

**PROTECTION OF THE ENVIRONMENT THROUGH THE
APPLICATION OF SECTION 24G OF THE NATIONAL
ENVIRONMENTAL MANAGEMENT ACT, 107 OF 1998**



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Abstract

Listed / specified activities are undertaken following authorisation through an environmental impact assessment process. It is an offence to commence them without authorisation, which may attract sanctions through administrative, civil or criminal measures. These measures have proven to be inadequate, which leads to the question: what possible remedies could be effective in such instances. The promulgation of s24G was meant to answer this by introducing a process which might 'correct' problems associated thereto.

However, s24G proved to be controversial and confusing, and possibly not aligned to the enabling provisions under which it was housed. Furthermore, a number of concerns were raised, such as being a *fait accompli* authorisation, potential for abuse, being inimical to sustainable development principles, possible unconstitutionality (double punishment for the same crime in contravention of the country's founding constitutional provisions), *etc.* This study sought to investigate whether these concerns are warranted, whether consideration is given to the environment in the s24G process, and the *ex post facto* environmental authorisation jurisprudence in the country.

This study found that environmental considerations were central to the s24G process and its outcomes, making it a possible solution to listed / specified activities undertaken without authorisation. Courts, however, have been inconsistent and somewhat contradictory in their interpretation of *ex post facto* authorisations, which makes it difficult to adequately allay some of the concerns. This study also found that concerns regarding s24G may have been warranted at its promulgation but may no longer be sustained by the current provisions as amended, because of refinement thereof over the years. Empirical evidence suggests that most of those who apply for s24G 'correction' in the Province of KwaZulu/Natal are companies, and many ultimately get authorisation. This is in line with the observations in other provinces. However, data is not readily available and where it is, it sometimes has gaps, making it almost impossible to make definitive findings. In this regard, it may be necessary to consider making the s24G application process and data thereof transparent and easily accessible.

Declaration

I, Sgananda ML Jikijela, hereby declare that the work on which this study is based is my original work (except where acknowledgements and context indicate otherwise) and that neither the whole work nor any part thereof has been, is being, or will be submitted for another degree in this or any other university.



12 December 2018

Signature

Date

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Acronyms

EAP	Environmental Assessment Practitioner
ECA	Environmental Conservation Act, 1989 (Act 73 of 1989)
EDTEA	Department of Economic Development, Tourism & Environmental Affairs
EIA	Environmental Impact Assessment
EMF	Environmental Management Framework
fn	footnote
GG	Government Gazette
GN	Government Notice
I&AP	Interested and Affected Parties
KZN	Province of KwaZulu/Natal
MEC	Member of the Executive Council
NEMA	National Environmental Management Act, 1998 (Act 108 of 1998)
EMPr	Environmental Management Programme
N ^o .	Number
NPA	National Prosecuting Authority
R.	Regulation
s	Section
s24G	Section 24G of NEMA
s24F	Section 24F of NEMA

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CHAPTER 1: INTRODUCTION

This chapter introduces the study, its objectives, problem statement and the questions it sought to answer. It also outlines the study methodology, ethical considerations and the justification for conducting the study. Finally, it presents the layout and the breakdown of chapters in this dissertation.

1.1 BACKGROUND AND PROBLEM STATEMENT

The environmental impact assessment (EIA) process seeks to investigate and anticipate possible impacts of listed / specified activities on the environment in order to avoid and/or mitigate against possible negative impacts. Where negative impacts cannot be altogether avoided and/or mitigated, alternatives or measures to offset them are explored, while positive impacts are enhanced.

South Africa first legislated EIAs in the late 1990s through the publication of regulations relating to the EIA process¹ and the identification of a list of activities which could not be undertaken without prior authorisation² under the Environment Conservation Act.³ ECA provisions which relate to EIAs and its regulations were subsequently repealed by the National Environmental Management Act⁴ and successive EIA regulations published thereunder.⁵

The aforementioned EIA legislation introduced a set of procedures and processes which had to be followed in order to get authorisation before anyone could undertake a listed / specified activity. A gap in legislation appeared to develop when listed / specified activities were undertaken without following the prescribed legislative processes. Subsequently, section 24G of NEMA, which sought to ‘correct’ such activities, was introduced and later amended.⁶ This provoked a lot of enquiry and commentary which, in the main, was critical of this ‘corrective’ statutory provision. The focus was on its possible abuse by unscrupulous

¹ General EIA Regulations (GN R.1183 published in *GG* N^o 18261 of 5 September 1997).

² Identification of Activities which may have a Substantial Detrimental Effect on the Environment Regulations (GN R.1182 published in *GG* N^o 18261 of 5 September 1997).

³ Act 73 of 1989 (herein referred to as ECA); see s21.

⁴ Act 107 of 1998 (herein referred to as NEMA); see Chapter 5 of this Act.

⁵ GN R. 385–7 published in *GG* N^o 28753 of 21 April 2006; GN R. 543–6 published in *GG* N^o 33306 of 18 June 2010; GN R. 982–5 published in *GG* N^o 38282 of 4 December 2014; and GN R. 324–7 published in *GG* N^o 40772 of 7 April 2017.

⁶ Through an amendment of NEMA in 2004, section 24G was introduced to ‘correct’ listed / specified activities undertaken without authorisation. Herein section 24G of NEMA is simply presented as s24G.

developers, its possible illegality, whether it may be inimical to the sustainable development imperatives, the quantity of the administrative fine it introduced, and the confusion it seemed to cause to both authorities and developers.⁷ However, there seems to be limited focus, if any, on the implications thereof for the environment.

The problem statement for this study, therefore, is that the aforementioned enquiry and commentary did not put enough consideration and emphasis on aspects which relate to the implications of the provisions of s24G on the environment. The problem question is whether or not this ‘corrective’ legislative regime promotes the fundamental objectives of environmental authorisation.

1.2 JUSTIFICATION AND RATIONALE FOR THE STUDY

Though s24G has been widely studied and reported upon, the focus seems to have been single-mindedly one-sided: mainly (as outlined above) negative, *viz.*, covering concerns that it was a means to ‘legality’ through the ‘back door’ for unscrupulous developers; concerns that it contravened the principle of legality; concerns that it was inimical to the objectives of sustainable development; and concerns that the administrative fine, which was (and still is) mandatory in terms thereof, did not serve as a deterrent. Seemingly, there has not been a thoroughgoing investigation into whether or not s24G is and/or may be a useful tool (amongst other environmental management tools) to foster the environmental right enshrined in the Constitution.⁸ In this regard, this study, as opposed to many before it, sought to take the debate on s24G further by investigating the role it plays, if any, in the protection of the environment.

It is also important to note that s24G has been amended and refined a number of times since its first introduction⁹ and many studies and commentary focussed on s24G before the amendments, and there seems to be no studies that investigated the implications of the latest amendments. This study sought to plug this gap.

⁷ There are a number of authors who raised concerns about s24G & are discussed hereunder; please refer to the discussion under 2.7.2 of this dissertation.

⁸ The Constitution of the Republic of South Africa, 1996; see s24.

⁹ Since its promulgation in 2004 it has been replaced twice. It was first inserted by s3 of National Environmental Management Amendment Act, 8 of 2004, then substituted by s6 of National Environmental Management Amendment Act, 62 of 2008 & again substituted by s9 of National Environmental Management Laws Second Amendment Act, 30 of 2013.

Results from this study would be an important input into the debate relating to whether or not s24G provisions are inimical to the sustainable development imperatives as broadly encapsulated in the provisions of s2 of NEMA.

1.3 STUDY OBJECTIVE AND RESEARCH QUESTION

The objective of this study is to assess whether or not s24G serves to protect the environment, and therefore the main research question is: does s24G serve the fundamental objective for which an environmental authorisation is meant to serve. In order to respond to this question, the following sub-questions are important and must be answered, *viz.*,

- (i) what information has been published on *ex post facto* environmental authorisation in South Africa,
- (ii) what jurisprudence has been developing, over the years, regarding *ex post facto* environmental authorisations in South Africa,
- (iii) what inferences, particularly with regard to the environment, can one draw from a sample of *ex post facto* environmental authorisation decisions in the Province of KwaZulu-Natal, and
- (iv) what conclusions can be drawn from the questions above, with regard to the implications for the environment, of *ex post facto* environmental authorisation, and what recommendations can one make.

These questions are answered thorough a review of literature (both primary and secondary sources) and an analysis of a sample of s24G departmental application files and/or decisions. The research methodology used to get to the answers is outlined below.

1.4 RESEARCH METHODOLOGY AND CHAPTER BREAKDOWN

In line with similar investigations or enquiries in the fields of humanities or social sciences, this study follows a qualitative research approach. Qualitative research is one of the methods used when conducting scientific research,¹⁰ and its strength is viewed as its ‘ability to provide complex textual descriptions’ of experiences and ‘information about the “human” side of an issue – that is, the often contradictory behaviours, beliefs, opinions, emotions, and

¹⁰ Scientific research is defined as an investigation that seeks to answer particular question/s through a predetermined systematic procedure of collecting evidence and/or making observation/s which is/are ultimately presented as findings in a report where plausible / reasonable deductions / inferences may be made.

relationships'.¹¹ This method will therefore be effective in bringing to the fore the intangible 'human' factor which may not be readily apparent¹² when applying other methods.

