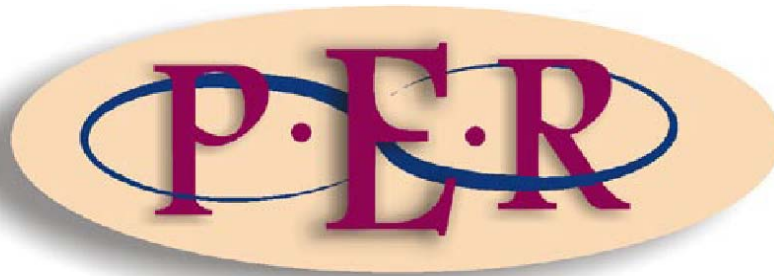

**THE CONSTITUTIONAL COURT'S CONTRIBUTION TO SUSTAINABLE DEVELOPMENT
IN SOUTH AFRICA**

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THE CONSTITUTIONAL COURT'S CONTRIBUTION TO SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA

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ABSTRACT

Sustainable development arguably relates to not only the sustainable use and exploitation of natural resources, but also to the enhancement of the quality of peoples' lives through inter alia constitutional governance. An enormous responsibility is placed on South African courts when having to balance the predominant responsibilities of the South African constitutional state. Sustainable development is therefore pertinent to the South African constitutional experiment. A careful consideration will have to be given by the Constitutional Court in order to establish an interpretative framework to guide both the executive and legislative authority in their quest to further both socio-economic development and environmental conservation on a road towards sustainability. This consideration should be conducted in an intellectually honest manner, recognising that, because of the lack of answers at present, future constitutional development may provide solutions to current pressing problems such as poverty alleviation and the conservation of natural resources.

1. INTRODUCTION

The rapid development of environmental law in South Africa during the past decade can in part be attributed to the inclusion of an elaborated environmental clause in the Bill of Rights contained in the Constitution of the Republic of South Africa 108 of 1996 (hereafter the 1996 Constitution). The comprehensive content of section 24, in particular section 24(a), provides for a right to an environment that is not harmful to people's health or well being. This wording suggests that section 24(a) can be construed as a traditional, positively formulated fundamental right to which every person is entitled. Section 24(b) however, contains directive principles and therefore resembles the character of a socio-economic right that imposes duties on the state to protect the environment for present and future generations through reasonable legislative and other measures. It is apparent from the wording of section 24 that there exists a potential relationship of conflict between environmental conservation

and sustainable development.

South African courts, with specific reference to the Constitutional Court, through its interpretation and adjudication responsibilities of constitutional matters, may play a vital role in the assessment and balancing of developmental issues and sustainable environmental protection as far as they pertain to environmental and constitutionally related issues. The manner, in which the judiciary interprets and adjudicates the fine balance between sustainable development and environmental conservation, may provide guidance to both the executive and the legislative authority when having to facilitate sustainable development on the one hand and protecting the environment on the other.

By focusing on the inherent conflict contained in section 24 of the 1996 Constitution, domestic legislation, and relevant constitutional case law, this paper will investigate the interactive co-existence of developmental and environmental conservation issues as it is currently established in South African law. The critical views expressed hereafter are intended to emphasize the importance of constitutional interpretation and adjudication by the Constitutional Court, especially in those instances where issues of sustainable development must be considered by South African authorities in the required process of ensuring sustainable development in South Africa.

2. THE RELEVANCE OF CONSTITUTIONAL INTERPRETATION

Prior to the enactment of the Constitution of the Republic of South Africa, 1993 (hereafter the Interim Constitution), the supremacy of parliament formed the fundamental basis of the South African state. The judiciary did not have the competence to oversee the legitimacy of legislation, which meant that parliament could, on the basis of its sovereignty, pass discriminatory legislation provided that it followed the correct procedure. The Interim Constitution however, brought about the establishment of a constitutional state where constitutional provisions constitute the supreme law in South Africa. This new legal order was reaffirmed and strengthened by the 1996 Constitution, which, through its comprehensive provisions, brought about a new era of legal thinking in South Africa.

Since this inception, the interpretation, implementation and adjudication of legal texts have accordingly changed in a dramatic fashion. The interpretation and adjudication of statutes by courts became subject to the constitutional provisions, which cumulatively espouse a number of values. These values are specifically meant to embody the spirit and purport of the fundamental rights in the 1996 Constitution. It is now required that these values be taken into account in the interpretation of any legislation in South Africa. The implication is that a pure textual approach has been replaced by a contextual approach that requires courts on all levels to make value judgments by considering issues of a political, socio-economic and cultural nature.

