 24G, numerous factors need to be taken into consideration of which the following factors are unique to this type of application:

1) The extent to which the unlawful activity has, is or may have any kind of significant impact upon the environment.
2) Whether those impacts are capable of being adequately mitigated
3) Whether denying authorisation in terms of section 24G may not exacerbate the threats to and/or the degradation of the environment.

5 2 An analysis of Possible Attacks in terms of PAJA:

As Section 24G itself cannot be tested against PAJA, only the decision made by the Minister or the MEC in terms of the application can be tested. As a result, if an applicant in terms of Section 24G or a person who is opposed to the activity is dissatisfied with the decision reached by the Minister or the MEC they may make use of PAJA in having the High Court review the decision to determine if it was lawful, reasonable and procedurally fair.

In taking a decision the Minister or the MEC performs an administrative action that can have an effect on the environment[47] and the purpose of PAJA is to govern the actions of administrators and to ensure good administrative practice[48] that the decisions that are made are fair, lawful and reasonable. Kotze and Paterson state that environmental issues rely on administrators making decisions which often lead to conflict surrounding those decisions.[49]

The purpose of this section of the paper is not to test a decision against PAJA, but to describe what could trigger the use of PAJA. Kidd and Burn,[50] say that administrative functions encompass both powers and duties for which PAJA provides requirements which have to be met so as to ensure just administrative action.[51] If the requirements set out in PAJA are not complied with then the action in question is subject to judicial review.[52] If however they are complied with the requirements guide the administrator through a just decision making process.[53]

In Section 1(1) of PAJA the definition of what is administrative action is given which includes taking or failing to take a decision. The definition also includes a list of actions that do not qualify as administrative action of which none are applicable to a decision taken in terms of Section 24G of NEMA.

In order for there to be just administration action, the action must firstly be lawful. Section 6(2) of PAJA, which are the review grounds in the act, sets out certain requirements which may show if the action taken was lawful. The crux of the requirements is that one needs to see if there is authorisation and if there is, whether the decision taken by the Minister or MEC complies with the requirements of the empowering provision. Section 24G(2)(a) and 24G(2)(b) allow the Minister or the MEC to direct a person to cease the activity, in full or partially or they may authorise the activity. For this to be lawful the procedure set out in Section 24G(1) must be

[47] E Bray "Administrative Justice" in A R Paterson and L J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 174 152-196.
[48] Y Burns and M Kidd "Administrative Law and Implementation of Environmental Law" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 228 222-268.
[49] LJ Kotzé and AR Paterson "South Africa" in LJ Kotzé and AR Paterson (eds) *The Role of the Judiciary in Environmental Governance* (2009) 579 577-602.
[50] Y Burns and M Kidd "Administrative Law and Implementation of Environmental Law" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 228 222-268.
[51] Y Burns and M Kidd "Administrative Law and Implementation of Environmental Law" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 228 222-268.
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[53] E Bray "Administrative Justice" in A R Paterson and L J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 174 152-196.

complied with or else Section 6(2)(b) of PAJA can be relied on to review the decision as authorisation for the decision depends on the procedure. The procedure that is contemplated in Section 24G(1) requires that the applicant must compile a report furnishing the Minister or MEC with information upon which a decision may be taken[54] and where the Minister or the MEC requires it, the applicant must provide any information or undertake any studies the Minister or the MEC deem necessary in the circumstances before them.[55] In order for the report to be considered the applicant has to pay an administrative fine as contemplated in Section 24G(2A).

In *Weenen Transitional Local Council v Van Dyk*[56] it was held that complete compliance is not required but the administrator must have given meaning to the intention of the legislature.[57] This is connected to Section 24G as the intention of the legislature is to protect the environment and manage the activities that people undertake. If an applicant does not pay the administrative fine the Minister or the MEC do not have to consider the report and cannot be compelled to do so. Where the fine is paid the Minister or the MEC must act in terms of Section 24G(2).