Some of the key features of qualitative research are that the study design is flexible / semi-structured, descriptive, iterative and open-ended.¹³ These are important features and this study exhibits these attributes, in that the methodology used is 'semi-structured' and flexible. Further details are presented in chapter 3 when discussing s24G applications data, but some aspects are outlined below.

1.4.1 Literature review

Some of the sub-questions for this study are answered through an extensive literature review, covering both primary and secondary sources of law, regarding *ex post facto* authorisation. With regard to primary sources, an analysis of the provisions of s24G is given, including a consideration of the provisions as they were at its promulgation in 2004, plus a consideration of the amendments, and their implications. Consideration is also given to applicable regulations which may have implications on the effectiveness of s24G implementation. Finally, authoritative or important case law regarding *ex post facto* environmental authorisation¹⁴ is analysed and reported upon. The foregoing is presented in part A of chapter 2 of this dissertation.

Regarding secondary sources, books, chapters in books, peer reviewed journal articles, s24G related thesis / dissertations, and internet-based sources are reviewed. Information gleaned from the foregoing sources is taken into consideration in order to answer some of the questions of this study. This is presented in part B of the chapter 2.

1.4.2 Analysis of application files

A sample of s24G application files from the KwaZulu-Natal provincial Department of Environmental Affairs¹⁵ is analysed. This is done in order to identify the kind of matters and

¹¹ NK Denzin & YS Lincoln, 'Introduction: The discipline and practice of qualitative research' in NK Denzin & YS Lincoln (eds), *The Sage Handbook of Qualitative Research*, 5th ed, London: Sage Publications, 2018, 1.

¹² *Ibid.*

¹³ RM Frankel & KJ Devers, 'Qualitative research: a consumer's guide', *Education for Health*, Vol.13:1, 2000, 113.

¹⁴ Effectively, s24G provides for *ex post facto* authorisation & these terms herein are used interchangeably unless the context indicates otherwise. Furthermore, environmental authorisation is simply presented as authorisation hereinafter, unless the context suggests otherwise.

¹⁵ Herein referred to as the Department.

queries which are raised and evaluated by authorities when making decisions on s24G applications. In line with qualitative research approach, the sample size and the main aspects of the analysis were not pre-determined, and these are presented with the outcomes of the analysis in chapter 3.

1.4.3 Dissertation chapters

The table below shows the study methodology presented against the study questions which each of the methods sought to answer, and the chapters under which the discussions or outcomes are presented.

TABLE 1: Research questions and methods

Research question	Research method	Dissertation chapter
-	-	Chapter 1: Introduction 1.1 Background & problem statement 1.2 Justification & rationale for the study 1.3 Study objectives & research questions 1.4 Study methodology & chapter breakdown 1.5 Ethical considerations 1.6 Chapter conclusion
What information has been published on <i>ex post facto</i> authorisation	Literature review – secondary sources of law	Chapter 2: Compliance & enforcement measures 2.1 Environmental assessments & authorisation 2.2 Consequences of undertaking listed activities without authorisation 2.3 <i>Ex post facto</i> authorisation 2.4 Conclusion – Part B
What jurisprudence has developed on <i>ex post facto</i> authorisation	Literature review – primary sources of law (analysis of statutes & case law)	Chapter 2: Legislation & case law analysis 2.5 Environmental authorisation legislation 2.6 <i>Ex post facto</i> authorisation case law 2.6.1 Cases relating to ECA 2.6.2 Cases relating to NEMA 2.7 Conclusion – Part A
How are the <i>ex post facto</i> authorisation decisions handled	Data analysis & analysis of s24G application files	Chapter 3: Analysis of s24G applications in KZN 3.1 Background & methodology 3.2 Assumptions & limitations 3.3 Broad overview of decisions in KZN 3.4 Discussion of specific s24G files 3.5 Chapter conclusion
What conclusion can be drawn from the above questions	Analysis of data & information gleaned from all the above methods	Chapter 4: Conclusion & recommendations 4.1 Overview of the study findings 4.2 Study conclusions 4.3 Recommendations
What recommendations can be drawn from this study	Author’s analysis & judgement of the facts derived from this study	Chapter 4: Conclusion & recommendations 4.1 Overview of the study findings 4.2 Study conclusions 4.3 Recommendations

1.5 ETHICAL CONSIDERATIONS

The plan of study was submitted to the Humanities & Social Sciences Research Ethics Committee of the University of KwaZulu-Natal through an application for ethical clearance. The Committee considered the application and agreed that the design of the study did not present any significant risks which may warrant an elaborate ethical approval process, hence the study was granted ethical approval through the least elaborate process (approval notification is attached as Appendix I).

The Department was also approached regarding access to s24G data and application files and/or decisions, and they granted permission to access such files after a request / application was considered in line with departmental policies and guidelines on such matters. While environmental authorisation decisions are public documents, the Department raised concerns regarding the possibility of accessing some information from the files which may be of a confidential nature and their permission (attached as Appendix II) provides that such information may not be disclosed.

In view of all the foregoing, this study adhered to ethical clearance conditions and strictly followed the guidelines provided by the Department. Maximum circumspection was exercised at all times to ensure that confidentiality was and shall not be compromised under any circumstances.

1.6 CHAPTER CONCLUSION

This chapter has outlined all the parameters that this study seeks to traverse, and these will be discussed in the next chapters. The subject matter of this study may have been considered in other studies before, but this study is better positioned to tap into new information and thereby develop new knowledge. This study is unique in the sense that:

- there have been successive amendments to s24G provisions, including the recently published regulations,¹⁶ which may not have been the subject of any thorough-going enquiry,
- this study acknowledges that s24G provides for *ex post facto* authorisation and also acknowledges the following facts:

¹⁶ See Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G, GN R. 698 published in GG N^o. 40994 of 20 July 2017; hereinafter referred to as s24G regulations.

- s24G is but one environmental instrument in a basket of many other tools,
- s24G is applicable only in instances where the environment has already been impacted upon (whether positive or negative), and
- s24G does not preclude the application of other instruments by authorities,
- considering that this study may involve accessing sensitive and/or confidential information (unlike other desktop analytical studies, which usually do not attract ethical issues), utmost discretion is exercised,
- some parts of the study methodology are flexible and, in the main, are determined by the data encountered during the study, and
- its success mostly depends on the accessibility of s24G data and application files from the environmental authorities in the Province of KwaZulu-Natal.

The first part of the next chapter reviews statutory provisions on *ex post facto* authorisation and important case law thereto. The second part provides an outline of the South African environmental authorisation dispensation and consequences of undertaking listed / specified activity without authorisation through a literature review which focusses on environmental assessments and authorisations, *ex post facto* authorisations, and implications thereof for the environment.

CHAPTER 2: LITERATURE REVIEW

This chapter reviews literature relating to *ex post facto* authorisation in South Africa and legislative provisions thereof. It is divided into two parts: the first part (Part A) is a review of primary sources of law and encompasses an overview of the statutory provisions of s24G and the South African case law which relates thereto, including those which predate it. The second part (Part B) deals with possible remedies or options individuals and authorities have when dealing with someone who has undertaken listed / specified activity without authorisation. This is discussed through a review of secondary sources of law.

PART A: LEGISLATION AND CASE LAW

It is important to look at what the statutes themselves provide and how the courts have applied / interpreted them. This part therefore does that, starting with the statutory provisions. In order to present a comprehensive picture, this part also reviews s24G legislative provisions which predate the current provisions,¹⁷ by looking at all the provisions which have since been repealed or replaced. In the same vein, case law which precedes the promulgation of s24G, *viz.*, *ex post facto* authorisation under ECA is also reviewed.

2.1 LEGISLATION RELATING TO *EX POST FACTO* ENVIRONMENTAL AUTHORISATION

Environmental authorisation in South Africa is provided for under the broad, but undefined, framework of integrated environmental management in chapter 5 of NEMA. This chapter has been amended extensively since its promulgation in 1998.¹⁸ One of the most significant, albeit controversial, amendments was the introduction of the authorisation of listed / specified activities *ex post facto* through s24G. This was a departure from the *status quo ante*, and perhaps the legislative strictures under which environmental authorisations are located. The *status quo ante* was concerned with ensuring that potential impacts of activities on the environment were identified and assessed beforehand.

Legislation which provides for *ex post facto* authorisation is discussed below, starting with provisions under ECA before focussing on s24G, as amended.

¹⁷ *Cf.*, fn 9.

¹⁸ *Ibid.*, plus by the National Environmental Management Laws Amendment Act, 25 of 2014.

2.1.1 *Ex post facto* authorisation pre-s24G promulgation

It is widely accepted that ECA only provided for authorisation before a ‘proposed activity’ could be undertaken. However, as it will be shown in the discussion on case law, some interpretation of this Act and its regulations suggest that partially undertaken activities before construction is complete could be viewed as ‘proposed activities’, and therefore authorisation thereof would not necessarily qualify to be *ex post facto*. Nevertheless, no statutory provision of ECA could be quoted to sustain an argument that there was an explicit, or even implicit, provision of authorisation *ex post facto*.