The contextual approach to interpretation emphasizes that a single and particular provision in legislation should be understood within the context of the encompassing legislation as a whole.¹ The advantages posed by contextualism as an interpretative method, is evident from the fact that it may be employed to facilitate harmonization of conflicting provisions in legislation. The contextual approach entails that the relevant judicial body should interpret legislative provisions by considering the language of the provision against the backdrop of the legislative meaning of the whole act. The relevant judicial body should further heed the broader context of the legislation, which includes the purpose, scope and history thereof. Contextualism also entails that a court should apply a purposive approach to interpretation. The latter emphasizes that interpretation should give meaning to a legislative provision by reading a purpose or object into the provision. The purposive approach is supplemented by the teleological approach, which strives for the realization of a given set of values. The objectives of the teleological approach correspond with section 39(2) of the 1996 Constitution, which states that when interpreting the Bill of Rights, the relevant judicial body must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom.

1 Du Plessis Re-Interpretation of Statutes 112.

It is apparent from the above that the Constitutional Court may employ the contextual approach when interpreting section 24 of the 1996 Constitution. Contextualism in this sense will require the consideration of sustainable development within the context of the 1996 Constitution and relevant national legislation in order to balance interests of sustainable development and environmental conservation by way of a careful consideration of the purpose, scope and history of the legislation within the context of values that underlie an open and democratic society.

The Constitutional Court is the highest court in all constitutional matters and as an instrument aimed at the interpretation and adjudication of constitutional provisions, it may play a vital role in the development of the above purposive approach. By employing a contextual approach, the interpretation and adjudication responsibility of the Constitutional Court may therefore be utilized to facilitate transformation from a culture of authority to a culture of justification.² By employing the contextual approach, the latter will result in the establishment of a rich law of precedent upon which a balanced interpretation and application of section 24 of the 1996 Constitution can be built by South African courts and authorities responsible for both sustainable development and environmental protection.

2 Mureinik 1994 SAJHR 32.

3. AN INTERPRETATION OF DEVELOPMENT IN THE SOUTH AFRICAN CONTEXT

Whilst it is clear from the wording of section 24 that government prioritizes environmental conservation and protection, common sense dictates the absolute need in a developing country such as South Africa, to address developmental issues of poverty, unemployment, housing backlogs and the need for infrastructure development.

It may be required of the Constitutional Court, when called on to adjudicate issues pertaining to section 24 of the Constitution, to refer to relevant interpretations of the concept of development in the South African context.

Apart from mentioning development in various clauses, environmental framework legislation, which includes inter alia the National Environmental Management Act 107 of 1998, 1998 (hereafter NEMA), nowhere provides for a clear definition thereof. The reason for this rather unfortunate omission may be due to the fact that the legislator intended to have all developmental issues regulated by the provisions of a single uniform set of rules in the form of the Development Facilitation Act, 1995 (hereafter DFA). The purpose of the DFA is evident from its long title, which states that the main aim of the DFA is to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programs and projects in relation to land.

Development is accordingly defined in section 1 of the DFA as land development, which refers to any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes. Evident from this definition is the fact that development in South African context is mainly focused on the reconstruction of an imbalanced landownership and land utilization regime as well as the rectification of socio-economic issues emanating there from. It is proposed that development, in the context of section 24 of the Constitution, describes a process of development, which is aimed at the reconstruction of an impoverished society plagued by landlessness, inadequate access to life-sustaining infrastructure and poor socio-economic conditions. This definition broadly describes development, which should include

physical land-use planning and development, as well as socio-economic, financial, cultural, political and other relevant connected factors.³ In order to aid the facilitation of improving the quality of life of South Africans, it is therefore proposed that the Constitutional Court should utilize the definition of development as it is employed by the DFA.

4. AN INTERPRETATION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND DOMESTIC LAW

For a proper understanding of sustainable development as an integrated concept, it seems worthwhile to make a distinction between sustainability on the one hand and development on the other. Sustainability arguably refers to the ability to maintain a desired condition over time, without eroding natural, social or financial resources. Seen in this context, sustainability describes an ultimate goal, which can be achieved through development. Due to the fact that development is a process and therefore not a goal, but a means to achieve a goal, development cannot be sustainable in itself. It is therefore evident for the purposes of sustainable development, that these two concepts can never be separated.

Of further importance is the division of sustainable development into environmental, social and economic dimensions by Myerson and Rydin.⁴ It is in fact these three dimensions which sustainable development aims to balance. Environmental sustainability concentrates on the resource base as the object of sustainability⁵ and therefore aims to sustain global life-support systems in an indefinite way.⁶ Economic sustainability refers to the maximization of the net benefits of economic development that is subject to the maintenance of services and quality of natural resources over time. Social sustainability in the last instance describes the sustenance of all moral capital of a particular society.