In *Hira and Another v Booysen and Another*[58] it was held that where the intention of the legislature was required to determine whether the error in law is reviewable, and the error materially affected the decision,[59] the decision could be reviewed. PAJA Section 6(2)(d) expresses the finding of *Hira* and when an action is materially influenced by an error it can be reviewed. This is relevant to Section 24G as the Minister or the MEC are not limited to the information before them that has been compiled by the applicant in terms of Section 24G(1)(a) or (b). It would be expected that in payment of the administrative fine, that the relevant Minister or MEC would look at information beyond the report so as to enforce the duty of care of the environment envisaged in Section 28 of NEMA. But in doing so they must still remember not to exceed what is expected of them in reaching a decision that is best suited to preserve the environment. By doing this, the Minister or the MEC must also be cautious and within reason. Section 6(2)(e)(iii) of PAJA allows the review of administrative action where the administrator has laboured under the incorrect fact

[54] Section 24G(1)(a) of NEMA.
[55] Section 24(1)(b) of NEMA
[56] 2002 (4) SA 653 (SCA).
[57] para 13.
[58] 1992 (4) SA 69 (A). (Hereafter *Hira*).
[59] para 93.

and that incorrect fact has materially affected his decision.[60] If the Minister or the MEC do require further information that is not contemplated for in Section 24G(1) of NEMA, that information has to be necessary for the Minister or MEC to reach a decision. Section 6(2)(d) and 6(2)(e)(iii) are both applicable on Section 24G in the sense that there will be an error of law where the Minister or MEC do not request further information and where there has been such a request, the decision that is made must not have been based on irrelevant facts.

Secondly, the decision made in terms of Section 24G of NEMA has to be reasonable. Rationality constitutes the core minimum standard[61] for reasonableness requiring only reasons to satisfy the requirement. This has been incorporated into Section 6(2)(f)(ii) of PAJA which sets out a number of criteria to see if the action is rational. In *Carephone (Pty) Ltd v Marcus NO and Others*[62] Froneman DJP held that there must be a rational objective basis justifying the connection between the information available and the final conclusion.[63]

Section 6(2)(h) of PAJA places a higher degree of reasonableness on the decision. This is so as Section 28 of NEMA places a duty of care on a person who owns property regarding the environment. O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[64] gave meaning to Section 6(2)(h). In the case the Judge sets out a number of factors namely the nature of the decision, the identification and expertise of the decision maker, reasons given and the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.[65] The decision will be reviewable if it is such that a reasonable decision maker would not reach such a decision.[66] A reasonable Minister or MEC who has a duty to protect the environment when considering a Section 24G application would be expected to have rationally considered all aspects and consequences the decision they will make could have not only on the environment but also on other interested parties and in doing so having a rational basis for their decision.

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[60] *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) at para 47.
[61] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 108.
[62] 1999 (3) SA 304 (LAC).
[63] 37.
[64] 2004 (4) SA 490 (CC). Hereinafter Bato Star.
[65] 45.
[66] Section 6(2)(h) of PAJA.

Where the minimum standard of Section 6(2)(f)(ii) is not enough to ensure the reasonableness of the administrative action, Section 6(2)(h) provides guidance. The implication of these factors of *Bato Star* is so that one can question why the decision was made, by incorporating proportionality to the decision. Proportionality requires a balance between the impact of the decision and the purpose of the decision.[67] As this is not a law of general application the limitation clause set out in Section 36 of the Constitution is not applicable, but one could interpret *Bato Star* and the factors set out in the case so as to function as a limitation clause in administrative law and in doing so determine the reasonableness of the decision. The factors that are considered in Section 36 of the Constitution that allows for the limitation so that there can be proportionality include, the nature of the interest, the importance of the purpose of the decision, the nature of the power, surrounding circumstances, the intensity of the impact, the broader public's interest and whether there is a less restrictive means. In considering an application brought through Section 24G a Minister or MEC will have to justify their decision that they make against each factor to show that they have balanced each affected interest against each other and have reasons for why they made the decision in such a way and is rationally justifiable.