It is also widely accepted that under NEMA, authorisation *ex post facto* was not provided for before the introduction of s24G. However, s28(4) provided for a directive to be issued to someone who ‘causes, has caused or may cause significant pollution or degradation of the environment’ to conduct an environmental assessment which, in most instances, is *ex post facto*. The interpretation by the courts in this regard is worth highlighting. In the *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd T/A Pelts Products and Others*¹⁹ case, when rejecting the ‘polluter’ first respondent’s assertion that it could not be compelled to do an EIA because an EIA ‘is an instrument carefully crafted for the assessment of whether to authorise an activity prior to it being carried out,’²⁰ the court held that an EIA ‘under s28 may [...] be required to prevent pollution continuing or recurring, and is not designed solely to enable prior assessment for authorisation to be granted.’²¹ In this regard an authorisation issued in such circumstances does not necessarily constitute *ex post facto* authorisation which would be *ultra vires* in terms of EIA regulations promulgated under ECA, as the case was at the time.

2.1.2 Statutory provisions of s24G

Perhaps, the starting point in analysing the provisions of s24G is to bear in mind that the section preceding it, *viz.*, s24F, when it was first promulgated, *inter alia*, criminalised the

¹⁹ 2004 (2) SA 393 (EC); hereinafter referred to as the *Hichange Investments* case.

²⁰ *Ibid.*, at paras 413H–I; see also W Du Plessis, ‘*Hichange* – A new direction in environmental matters? – *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd T/A Pelts Products and Others*’, *SAJELP*, Vol.11:1, 2004, 135.

²¹ *Hichange Investments* case, (fn 19) at paras 414C–E; the court distinguished this case from the *Silvermine* case (discussed latter). See also GJ Erasmus, ‘An Analysis of Section 24G of the National Environmental Management Act’, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120828analysis_0.pdf, 2011, at p 8 argues that *Hichange Investment* case acknowledges that an EIA in terms of s28 is similar in nature, but different in purpose from the one undertaken in terms of s24 of NEMA.

undertaking of listed / specified activities without authorisation,²² and s24G sought to ‘correct’ the environmental impacts of that ‘criminality’. S24G, as amended,²³ is the quintessential *ex post facto* environmental authorisation statutory provision in the country. It is titled ‘Consequences of unlawful commencement of activity’, which is an amendment of the original title, *viz.*, ‘Rectification of unlawful commencement or continuation of listed activity’. The latter seems to have been a source of confusion,²⁴ but none of the subsections thereunder actually made any explicit or implicit reference to rectification.²⁵

Below, s24G, as amended, and its subsections are quoted in full and discussed, *ad seriatim*.

- 24G. Consequences of unlawful commencement of activity.** – (1) On application by a person who –
- (a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1);
 - (b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008),
- the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be, may direct the applicant to –
- (i) immediately cease the activity pending a decision on the application submitted in terms of this subsection;
 - (ii) investigate, evaluate and assess the impact of the activity on the environment;
 - (iii) remedy any adverse effects of the activity on the environment;
 - (iv) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;
 - (v) contain or prevent the movement of pollution or degradation of the environment;
 - (vi) eliminate any source of pollution or degradation;
 - (vii) compile a report containing –
 - (aa) a description of the need and desirability of the activity;
 - (bb) 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 and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
 - (cc) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;
 - (dd) 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 the issues raised have been addressed;
 - (ee) an environmental management programme; or
 - (viii) provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.

²² It has since been amended to only prohibit the commencement or continuation of listed / specified activities without authorisation. The criminalisation & penalty provisions were moved to s49A & s49B, respectively.

²³ *Cf.*, fn 9. The proclaimed commencement date was the 7th of January 2005 (see PN R.1 in GG N^o. 27161 of 6 January 2005).

²⁴ L Kohn, ‘The anomaly that is section 24G of the NEMA: An impediment to sustainable development’, *SAJELP*, Vol.19:1, 2012, at p 2 suggests that ‘this title alone should have been enough of a forewarning of the adverse consequences that would ensue from such an anomalous provision.’

²⁵ M Kidd, ‘Environmental Law’, *Annual Survey of SA Law*, Vol.2013:1, 2013, 380, at p 395 points out that ‘there was nothing in the text of the section itself that referred to “rectification”, which appeared only in the section heading.’

The above provisions show the voluntary nature of the s24G process by explicitly providing that this process is initiated ‘on application’ by someone who has contravened s24F.²⁶ Then it provides that such a person may be directed, *inter alia*, to immediately cease the activity pending decision on the application,²⁷ remedy any adverse effects,²⁸ contain or prevent pollution or degradation of the environment,²⁹ and compile what is tantamount to an EIA report.³⁰ One of the most important provisions of this subsection is that the aforementioned report must contain the need and desirability of the activity;³¹ and the nature, extent, duration and significance of the impacts on the environment.³² This means the report, and the assessments pursuant thereto, may be much more extensive than the ‘normal’ EIA process. Furthermore, the fact that there is an express provision for a directive to cease the activity at the very beginning of this subsection is significant and may go a long way in addressing some of the concerns on s24G. Also, the provisions in this subsection could be quite onerous, and perhaps, to some extent, may be a deterrent to would be witting contraveners of ‘normal’ EIAs.

- (2) The Minister, Minister responsible for mineral resources or MEC concerned must consider any report or information submitted in terms of subsection (1) and thereafter may –
- (a) refuse to issue an environmental authorisation; or
 - (b) issue an environmental authorisation to such person to continue, conduct or undertake the activity subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued; or
 - (c) direct the applicant to provide further information or take further steps prior to making a decision provided for in paragraph (a) or (b).

In terms of the above subsection, report/s or information received in terms of the first subsection must be considered, and thereafter authorisation may be refused,³³ or granted with conditions,³⁴ or further information may be requested.³⁵ This compels authorities to consider reports and make decisions in terms of three possibilities: request further information, refuse or grant authorisation. Furthermore, this subsection expressly provides that authorisation, if

²⁶ *Cf.*, fn 22. This subsection also expressly provides for those who have contravened waste licence requirements in terms of the National Environmental Management: Waste Act, 59 of 2008.

²⁷ S24G(1)(b)(i).

²⁸ S24G(1)(b)(iii).

²⁹ S24G(1)(b)(v).

³⁰ S24G(1)(b)(vii).

³¹ S24G(1)(b)(vii)(aa).

³² S24G(1)(b)(vii)(bb).

³³ S24G(2)(a).

³⁴ S24G(2)(b).

³⁵ S24G(2)(c).

granted, takes effect from the date of issue and therefore has no retrospective effect, which is very significant in terms of allaying some of the concerns relating to s24G.

- (3) The Minister, Minister responsible for mineral resources or MEC may as part of his or her decision contemplated in subsection (2)(a), (b) or (c) direct a person to –
- (a) rehabilitate the environment within such time and subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary; or
 - (b) take any other steps necessary under the circumstances.

The above provisions were not part of s24G at its introduction and is a reinforcement of the decision/s made under the second subsection. It provides that an applicant may be directed, as part of the decision/s contemplated under the second subsection, to rehabilitate the environment within specified timeframes and subject to conditions deemed necessary,³⁶ or further steps taken which may be necessary under the circumstances.³⁷

- (4) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)(a) or (b).

The above provision is in line with the 2008 amendment, and provides that an administrative fine must be paid before a decision to refuse or grant authorisation is considered.³⁸ The difference from the pre-2008 provision is that the maximum administrative fine is R5 Million as opposed to 1 Million.

- (5) In considering a decision contemplated in subsection (2), the Minister, Minister responsible for mineral resources or MEC may take into account whether or not the applicant complied with any directive issued in terms of subsection (1) or (2).

The above provision was also not part of s24G at its introduction and provides that the decision contemplated in the second subsection may take into account whether or not any directive issued in terms of the first / second subsections had been complied with.³⁹ What perhaps may be missing from this provision is an explicit indication that the aforementioned decision must as well take into account the principles stipulated in s2 of NEMA.

- (6) The submission of an application in terms of subsection (1) or the granting of an environmental authorisation in terms of subsection (2)(b) shall in no way derogate from –
- (a) the environmental management inspector's or the South African Police Services' authority to investigate any transgression in terms of this Act or any specific environmental management Act;
 - (b) the National Prosecuting Authority's legal authority to institute any criminal prosecution.

³⁶ S24G(3)(a).

³⁷ S24G(3)(b).

³⁸ S24G(4).

³⁹ S24G(5).

Again, the above provisions were not part of s24G at its introduction and correct the misconception that s24G suspends sanctions provided for in terms of s49A. It explicitly provides that the lodging of an application or the granting of an authorisation shall not derogate from the authority of the police or environmental officers to investigate transgressions in terms of NEMA or related legislation,⁴⁰ or the prosecuting authority's legal authority to institute criminal prosecutions.⁴¹ Kidd points out that this should be welcomed because s24G was never intended as an alternative to criminal prosecutions, but has been used as such because it is 'undoubtedly less of a burden than pursuing a criminal prosecution,' and goes further to express hope that 'appropriate cases will, in future, be referred for criminal prosecution'.⁴² I fully share these sentiments.

(7) If, at any stage after the submission of an application in terms of subsection (1), it comes to the attention of the Minister, Minister for mineral resources or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F(1) or section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time that the investigation is concluded and –

- (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
- (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
- (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.