3 Zagaris Law and Development 123.

4 Myerson Sustainable Development 27.

5 Redclift Measuring of Sustainable Development 395-403.

It is proposed that these three dimensions of sustainable development are inter-dependent. Whilst the one cannot exist without the other it may be construed from the above that social, environmental and economic sustainable development have to be present in order to constitute a sound understanding of sustainable development per se. The concept of sustainable development is frequently used in the provisions of environmental framework legislation. The preamble of the NEMA states that sustainable development requires the integration of social, economic and environmental factors in planning, implementation and evaluation of decisions to ensure that development serves present and future generations.

Significant is the fact that the NEMA defines sustainable development in section 1 thereof. This is the first attempt to provide a formal definition of sustainable development in South African environmental legislation. This definition describes sustainable development as the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations. Apart from the fact that development should be socially, environmentally and economically sustainable, section 2(1)(4)(a) establishes a number of relevant principles that should be considered by relevant authorities during the initiation and implementation of development. These principles include: that the disturbance of ecosystems and loss of biological diversity be avoided or minimized and remedied; that environmental pollution and degradation should be avoided or minimized and remedied; that the disturbance of landscapes and sites that constitutes cultural heritage be avoided or minimized and remedied; that waste should be avoided or minimized, reused or recycled in a responsible manner; that the use and exploitation of non-renewable and renewable resources should be responsible and equitable; that a risk averse and cautious approach should be applied during the environmental management process and that negative impacts on the environment and on peoples' environmental rights be anticipated and prevented.

Evident from a literal interpretation of these principles, is the fact that all of the national environmental management principles contained in section 2 of the NEMA, are in fact rooted in the concept of sustainable development. The definition and description of sustainable development provided by the NEMA is furthermore far more comprehensive than the definition offered under section 24 of the 1996 Constitution. The NEMA definition aims to integrate social, environmental and economic concerns into planning, development and decision-making. By providing a number of factors that should be considered when having to facilitate sustainable development, the NEMA provisions greatly enhance the understanding of what is meant by the concept of sustainable development. It is proposed that the Constitutional Court should consider the NEMA definition of sustainable development during the adjudication of environmental matters before the Court. By heeding these comprehensive provisions, the Constitutional Court will be enabled to create balanced precedents based on the notion that sustainable development should further the interests of present and future generations in a country where justifiable, sustainable development and environmental protection is of the essence.

5. THE CONSTITUTIONAL COURT AND KYALAMI RIDGE ENVIRONMENTAL ASSOCIATION

A recent case to have come before the Constitutional Court for the adjudication of environmental matters that pertains to section 24 of the 1996 Constitution, is *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 3 SA 1151 (CC) (hereafter the Kyalami case). In this case the applicants, a concerned environmental association, took the government to court, arguing that the realization of some of the socio-economic rights of desperate and poor people infringed on the property and environmental rights of property owners in the disputed area. The applicants based their case on the provisions of relevant environmental legislation that include section 24 of the 1996 Constitution, the provisions of the Environment Conservation Act, 1989 (hereafter the ECA) and certain provisions of the NEMA.

Although the Constitutional Court did not anywhere in its judgment explicitly refer to the concept of sustainable development, it did however; expand on issues pertaining to sustainable development and environmental conservation in the context of section 24 of the 1996 Constitution and other relevant provisions in legislation. The interpretation employed by the Constitutional Court in the Kyalami case may therefore be significant for the future adjudication of environmental matters within the context of section 24 of the 1996 Constitution.

5.1 Facts of the case

Towards the end of the summer of 2000, heavy rains in parts of South Africa caused extensive destruction and damage to the area in the vicinity of Alexandra Township near Johannesburg. The floods destroyed the homes of approximately 300 people living on the banks of the Jukskei River. Some of the Alexandra flood victims were given inadequate and temporary accommodation in overcrowded shelters that lacked sufficient water supply and sanitation. It was agreed by government that there was an urgent need to make sufficient provision for the temporary accommodation of the flood victims by way of the establishment of a transit camp for this purpose.