Finally, PAJA requires that the decision must have been reached following a fair procedure. Section 3 of PAJA in particular Section 3(5) allows for a procedure that is different to that found in Section 3(2)(b) as long as it is fair. In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others*[68] it was stated that Section 3 of PAJA is the bare minimum with which must be complied and that where an alternative procedure exists that is provided for by the empowering provision then that procedure must be followed.[69] For the alternative procedure to be fair, it requires the procedure to be lawful. Therefore there is a possible overlapping of the requirements for lawfulness (Section 6(2)(b)) and the requirements for procedural fairness (Section 6(2)(c)), for compliance of the procedure not in terms of NEMA but rather in terms of PAJA .

Section 24G(1) sets out the procedure that an applicant in terms of Section 24G must have abided by, by compiling a report and submitting that report to the Minister or MEC for consideration. This section requires that the compiled report be extensive

[67] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para 162.
[68] (*No 1*) 2008 (3) SA 91 (E).
[69] para 71.

by including the interests of all the affected parties,[70] public participation[71] and an environment management programme.[72] Even though NEMA allows for an alternative procedure in Section 24G(1), the compiling of the report and 24G(2) allowing the Minister or the MEC to make a decision, Section 3(2)(b) of PAJA is the bare minimum that must still be complied with. The Minister or MEC will have to furnish reasons for why they made their decision and if they do not do so, inform the applicant or interested party of their right to request reason. To ensure compliance with procedural fairness the Minister or MEC will have to take cognisance of not only the procedure as in NEMA but also the procedure set out in PAJA.

6 Conclusion:

Section 24G has been described as an anomaly[73] and as being inconsistent with the South African Framework for Environmental Governance because it allows for retrospective authorisation of unlawful activities. The fact of the matter is that it has given the competent authority more control over exercising their powers regarding the environment and addresses what was a *lacunae* in the law.

It has been claimed that by allowing retrospective authorisation a number of possible shortfalls have been created. These include the fact that the administrative fine does not serve as a strong enough deterrent[74] to those who would try and circumvent the normal procedures for obtaining authorisation. Another possible shortfall is that NEMA is not clear for what type of situations Section 24G is applicable and that if the activity has begun that there has already been environmental damage and the result is that Section 24G is void because one cannot remedy the damage already done. Finally another concern is that when application is made in terms of Section 24G, the provision does not provide that the applicant must cease his activity immediately.[75]

In considering these concerns, one should not look at Section 24G apart from the rest of the provisions of NEMA. What Section 24G does not do is to remove the

[70] Section 24G(1)(a)(iii) of NEMA.
[71] Section 24G(1)(a)(iii) of NEMA.
[72] Section 24G(1)(a)(iv) of NEMA.
[73] M van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" in H A Strydom and N D King (eds) *Environmental Management in South Africa* (2009) 207 193-221.
[74] R Paschke and J Glazewski "Ex Post Facto Authorisation in South African Environmental Assessment Legislation: A Critical Review" (2006) 9 *PELJ* 145 120-150.
[75] Paschke and Glazewski 2006 *Potchefstroom Electronic Law Journal* 9.

deterrent effect of Section 24F by granting authorisation in terms of Section 24G. This is the important part of the provision. What it does is that it allows a person to firstly admit that they are guilty for contravening Section 24F and then allow the authorities to hold the person liable for the contravention in addition to allowing the offending party to seek rectification in an environmentally accountable way. If the applicant of the Section 24G application however contravenes the order made in terms of Section 24G(2)(a) or 24G(2)(b), that person will be guilty of another contravention of NEMA.

Secondly, by applying in terms of Section 24G reference should be made to Section 28 and the duty of care placed on the applicant so as not to cause harm to the environment. This by necessary implication means that because of the application one should cease to carry on with the activity so as to comply with the duty of care.

Finally, as mentioned above, the administrative fine is not a criminal or penal sanction. It is rather a means to cover the costs of the application. If however you do not pay the fine, the Minister or the MEC cannot be forced to consider the application.

Section 24G is rather an extraordinary provision as it functions as a supplement to the purely punitive provisions of Section 24F and it makes sure that unlawfully undertaken or commenced activities are dealt with in an environmentally accountable manner.

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