The above provisions are the last subsection and were also not part of s24G at its introduction. They provide that the issuing of an authorisation may be deferred, if it came to the attention of authorities that the applicant is facing criminal investigation in relation to the activity under consideration, until such time that the investigation is complete and a decision not to prosecute is reached,⁴³ the applicant is found not guilty,⁴⁴ or convicted and all appeal processes have been exhausted.⁴⁵ It is significant that this subsection explicitly provides for the deferment of only the authorisation decision, implying that the other two possible decisions may not wait for the completion of criminal investigations and/or prosecutions.

S24G, as amended and discussed above, is substantially extended and expanded, particularly the first subsection, from its provisions as originally introduced. It had been amended and

⁴⁰ S24G(6)(a).

⁴¹ S24G(6)(b).

⁴² Kidd, (fn 25) at p 395.

⁴³ S24G(7)(a).

⁴⁴ S24G(7)(b).

⁴⁵ S24G(7)(c).

refined to possibly address any ambiguities. It was introduced through a public awareness campaign which offered individuals a six-month grace period to pay a token administrative fine and ‘correct’ their activities without further repercussions. It appears a sizeable number responded to that offer resulting in capacity constraints to process the applications.⁴⁶ Furthermore, the provisions themselves were found to be vague and ambiguous in some parts. In the main, at its inception, s24G had three subsections, *viz.*:

- subsection 1 stipulated that upon application, someone who had committed an offence in terms of s24F could be directed to compile what, in essence, was an EIA report, with an environmental management plan, and provide any other information or undertake further studies as deemed necessary,
- subsection 2 stipulated that upon payment of an administrative fine,⁴⁷ the aforementioned report was to be considered and thereafter a directive could be given to cease the activity and rehabilitate the environment subject to conditions deemed necessary, or authorisation could be granted, again subject to conditions deemed necessary, and
- subsection 3 stipulated that someone who failed to comply with the directive contemplated above or contravenes conditions attached thereto was guilty of an offence and liable, on conviction, to a penalty in terms s24F, as it was the case at the time.

In all the above, the authority tasked with administering these provisions was the Minister or the MEC responsible for the environment portfolio. While the provisions themselves did not expressly suggest so, s24G was viewed as a substitute for the criminal penalties provided for in s24F at the time. This may have led to its first amendment in 2008, which in the main was meant to refine areas of ambiguity. This was done through the addition of a fourth subsection,⁴⁸ which explicitly provided that the payment of the administration fine was a prerequisite for the consideration of reports by the authority, which was a welcome change.⁴⁹ Another amendment was the inclusion of the Minister responsible for mineral resources as an authority for activities relating to mining. There were cosmetic amendments to other subsections to cater for these changes.

⁴⁶ K Pule, ‘The obligation on environmental authorities to consider socio-economic factors in EIAs: A critical examination of s24 of NEMA’, Unpublished Master’s Dissertation, Pietermaritzburg: University of KwaZulu-Natal, 2014, at p 117. This was corroborated by anecdotal evidence from KZN environmental authorities as I interacted with them to access s24G data for the discussion presented in the next chapter.

⁴⁷ This was to be determined by the competent authority & not to exceed R1 Million.

⁴⁸ S2A, which stipulated that someone who had made an application in terms of this section ‘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)’.

⁴⁹ M Kidd, ‘Environmental Law’, *Annual Survey of SA Law*, Vol.2009:1, 2009, 393, at p 415.

In view of the discussion above, I suggest that s24G, as amended, is indeed a useful tool which may be applied to address environmental problems, particularly those that emanate from listed / specified activities undertaken without authorisation, of which other tools and/or measures have so far proven to be inadequate. Over-and-above the foregoing stipulations, s24G has been augmented by regulations, policies and guidelines, which are considered next.

2.1.3 Regulations and policies relating to s24G

S24G provisions discussed above are supplemented by s24G standard operational procedure; an internal document which guides environmental authorities in dealing with s24G applications, particularly the determination of the quantum of the administrative fine. This policy outlines the guiding principles when dealing with s24G applications, and conditions under which one may deviate from the imposition of a determined fine. Also, this policy introduces the s24G fine calculator, with five indices which are used to determine the appropriate amount. These are: i) social benefit impact, ii) socio-economic impact, iii) biodiversity impact, iv) pollution impact, and v) sense of place / heritage impact. Of note is the fact that different considerations are given to whether the applying party is a company, government or government entity, on the one side; or an individual, family or family trust on the other, with minimum and possible maximum fines stipulated.

The foregoing policy has been strengthened by the promulgation of regulations⁵⁰ which seek to provide the procedure to be followed and criteria to be considered when determining a fine,⁵¹ the establishment of institutional bodies which must oversee the process of the imposition of fines,⁵² factors that may be used to calculate it,⁵³ etc. Importantly, these regulations stipulate that the maximum fine of R5 Million must be recommended for repeat offenders.⁵⁴

Having considered the statutory provisions of s24G, it becomes important to ensure that there is common understanding and interpretation thereof. The next discussion, which is case law, therefore becomes important.

⁵⁰ Cf., fn 16; which were developed in terms of s44(1)(aC) of NEMA.

⁵¹ Regulation 2.

⁵² Regulation 3(1).

⁵³ Regulation 4.

⁵⁴ Regulation 9(1).

2.2 EX POST FACTO ENVIRONMENTAL AUTHORISATION CASE LAW

Over the years, there have been many disputes relating to *ex post facto* authorisations. Some end up in courts and sometimes the courts help to better define / adequately clarify the statutory provisions, and thereby develop appropriate jurisprudence. However, and unfortunately, sometimes they err and cause confusion. The discussion below does not seek to provide a comprehensive deliberation of *ex post facto* case law, but focusses on some of the key cases which, in my opinion, are important in addressing some of the research questions of this study.

The discussion begins by analysing *ex post facto* authorisation cases under ECA, before consideration of cases emanating from the NEMA era.

2.2.1 Ex post facto authorisation case law pre-s24G introduction

Though *ex post facto* authorisation in South Africa was first promulgated under NEMA, the need to deal with listed / specified activities undertaken without authorisation predates NEMA. They began when the applicable legislation followed the processes prescribed under s22 of ECA.⁵⁵ A seminal judgment during this period is the *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*⁵⁶ case and is discussed next.

2.2.1.1 The Silvermine case

The dispute in this case, regarding the subject matter of this study, came about when the applicant, who objected to the development, asked the court to compel authorities to commission an EIA, in terms of s21 of ECA,⁵⁷ though the activity had already been undertaken.

Facts of the case: the first respondent⁵⁸ had commenced with earthworks in preparation for the planting of a vineyard on a site which had been quarried for gravel.⁵⁹ One of the

⁵⁵ S22(2) allowed the Minister to prescribe the process that may be followed and GN R.1183 of 5 September 1998 published in GG N^o 18261 prescribed such process.

⁵⁶ 2002 (1) SA 478 (C); herein referred to as the *Silvermine* case.

⁵⁷ Provides for the Minister to identify activities that may not commence without authorisation and GN R.1182 of 5 September 1998 published in GG N^o 18261 identified such activities.

⁵⁸ Lessee of the property under consideration.

⁵⁹ *Silvermine* case, (fn 56) at paras 480B–E.

members of the applicant group⁶⁰ requested the first respondent to undertake an EIA prior to the development and threatened legal action if the request was not granted. This was rebuffed. A year later, the applicant threatened to institute interdictory proceedings against the development. The first respondent reiterated its entitlement to continue with the activity and informed the applicant that the development had been completed. The applicant then instituted legal proceedings.⁶¹

Legal question: the court was faced with a question of whether or not an EIA could be commissioned after the effect in terms of ECA and its regulations.⁶²

Judgement: after analysing legislation and the objectives of an EIA, the court held that an EIA cannot be ‘wrenched from its particular purpose [...] and be employed as an independent remedy’.⁶³ It underscored the fact that an EIA

fits into a scheme which has been set up to ensure that official approval is granted before certain land can be put to specific uses [...]. A person who performs an identified activity without seeking and obtaining authorisation, acts unlawfully [...]. [I]n general, a person who performs an identified activity unlawfully without authorisation cannot be forced to comply with the procedure applicable to one who has in fact sought authorisation. The unlawfulness of the conduct determines the remedy. In other words the legal relief required may be different.⁶⁴

The court further held that an EIA *ex post facto* would ‘hold no legal significance in terms of the legislative structure’ under which it was located, save perhaps for giving the applicants the moral high ground if its conclusions supported their arguments.⁶⁵ In finding that an EIA cannot be the remedy, the court located the remedy for such unlawfulness in a number of other remedies, which straddle civil and criminal sanctions. In this regard, the court held that remedies lie in civil law where

there may be a prohibitory interdict if the ongoing activity continues or possibly a mandatory interdict for removal and restoration of the *status quo ante*. In criminal law there could well be a prosecution in terms of s29(4) of the ECA and an order for repair of damages to the environment in terms of s29(7) of the same Act.⁶⁶

⁶⁰ Voluntary body comprising of a number of not-for-profit entities.

⁶¹ *Silvermine* case, (fn 56) at paras 480F–H.

⁶² *Ibid.*, at paras 479G–I; LJ Kotzé, W Du Plessis, L Feris & M Olivier, ‘*South African Environmental Law Through the Cases*’, 1st ed, Durban: LexisNexis, 2008, at p 69.