A portion of state-owned land, on which the Leeuwkop Prison is located, was identified as the most suitable site for the transit camp. No prior consultation was held with residents in the vicinity of Leeuwkop, who first learned of the government's plans when a contractor moved onto the prison site to commence with preparatory work. A number of the residents were not satisfied and subsequently formed a residents' association (hereafter the Kyalami Residents). Legal advice was sought and a demand was made to the Minister of Public Works asking her to suspend operations on the site or face court proceedings. The demand was not complied with and after an urgent application was brought before the High Court, an interim interdict was granted on the terms claimed by the Kyalami Residents. The Court held that the decision of the Department of Public Works to establish an informal residential settlement on the disputed area, be reviewed and set aside. The Court further held that the decision of government could not be validly implemented without complying with the various environmental and developmental statutes, laws, by-laws and regulations. The government then applied to the Constitutional Court for leave to appeal directly to it against the order made by the High Court.

5.2 Government's failure to comply with relevant legislation

The applicants inter alia contended that government had failed to comply with the provisions of section 2(4)(g) and section 2(4)(k) of the NEMA, which set out the principles on the basis of which environmental management should be conducted in South Africa. Section 2 of the NEMA states that the principles set out therein, apply throughout South Africa to the actions of all organs of state that may significantly affect the environment. The principles are applicable alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfill the rights contained in the 1996 Constitution. The Court examined the nature of the principles and their application, emphasizing the role that they are intended to play in directing the state's formulation of environmental policies. The Court also emphasized the importance of the principles in the greater scope of environmental management, by specifically discussing the role that it plays in environmental implementation and management plans. It specifically stated that the principles are not aimed at controlling the manner in which organs of state use their property. The Court argued that seen in the context of the NEMA as a whole, the principles are rather aimed at the formulation of environmental policies by the State.

In its argument, the Kyalami Residents relied on a report of an environmental expert. The report addresses issues pertaining to the possibility of soil erosion, air pollution, the possible damage to flora and fauna by the residents of the camp, the possible loss of the agricultural potential of the land and the impact that the establishment of the camp will have on the socio-cultural environment of the area and property values.

The government however argued that the accommodation of the flood victims on the prison farm is a temporary measure. Therefore no obligation on government to comply with the legislative requirements referred to in the environmental report existed. In their argument, government added that the negative impact foreseen in the report will not materialize and if, in the unlikely event that it does, all negative impacts can be rectified after the camp has been removed.

In dealing with the above contentions by the Kyalami Residents and the government, the Court stated that the principles of section 2 of the NEMA are only applicable to

activities that may (own emphasis) significantly affect the environment. The Court accordingly found that the Kyalami Residents failed to indicate whether the proposed activity will (own emphasis) have a significant effect on the environment. The Court ruled that even if the development has to be carried out in accordance with the principles in section 2, it has not been shown that the provisions of the NEMA were infringed by the government's decision to locate the camp at Leeuwkop.

5.3 The applicants' contentions pertaining to procedural fairness

The Kyalami Residents contended in the alternative that even if the decision by government to establish the camp was lawful, the procedure that was followed in choosing the site, infringed their constitutionally protected right to procedurally fair administrative action.

The Court approached the question of procedural fairness, raised by the applicants, by considering their interests in the matter. It stated that where, as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. The Court added that procedural fairness depends in each instance on the balancing of various relevant factors, which includes the nature of the decision, the rights affected by it, the circumstances in which it is made, and the consequences resulting from it. The Court stressed that in these particular circumstances there was a need for a decision to be taken quickly in order to address the plight of the flood victims.

The Court further stated that the interests of the Kyalami Residents are similar to the interests that landowners in other places would have had if the choice had been made to locate the camp at a different site close to them. The interests of the Kyalami Residents are primarily vested in property values and in a peaceful and clean environment that might be disturbed by the temporary settlement of a large number of people in a transit camp in their vicinity. The interests of the flood victims on the other hand is to be accommodated at a place reasonably close to the place where they had previously been living as well as the interests of other homeless communities in search of land on which to settle. The Court accepted the fact that property values may be affected by low cost housing development on neighboring

land. It furthermore recognized that this is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide access to housing. The Court however concluded that it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.

Although the interests of the Kyalami Residents may be affected, consideration is also to be given to the interests of the flood victims. The flood victims have a constitutional right to be given access to housing. In this instance the provision of housing by the government in the form of the transit camp is temporary, urgent and essential. For this reason the Court found that the interests and rights of the victims should be considered above those of the Kyalami Residents.

5.4 Some critical comments on the Constitutional Court's judgment

The Kyalami case is a clear example of an instance where it was required of the Constitutional Court to adjudicate matters relating to constitutional provisions and environmental concerns. It is however respectfully proposed that the Court in many instances reached disappointing conclusions.