⁶³ *Silvermine* case, (fn 56) at para 488F.

⁶⁴ *Ibid.*, at paras 488C–D.

⁶⁵ *Ibid.*, at para 488H.

⁶⁶ *Ibid.*, at para 488E.

Discussion: this decision is supported by a number of scholars⁶⁷ who, in my view, correctly appreciate the fact that ECA did not provide for *ex post facto* authorisation. Paschke and Glazewski⁶⁸ take this further by making a point that *ex post facto* authorisation under ECA would be problematic because it would have undermined its very purpose of protecting the environment.⁶⁹ Whether or not this view was ‘correct’ is debatable in view of the discussion on *ex post facto* authorisation in second part of this chapter. Be that as it may, the court ruled against the commissioning of an EIA retrospectively and held that an EIA ‘cannot stand alone, lifted unaided from its legislative structure to provide a remedy’⁷⁰ for listed / specified activities undertaken without authorisation.

The above largely accepted decision was not the only held interpretation. The *Eagles Landing Body Corporate v Molewa NO and Others*⁷¹ case attests to this. Though *obiter* and perhaps contradictory,⁷² this case, which is discussed next, suggests that it could never have been the intention of the legislature to require the demolition of partially constructed structures in order to do an EIA and then reconstruct them afresh. Therefore, the court opined, that the ‘proposed activity’ must be interpreted to mean the completion of an activity.

2.2.1.2 The *Eagles Landing* case

This case arose out of a dispute between an interested and/or affected party on one side, and the authorities and a developer on the other. Authorities had granted an authorisation to the developer who had already commenced construction in pursuance of an identified activity without authorisation. The applicant, who happened to be the neighbour, opposed a decision by authorities to grant authorisation *ex post facto* and sought the intervention of the court.

Facts of the case: the applicant was the body corporate of a sectional title, the first and second respondents were the authority representatives. The third respondent was the developer, who had commenced the development (which included the impugned reclamation of land from a dam to form a peninsula) without authorisation.

⁶⁷ See JHE Basson, ‘Retrospective authorisation of identified activities for the purposes of environmental impact assessment’, *SAJELP*, Vol.10:2, 2003, 133; and R Paschke & J Glazewski, ‘*Ex post facto* authorisation in South African environmental assessment legislation: A critical review’, *PER/PEJ*, Vol.1:1, 2006, 120.

⁶⁸ Paschke & Glazewski, (fn 67).

⁶⁹ *Ibid.*, at p 134.

⁷⁰ *Silvermine* case, (fn 56) at paras 491D–E.

⁷¹ 2003 (1) SA 412 (T); hereinafter referred to as the *Eagles Landing* case.

⁷² The possible contradictory views of the court are discussed below.

Upon receiving a complaint from the applicant, the second respondent issued a directive, in terms of s28 of NEMA,⁷³ to the third respondent to cease its activities and undertake an EIA in terms of ECA regulations.⁷⁴ The third respondent complied and undertook the requested EIA, and subsequently got authorisation to continue with the development. The applicant unsuccessfully appealed the decision internally and then approached the court.

Legal question: the court had to declare whether or not the authorisation decision was contrary to the doctrine of legality or, alternatively, *ultra vires* their competence in terms of s22 of ECA and therefore the development had been undertaken unlawfully.⁷⁵

Judgement: the court dismissed the application before getting into the merits based on a number of scores, including holding that it was being invited to express a legal opinion and therefore refused to do so. In case it erred, it held that it still maintained discretion but felt it would be an appropriate exercise of its discretion to refuse to grant the declaratory order because ‘no benefit, in practical and real terms’, would be realised.⁷⁶

This decision had the effect that the applicant’s case was dismissed. However, the court went further and expressed an opinion, *inter alia*, on the merits of the case. This is the aspect of the judgement that most detractors and scholars find problematic.⁷⁷ What seems to be the passage that is uncomfortable is the court’s opinion in agreement with the respondent’s Counsel that

if the applicant’s contentions were to be upheld, it would mean that in every case where *some* construction had been undertaken without the necessary authority [...], authorisation could never be given for the completion of the construction; 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. [...]. 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.⁷⁸

Discussion: objections to this opinion are understandable and warranted. However, two critical points, in my view, are overlooked. Firstly, the fact that it was *obiter* and therefore

⁷³ S28(4) provides for authorities to issue a directive to every person who causes, has caused or may cause significant pollution or degradation of the environment.

⁷⁴ GN R.1183 of 5 September 1998 published in GG N^o. 18261 outlines the process that has to be followed.

⁷⁵ Kotzé *et al.*, (fn 62) at p 79.

⁷⁶ *Eagles Landing* case, (fn 71) at paras 432F–G.

⁷⁷ See M Van der Linde, ‘National Environmental Management Act 107 of 1998 (NEMA)’, in HA Strydom & ND King (eds), *Fuggle & Rabie’s environmental management in South Africa*, 2nd ed, 2009, 193, at p 206; and J Glazewski, ‘*Environmental law*’, 2nd ed., Durban: Butterworths, 2005, 740, at p 236.

⁷⁸ *Eagles Landing* case, (fn 71) at paras 444D–E.

had no judicial implications. Secondly, the chronology of events regarding the dispute,⁷⁹ may suggest *mala fide* on the part of the applicants, coupled with the fact that the entire development was approved and commenced before the promulgation of EIA regulations, and therefore calling into question applicability thereto. These two points should perhaps indicate that not much consideration should be put on the passage quoted above and therefore the objections thereto may not be that much useful.

Another important consideration is the finding that the relief sought was academic. Had there been no possible *mala fide* on the part of the applicant and substantive remedy sought, one wonders whether the court might have come to a different conclusion. I base this on what I view as contradictory opinions of the court. As already quoted above, the court agreed that ‘partially commenced’ activities may be regarded as ‘proposed’ activities for the purposes of EIA requirements. However, and contrary to this, the court agreed with the applicant that ECA does not allow commencement of listed activities without authorisation. In this regard, the court opined

because part of the peninsula was already in existence when the authorisation was granted, the authorisation was unlawful in that it fell foul of the provisions of s22 of ECA [...]. Emphasising on the words ‘no person shall undertake an activity identified in terms of s21(1) [...] *except* by virtue of an authorisation ...’ [...], [C]ounsel argued that authorisation for any identified activity must precede the undertaking of the activity and that the legislation did not permit *ex post facto* authorisation of an activity already undertaken. Counsel’s interpretation of the legislation was correct.⁸⁰

The above passage suggests that the court agreed with the applicant that *ex post facto* authorisations were not provided for under ECA and its regulations. However, the court was not satisfied that such applied to the facts of the case. Unfortunately, it does not point us to the ‘facts’ that would make it acceptable for s22 of ECA to apply *ex post facto*.

Another important case in the ECA era is the *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd and Others*⁸¹ case, and this is discussed next. Importantly, it disagreed with some aspects of the *Eagles Landing* case and acknowledged that some of its opinions were *obiter* and therefore not an authority on *ex post facto* authorisations.

2.2.1.3 The *Capital Park Motors* case

This case involves a petrol filling station operator and the association that represents them (applicants) against an energy company and its franchisee (respondents). The applicants

⁷⁹ *Ibid.*, at paras 439I–442J.

⁸⁰ *Ibid.*, at paras 443H–J.

⁸¹ [unreported] [2007] JOL 20072 (T); hereinafter referred to as the *Capital Park Motors* case.

approached the court for an interdict against the respondents from operating an identified activity which was developed without authorisation.

Facts of the case: the first respondent (Shell South Africa) had constructed a petrol filling station and associated infrastructure without authorisation. It was charged in terms of s29 of ECA,⁸² prosecuted, convicted and fined. With a view of operating lawfully thereafter, it applied for authorisation in terms of s22 of ECA and the application was unsuccessful. It then appealed, in terms of s35 of ECA,⁸³ which was pending at the time of the proceedings. The fifth respondent (franchisee) started operating the petrol filling station which prompted a demand, by the applicants, for an undertaking that it will desist from doing so, which was not heeded.⁸⁴ The applicants then approached the court for relief.

Legal question: the court had to decide whether or not, after serving a sentence, thereafter one could be allowed to operate unlawfully developed activities.

Judgement: faced with the argument shared by both sides, supposedly based on the *Eagles Landing* case, that since the construction had been ‘completed, authorisation *ex post facto* is by definition impossible’, the court held that that judgement was no authority on the matter. The court pointed out that it was not only *obiter*, but ‘did not even apply that specific interpretation [...] because [it] found that on the facts, such authorisation can also be given even though the activity is already partly constructed or erected.’⁸⁵ The court further expressed the view that if an *ex post facto* authorisation could be granted for partially completed activity it saw no reason why same could not be done for a completed one.⁸⁶ It was therefore for this reason that the court held that the pending appeal was not a dead letter.

Another argument which was fiercely pursued by the respondents is that someone who has been punished for non-compliance should be allowed to proceed with trading lawfully after the punishment.⁸⁷ The court vehemently rejected this and held that such

reasoning is preposterous. It would mean any (oil) company, or any other entity for that matter may now at will erect any filling station or other edifice, get charged and convicted and pay a minimal fine, then

⁸² S29(4) stipulates that any person who contravenes s22(1) shall be guilty of an offence and liable on conviction to a fine or imprisonment.

⁸³ S35(3) stipulates that any person aggrieved by the decision of an officer exercising power delegated and/or conferred on him by this Act or its regulations may appeal to the Minister in the prescribed manner, within the prescribed period and upon payment of a prescribed fee.

⁸⁴ *Capital Park Motors* case, (fn 81) at paras [3]–[5].

⁸⁵ *Ibid.*, at para [13].

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at para [12].

continue happily ever after trading in unlawful circumstances. No court can countenance that. Furthermore, by way of logical reasoning, the prohibition against construction/erection is aimed at not being able to have or to utilise such prohibited activity. Otherwise the whole prohibition becomes nugatory/redundant. That cannot be the case.⁸⁸

Discussion: while the substance of the case was not about whether or not an authorisation *ex post facto* may be granted, the interim order which was sought goes to the heart of this question. The interim order had the effect that the operation of the petrol filling, which was developed without authorisation, would stop. However, the fact that the court held that there is no reason to suggest that *ex post facto* authorisation may not be granted is confusing and seems to contradict its vehement disagreement with the argument that someone who has been punished for s22 of ECA contraventions should be allowed to trade lawfully thereafter.

2.2.1.4 Discussion & conclusion

The above cases show that there were differing interpretations of the law relating to *ex post facto* authorisations under ECA. While it is clear from the wording of ECA and its regulations that authorisations were to be based on *ex ante* EIAs, some of the judgements seem to be amenable to *ex post facto* authorisations. This had the effect of causing confusion to both the authorities and developers. Besides the different legal interpretations, the fact is: disputes arose because an identified activity had been undertaken without authorisation. While some of the activities were undertaken in bad faith or due to negligence on the part of the developer, some were because of genuine ignorance of the law or ambiguity in legislation.⁸⁹ It seemed therefore that another remedy, besides the administrative and criminal sanctions provided for in ECA, was necessary.

In trying to establish such a remedy and possibly address the confusion caused by contradictory judgements, the Legislature promulgated s24G under NEMA in order to 'correct' unlawfully developed activities. Also, some of the terminology, such as commencement, were defined in order to facilitate common understanding. The promulgation of this section seemingly was not a silver bullet and disputes relating to its application and interpretation arose. Key court cases thereof are discussed next.

⁸⁸ *Ibid.*, at para [14].

⁸⁹ *E.g.*, in the *Silvermine* case, there were different legal opinions from Senior Counsel on whether or not the activity under dispute fell within the scope of listed activities.

2.2.2 Case law under the s24G era

There are two critical cases that considered the substantive provisions of s24G and they are discussed extensively hereunder. These are the *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and others*⁹⁰ case and the *Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and Another*⁹¹ case. Unfortunately, they do not come to a similar conclusion and their interpretation of s24G are contradictory.

There are also many other cases which interpret some aspects of s24G and a brief overview of them will be considered thereafter. The *Magaliesberg* case is the first s24G case to be considered by the Supreme Court of Appeals,⁹² and is discussed next.

2.2.2.1 The *Magaliesberg* case

The appellant (an association of environmental not-for-profit entities) sought to appeal the decision of the High Court which rejected its application to review and set aside the decision by the first and second respondents (environmental authorities) to give authorisation to the third respondent (a developer) through the s24G process. Background and further details of are discussed below.

Facts of the case: in July 2008 a member of the appellant association became aware of a lodge, conference facility and associated structures under construction within the Magaliesberg protected environment. It approached environmental authorities who confirmed that the development was being undertaken without authorisation. The appellant applied, unsuccessfully, for an order to prevent further development of the facilities.

By December 2008, the appellant was made aware of a public participation process in pursuance of the s24G application by one of its sister organisations. Throughout this period, the appellant made representations to environmental authorities, the municipality and the environmental consultancy managing the application expressing its reservations and strongly

⁹⁰ [2013] 3 All SA 416 (SCA); hereinafter referred to as the *Magaliesberg* case.

⁹¹ [unreported] [2013] JOL 30257 (GNP); hereinafter referred to as the *Supersize Investments* case.

⁹² *I.e.*, if one disregards the *Kiepersol Poultry Farm* case (discussed below) whose leave to appeal interdictory orders were unsuccessful all the way to the Constitutional Court.

held view that ‘the only way forward was that the development be demolished and the environment restored’.⁹³

In March 2009, the s24G authorisation was granted. The internal appeal was dismissed in January 2010, and the subsequent judicial review was dismissed with costs in December 2011, hence the appeal.

Legal question: the court had to decide whether or not the court *a quo* erred in not finding the MEC’s decision invalid and thus fell to be reviewed and set aside on the basis that he failed to consider the environmental management framework (EMF) and relied on a flawed EIA report, coupled with an inadequate public participation process.

Judgement: in dismissing the appeal, the court noted that the s24G process ‘ought to be the exception rather than the norm’ and that the provisions of s24G do set out ‘the considerations that ought to be addressed by an applicant’ in its report, which must be ‘considered by a competent authority’.⁹⁴ The court underscored the fact that the appellant’s Counsel (when faced with a question of whether or not the authorities, in granting authorisation, had regard to the factors set out in s24G) was constrained to concede that it could not be contended, based on its papers, that the report by the developer’s environmental consultant and its consideration by authorities were deficient in that regard.⁹⁵

The court dealt with the failure by authorities, particularly the MEC, to consider the EMF and other planning documents and rejected the respondent’s argument that the EMF had not come into effect by the time the original decision was made. In this regard, the court held that the EMF is a policy document and requires no promulgation to come into force. Furthermore, all parties ‘accepted that an appeal to the MEC was an appeal in the broad sense in that new evidence could be placed’ before him and should have been considered.⁹⁶ However, the court was not convinced that the contents of the EMF and other planning documents would have made any difference to the decision. In this regard the court held that

unless one adopts the position [...] that in assessing an application for *ex post facto* authorisation or, indeed, for pre-commencement authorisation, a decision-maker is bound to refuse environmental authorisation, then one is left with the conclusion that, in the present case, neither the EMF nor the [Rustenburg Spatial Development Framework] added any further relevant factors for consideration. Put simply, they were inconsequential. If a competent authority were to act in the predisposed manner

⁹³ *Magaliesberg* case, (fn 90) at paras [6]–[9].

⁹⁴ *Ibid.*, at para [49].

⁹⁵ *Ibid.*, at paras [49] & [52].

⁹⁶ *Ibid.*, at para [41].

suggested on behalf of the [appellant], such a decision would no doubt be challengeable on account of it constituting a rigid adherence to a fixed policy.⁹⁷

Discussion: the above quote sums up, in my view, the main flaw in the appellant's approach, and perhaps many scholars and detractors who express reservations about s24G. There seems to be an expectation that the outcome of an s24G application should almost always be a refusal to grant authorisation and to order rehabilitation of the environment. What this expectation misses, in my view, is that such an order may not necessarily be in the interest of the environment, and may not be in keeping with striking the correct balance between environmental and socio-economic needs as required in s2 of NEMA.⁹⁸ Considering that s24G only comes into play when the environment has already been impacted upon, I would argue that a thorough-going process must be undertaken to inform a decision on whether or not it would be in the interest of the environment to allow the development to proceed. Such a decision, in my view, should infuse sustainable development principles provided for in s2 of NEMA. I submit that s24G seeks to do precisely that. It is worth noting that, this judgement highlights important matters which need consideration when dealing with a relief of demolition as sought by the appellant,⁹⁹ and my view is that s24G presents an opportunity to assess such potential impacts as well.¹⁰⁰

Young¹⁰¹ suggests that by not explicitly expressing that 'authorities were at fault for not having considered the EMF,' a message may have been communicated that an injustice might have been caused to the developer 'had [authorities] taken EMF into account' considering that it had not been published and the developer had not taken it into account. On the contrary, my reading of the judgement is that the court acknowledged that both parties agreed that the EMF should have been considered (at the very least by the MEC)¹⁰² and went further to assert that had it been considered (as it should have), it would have placed no additional information of consequence to the decision-maker, other than what the authorities already

⁹⁷ *Ibid.*, at para [48].

⁹⁸ In particular, s2(2) & (3) require that people & their needs be at the forefront of environmental management practices, and 'development must be socially, environmentally & economically sustainable.'

⁹⁹ See *Magaliesberg* case, (fn 90) para [52] in part points to 'the image of wrecking equipment, bulldozers, earth moving machines and the like, with concomitant pollution and potential further harm to the environment [which] cannot be ignored. Without knowing what the further devastating effects of acceding to such a remedy may be, it becomes even more problematic.'

¹⁰⁰ *E.g.*, s24G(1)(b)(viii) provides that authorities may direct an applicant to 'provide such other information or undertake such further studies as [authorities] may deem necessary.'

¹⁰¹ M Young, 'Are we greening our court rooms? An analysis of the recent decisions in *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development*', *SAJELP*, Vol.19:1, 2012, 63, at p 71.

¹⁰² *Cf.*, fn 96.

had before them.¹⁰³ Moreover, it appears that Counsel for the appellant conceded to this fact, save perhaps for a graphic with ‘multiple crosses denoting incompatibility’ with the development in question.¹⁰⁴ In my view, this was a major concession and might have proved fatal to the appellant’s case.