The establishment of the transit camp constituted a form of development that is aimed at the provision of adequate housing to the homeless. In this regard the judgment of the Court should be commended because it recognizes and unquestionably reaffirms the constitutional duty of the government to provide relief for the homeless and victims of natural disasters. Although the government could not base its decision to establish the transit camp on appropriate legislation, the decision had to be taken swiftly. Had the government done nothing to aid the flood victims, it would accordingly have failed in its constitutional duty. The Constitutional Court had an enormous responsibility to balance the right to housing and the right to a clean and protected environment. One can however speculate whether the Court would have reached a different conclusion if it contextually and purposively considered the possible implications of justifiability and sustainability in the context of development. The poor socio-economic conditions in South Africa may arguably have urged the Court to be less concerned about environmental concerns than other more pressing

matters. It is therefore proposed that the Court may have reached a different conclusion if it considered all relevant issues of sustainable development that are well established in South African legislation and international law. The implication is that a pure textual approach was followed rather than a contextual approach.

The Court's interpretation of the environmental management principles contained in section 2 of the NEMA is a further matter for concern. The Court emphasized that the main aim of the section 2 principles is to provide for the preparation of environmental management and implementation plans. The regulation of such plans however constitutes only a single chapter of the comprehensive provisions of the NEMA. The author agrees with Kidd when he rightly puts it that: "This description of NEMA seriously skews its overall objectives. The plans are important but they are certainly not the fulcrum around which the rest of the Act revolves"⁷. It is respectfully proposed that the Court may have reached a different conclusion if it considered the case within the context of the objectives of the NEMA as a whole and not only with reference to only one of its aims.

The Court went on to find that the principles of section 2 do not control the manner in which organs of state use their property. It is however clear from the text of section 2(1) that "The principles set out in this section apply throughout the Republic to the actions of all (own emphasis) organs of State". This interpretation of the Court is therefore clearly flawed.

In its assessment of the environmental report submitted by the Kyalami Residents, the Court concluded that the Kyalami Residents failed to prove that the proposed activities will (own emphasis) significantly affect the environment. Section 2(1) of the NEMA however only states that the principles therein "apply ...to the actions of all organs of State that may (own emphasis) significantly affect the environment". The author again concurs with Kidd when he proposes that:

The Act uses the word 'may' because it should not be necessary for someone relying on these principles to show that an action by government will significantly affect the environment, but only that it may significantly affect the environment.⁸

⁷ Kidd 2001 SAJELP 122.

⁸ Kidd 2001 SAJELP 124-125.

Due to the increased international and national importance and relevance of sustainable development as a paramount concept in the facilitation of development, parties involved in the environmental management process should not be burdened with strict obligations of having to prove the probable effect of activities on the environment. This submission accords with the aim of the NEMA which, through the wording of section 2(1) arguably intends to lighten the legislative obligation on interested parties to prove the significance of activities.

With regard to the Court's interpretation of the NEMA environmental principles, it is suggested that the Court did not have due regard to the literal interpretation of the principles that unquestionably supports sustainable development. The Court might have come to a very different conclusion had it recognized the fact that the principles are in fact rooted in the concept of sustainable development. It is proposed that the Court regrettably lost an opportunity to contextually interpret section 24 of the 1996 Constitution and the relevant provisions of environmental legislation in a way that would have furthered sustainable development. The pure textual interpretation of specifically the environmental management principles of the NEMA, should rather have been replaced by the contextual approach, where consideration should have been given to the purpose of the NEMA as an act that *inter alia* aims to facilitate sustainable development in the context of the present South African society.

6. CONCLUSION

Post-apartheid South Africa stands at the threshold of a new era where the South African people are faced with enormous political, social and economic challenges. One of these challenges is to initiate and facilitate the development of South Africa, which in the present South African context entails the widest possible definition and application of development. Development and the alleviation of poverty are however inherently intertwined with environmental concerns. In this regard, much can be said for the statement of Justice Albie Sachs when he acknowledges that "the greening of our country is basic to its healing"⁹. It should therefore be a priority of developmental authorities to conduct development in a sound, sustainable and justifiable way in order to expand the options of both present and future generations.

The right to have the environment protected on the one hand whilst facilitating sustainable development on the other is firmly established by section 24 of the Constitution and other relevant environmental legislation. The South African judiciary and more specifically the Constitutional Court may therefore play a profound role in the establishment of sustainable development in society through its constitutional interpretation responsibilities.

The judgment of the Court in the Kyalami case did in many respects not further the cause of sustainable development in South Africa. It is proposed that the Constitutional Court should in future engage in a holistic, purposive and contextual approach in constitutional interpretation when having to deal with the concept of sustainable development in South Africa. Such an approach may prove to establish a rich law of precedent upon which a practice may evolve that will protect the fundamental rights of all South Africans whilst guaranteeing the greening of a country that is renown for its natural beauty.