The other case which considered the substantive provisions of s24G, albeit not as extensively as the *Magaliesberg* case, is the *Supersize Investments* case which is discussed next.

2.2.2.2 The *Supersize Investments* case

The *Supersize Investments* case is viewed as an odd case in that the applicant (Supersize Investments) undertook all the necessary prerequisites and commenced with the development under the impression that authorisation had been granted.

Facts of the case: in this case an EIA was undertaken, reports submitted to authorities for decision-making and ‘authorisation’ sent to the applicant via an intermediary. The applicant commenced with the development and stopped after learning that the authorisation was fraudulent. He waited for the decision, but it was not forthcoming. He successfully approached the court to compel the authorities to make a decision. He was subsequently informed that the application could not be processed further because construction had commenced prior to authorisation.¹⁰⁵

Legal question: the court had to decide whether or not the authority’s decision not to grant authorisation in the circumstances was a decision materially influenced by an error of law.

Judgement: the court could ‘not find that the relevant official acted with bad intent and decided to circumvent the order of the court’,¹⁰⁶ but held that the decision not to consider the EIA application on the merits was because of the misinterpretation of the

relevant provisions of NEMA, and not, as I was asked to find, because he cynically attempted to circumvent the effect of the court order, and therefore acted *mala fide*. It is true that he ought to have asked the applicant to submit additional information on the merits, if he thought that was necessary to arrive at a proper decision.¹⁰⁷

¹⁰³ *Magaliesberg* case, (fn 90) at para [47]; *cf.*, fn 97.

¹⁰⁴ *Ibid.*, at para [49]; *cf.*, fn 95.

¹⁰⁵ *Supersize Investment* case, (fn 91) at paras [1], [3] & [6].

¹⁰⁶ *Ibid.*, at para [10].

¹⁰⁷ *Ibid.*

The court stressed the fact that ‘NEMA must be interpreted contextually and purposely [... and] a case must be considered on its merits having regard to the purpose of the Act’,¹⁰⁸ and proceeded to outline common cause issues which point to the fact that all the necessary information for decision-making was before the authorities. Of more relevance to the subject matter of this study, the court held that

[s]ection 24G refers to an offence committed in terms of section 24F [...]. In my view, it is clear that both sections 24F and 24G in the present context refer to criminal proceedings against a person. The present applicant was not subjected to any criminal proceedings, and obviously not convicted in a criminal court of any offence relevant to section 24F and section 24G. Accordingly those provisions cannot be applied to it.¹⁰⁹

The court further applied the *ratio* in the decision of the *Eagles Landing* case that ‘proposed’ activity should be regarded as the completion of the activity and therefore authorisation could be given throughout the construction as long as the objectives of NEMA would otherwise be achieved,¹¹⁰ and further agreed with the argument that

section 24G was designed to cater for the situation where no [EIA] application had been lodged, no or insufficient reports dealing with impact, mitigation and management had been submitted, and an offence had been committed. In the present situation all of the requirements had been complied with.¹¹¹

In the event, the review application was successful, and the court exercised its discretion not to remit the application back to authorities for re-consideration.

Discussion: I fully agree with the court’s decision that authorities should have asked for additional information, had there been a need, and made a decision on the merits of the reports before them, as compelled by the court order. My view is that it would have been within acceptable confines of environmental legislation to request additional information on the already initiated activities to augment the reports which authorities already had, instead of being rigidly fixated on the fact that the activity had already commenced without a valid authorisation. However, this is the only aspect of the judgement I agree with.

The court’s interpretation of s24G was erroneous. Kidd¹¹² points out that ‘[s]ection 24G refers to a person “who has committed an offence” in terms of section 24F, not a person who has been “charged and/or convicted of an offence” ... [which] means that section 24G applies [...], irrespective of whether he or she has been prosecuted’. I submit that this interpretation is correct, and the court erred on this score.

¹⁰⁸ *Ibid.*, at para [12].

¹⁰⁹ *Ibid.*, at para [13].

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, at para [13.3].

¹¹² Kidd, (fn 25) at p 416.

Secondly, the court's application of the *Eagles Landing* decision was also erroneous. While the court accepted that the ECA provisions which were applicable at the time were similar to the applicable NEMA provisions *in casu*, what the court missed, in my view, are two critical points: i) there were no statutory provisions to deal with partially undertaken activities under ECA as opposed to NEMA's s24G provisions *in casu*;¹¹³ and ii) the term 'commence' within the context of chapter 5 of NEMA is clearly defined as opposed to the situation under ECA. Therefore, harping back to 'proposed' activity as meaning completion of the activity would not be appropriately aligned with the need to 'contextually and purposely' interpret provisions under NEMA, making the *ratio* of *Eagles Landing* case incongruent with the underlying legislative prescripts *in casu*.

Thirdly, what I find odd is that the decision was not remitted back to the authorities to make a lawful authorisation. One is left wondering whether the court formulated its own authorisation, or the applicant was allowed to proceed with the development along the terms (and authorisation conditions) determined in the fraudulent authorisation. Both scenarios are untenable. Be that as it may, the decision by the court to review and set aside the decision of the authorities was correct, though the reasons adduced may have been erroneous.

Finally, another aspect I find odd is that the developer, possibly to the marginalisation of the environmental consultant, seems to have been more hands on with respect to submission of documents to authorities, and vice versa – this may call into question the independence of the process. This went to an extent where the 'authorisation' was received by the environmental consultant from the developer as opposed to the other way round, as one would expect. The fact that this didn't raise the suspicion of the environmental consultant who, though independent, is a client of the developer and therefore expected to advise him accordingly. This case therefore doesn't only expose erroneous interpretation of s24G provisions by the court, but also the shortcomings in the da-to-day application of authorisation processes.

The foregoing cases are not the only cases which, in one way or another, the courts interacted with s24G provisions. Hereunder is a brief overview of the other s24G related cases, starting with those that looked at the administrative fine.

¹¹³ Perhaps this misjudgement was due to the erroneous interpretation of s24G discussed in the preceding paragraph.

2.2.2.3 Cases regarding s24G administrative fine

The recently delivered judgement in the *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape v Plotz NO*¹¹⁴ case is the only other s24G related matter which reached the Supreme Court of Appeals. This case considered an appeal against a judgement which reviewed and set aside the administrative fine issued by the authorities. Though the respondent family trust had obtained the relief it sought in the court *a quo*, ostensibly because the prospects of success on the merits were strong,¹¹⁵ the appeal was upheld because the respondent had not shown good cause why its failure to exhaust internal remedies ought to be condoned.¹¹⁶ Consequently, the matter was disposed of without the consideration of merits.

In the *Pretoria Timber Treathers CC v Mosunkuto NO*¹¹⁷ case, the applicant sought to review the amount of the administrative fine, but the court dismissed the application on the basis that the evidence supplied by the respondent on the factors ‘taken into consideration in the calculation of the fine [...] together with the percentage weighing and scoring’ indicating how the imposed fine was arrived at was incontrovertible and remained uncontested.¹¹⁸

As opposed to the *Plotz* and the *Timber Treathers* cases above, the *York Timbers (Pty) Ltd v National Director of Public Prosecutions*¹¹⁹ case did not deal with the administrative fine. It dealt with an appeal against a confiscation order granted in terms of the Prevention of Organised Crime Act.¹²⁰ The appellant had been convicted of contravening s24F and fined an amount of R180,000 (under appeal at the time of this case). Over-and-above this, a confiscation order to the value of R450,000 was granted against it, which led to the appeal. The appeal was upheld, and the confiscation order set aside.

In this case, the court interpreted s24G provisions and held that someone cannot be legally obliged to apply for s24G in circumstances where the unlawfully undertaken activity is

¹¹⁴ [unreported] [2017] JDR 1964 (SCA); hereinafter referred to as the *Plotz* case.

¹¹⁵ *Ibid.*, at para [31]. The court *a quo* agreed with the views that the administrative fine is ‘not a typical administrative penalty’ & ‘not strictly punitive’ as espoused by Paschke & Glazewski, (fn 67) at p 142 & M Fourie, ‘How civil and administrative penalties can change the face of environmental compliance in South Africa’, *SAJELP*, Vol.16:2, 2009, 93, at p 113, respectively.

¹¹⁶ *Plotz* case, (fn 114) at para [32].

¹¹⁷ [unreported] [2009] JDR 0953 (GNP); hereinafter referred to as *Timber Treathers* case.

¹¹⁸ *Ibid.*, at para [24].

¹¹⁹ 2015 (1) SACR 384 (GP); hereinafter referred to as the *York Timbers* case.

¹²⁰ Act 121 of 1998.

abandoned, but the situation may be different if one intends to continue it.¹²¹ In rejecting the respondent's submission to the contrary, the court pointed out that having been charged, convicted and sentenced, the appellant would 'be forced to subject [himself] to double punishment for the same offence – something which would probably be unlawful and unconstitutional.'¹²² Although this was *obiter*, it raises the spectre of *autrefois convict* and is something that needs further judicial scrutiny because s24G expressly provides for application of other measures despite payment of an administrative fine.

Some cases with broader scope than administrative fine which have, in one way or the other, also interpreted the provisions of s24G and the contradictions emanating therefrom are further discussed below.

2.2.2.4 Other s24G related cases

There are a number of other s24G related cases and these are briefly outlined here, starting with the *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd & Others*¹²³ case. It dealt with an applicant (Kiepersol) who brought an urgent application to prevent the respondents (interested and/or affected parties) from executing court judgments in terms of which the applicant was interdicted from conducting its unlawful activities. Two prior judgements against the applicant had been granted and leave to appeal thereto was unsuccessful all the way to the Constitutional Court.¹²⁴

The court dismissed the application and pointed out that the applicant's s24G application betrayed its disregard for the law. In fact, the s24G application and reports thereto revealed that its attitude throughout the dispute was *mala fide*, hence the court found that it knowingly undertook its activities unlawfully, and still continued to do so despite the previous judgements against it.

This case bears similar traits to the *Noordhoek Environmental Action Group v Wiley & Others*¹²⁵ case, where a relief was sought against respondents (trustees of a family trust) to restore a property zoned as open space to its original condition,¹²⁶ after they also ignored a

¹²¹ *York Timbers* case, (fn 119) at paras 403J–404A.

¹²² *Ibid.*, at paras 403H–J.

¹²³ [unreported] [2008] JOL 22537 (T); herein referred to as the *Kiepersol Poultry Farm* case.

¹²⁴ *Cf.*, fn 92.

¹²⁵ [unreported] [2008] JOL 21943 (C); hereinafter referred to as the *NEAG* case.

¹²⁶ The condition it was before the respondent undertook a listed activity without authorisation.

court order to do so. In granting the relief sought, the court held, correctly in my view, that s24G rectification cannot be invoked to cure a defect that had already been settled in the previous court order.¹²⁷

Kohn,¹²⁸ quoting the above two cases, suggests that s24G has enabled the ‘condoning of illegal conduct’ and gives the accused parties ‘opportunity to profit from [their] illegal activities’. The outcomes of these cases, in my view, show the opposite. The fact that evidence sourced from their s24G applications was able to prove *mala fide* on the part of the accused parties is significant. Furthermore, the courts in both cases were able to set a clear tone from the very inception of the s24G process that it shall not be viewed as a means of avoiding accountability for any unlawfulness.

In the *Interwaste (Pty) Limited and others v Coetzee and others*¹²⁹ case, applicants (neighbouring businesses) sought to interdict the operation of a waste disposal facility based on the fact that it had been operating, for years, without the prerequisite authorisation and licence in terms appropriate legislation.

The court dismissed the application because no clear right could be established, and further expressed views on the s24G provisions. The court opined, erroneously and similar to the *Supersize Investment* case, that s24G suspends the possibility of prosecution in terms of s24F¹³⁰ and any unlawfulness on the part of the respondent. In this regard, the court said s24G provides ‘a moratorium against any further action [...] pending the finalisation of the [s24G] application’ process.¹³¹ Lastly, the court dismissed, correctly in my view, the suggestion by the applicant’s Counsel that s24G does not apply to activities administered under the Waste Act,¹³² and held that s24G applications ‘find equal application in terms of the Waste Act’.¹³³

The views in the above case were not in line with the *Body Corporate of Dolphin Cove v Kwadukuza Municipality and another*¹³⁴ case, which dealt with a matter where the s24G process was still pending. The court declined to deal with the merits of the s24G process and

¹²⁷ *NEAG* case, (fn 125) at para [23].

¹²⁸ Kohn, (fn 24) at p 12.

¹²⁹ [unreported] [2013] JOL 30686 (GSJ); hereinafter referred to as the *Interwaste* case.

¹³⁰ *Cf.*, fn 22.

¹³¹ *Interwaste* case, (fn 129) at para [29].

¹³² Act 59 of 2008.

¹³³ *Interwaste* case, (fn 129) at para [31]; s24G was subsequently amended to explicitly express this.

¹³⁴ [unreported] [2012] JOL 28771 (KZD); hereinafter referred to as the *Dolphin Cove* case.

correctly left it to the authorities. It, however, and correctly in my view, held that ‘[t]he section 24G process is merely an application which may secure authorisation after the fact. It may also result in [...] being directed to cease the activity’.¹³⁵ Faced with the respondent municipality’s¹³⁶ contention that s24G ‘allows it to correct its unlawful activity’,¹³⁷ the court held, contrary to the *Interwaste* case, that s24G ‘is not an invitation to commit offences so that they can be corrected later.’¹³⁸

2.2.2.5 Discussion & conclusion

The above cases show that the courts have had contradictory interpretations of the provisions of s24G. What is encouraging is that the courts have affirmed the institution of the administrative fine, even after lower courts had ruled in favour of setting them aside as shown in the *Plotz* case. Furthermore, the *NEAG* and *Kiepersol Poultry Farm* cases show that the courts were alive to the possibility that some parties may use s24G as an escape route to ‘correct’ their blatant unlawful practices, and decisively ruled against such parties.

The *Magaliesberg* and the *Dolphin Cove* cases correctly interpreted the provisions of s24G and confirmed the tone set by the two cases identified in the above paragraph that s24G cannot be used by any party as a means to avoid answering to any prior unlawfulness on their part. However, the *Supersize Investments* and the *Interwaste* cases’ interpretations were erroneous. The suggestion that if a party is not convicted of unlawfully undertaking a listed / specified activity or the lodging an s24G application stays the institution of possible sanctions and/or the application of other s24G provisions is erroneous.

Finally, the *York Timbers* case suggests that s24G may lead to the double punishment of the accused parties for the same crime, something which is not in line with the principles of the rule of law and therefore inconsistent with the Constitution. This is something that needs further scrutiny, but the provisions of s24G allow it and is practised in other jurisdictions.¹³⁹

After the consideration of s24G provisions, policies, regulations and interpretations by the courts, it may be useful to discuss some of the concerns raised against s24G in light of what the law and its interpretation by the courts provide. This is done in the next discussion;

¹³⁵ *Ibid.*, at para [45].

¹³⁶ It had committed an offence in terms of s24F.

¹³⁷ *Dolphin Cove* case, (fn 134) at para [3].

¹³⁸ *Ibid.*, at para [41].

¹³⁹ See *Fourie*, (fn 115) at p 105.

however, it must be borne in mind that most concerns were raised at a time when the provisions were not as well developed and as well refined as they currently are, and perhaps some concerns even played a role in reshaping the provisions as they stand to date.

2.3 CRITICISM OF S24G VIS-À-VIS ITS ACTUAL PROVISIONS

In my view, the concerns that *ex post facto* authorisations as provided for under s24G can be easily abused by unscrupulous developers are unwarranted. So are the concerns that they present a short-cut and an opportunity to get authorisation through the ‘back door’. Based on the statutory provisions explicitly provided for under s24G, policy guidelines, regulations and the court’s interpretation thereof, the following conclusions can be drawn:

- authorities have a discretion to accept an application (meaning there is a chance that it may be rejected). Only once this discretionary hurdle is overcome may one consider other processes stipulated under s24G. Certainly, this alone presents a risk that could be a ‘fatal flaw’ to would-be contraveners of s24F prohibitions.
- the process to be undertaken is neither constrained nor time-bound, and authorities have wide ranging powers, including the power to direct the applicant to cease all or certain activities, undertake remediation, or rehabilitate the environment (rehabilitation may include demolition of whatever structure had been constructed). This, in my view, is an unacceptable high level of risk and it is hard to believe that there may be an investor who could consciously and knowingly contravene ‘normal’ EIA requirements, while being aware of the potential consequences and repercussions of such actions.
- the payment of the fine does not guarantee a positive outcome, it only means the application shall be considered. This on its own could be quite costly and if one adds the possibility that one may be directed to cease the activity or undertake perhaps even more onerous studies, considering that the environment may have been impacted upon, and added to that, there would be no guarantee of a positive outcome from authorities.
- the application and/or authorisation does not detract from possible institution of other remedies to deal with the original unlawfulness.

In view of the foregoing, the concerns that s24G is a short-cut to legality is not supported by the facts in the statutory provisions thereunder. All the above suggest that s24G, as amended, may not suffer the many ills that most scholars and commentators have alleged. However, this does not mean that there have been no inconsistencies, discrepancies, inadequacies and

improper utilisation and application of its provisions by authorities, but where there is evidence of such, it should be characterised as such and addressed, instead of impugning the entire s24G process.

Be that as it may, concerns which relate to the possibility that s24G may not be aligned to the objectives of the chapter in NEMA under which it falls, and perhaps even counter to the enabling provisions thereof, need serious consideration. While this may not necessarily be so for the entirety of the section, there may be merit in suggesting that some provisions thereof may be better housed elsewhere. This suggestion is reinforced by the fact that some provisions under s24F which dealt with offences and penalties were removed and placed in appropriate chapters of the Act. It therefore follows that a consideration should be given to moving s24G, or some of its provisions to the chapter which deals with compliance and enforcement matters. It is worth noting that s24G in the Province of KwaZulu/Natal already falls within environmental compliance and enforcement units, and not in the same units that deal with 'normal' EIAs. Furthermore, concerns relating to 'double jeopardy' may also need further interrogation.

2.4 PART A CONCLUSION

It is clear from the discussion in this part of the chapter that s24G legislative provisions, when first promulgated in 2004, were not as clearly defined as they currently are. This led to a lot of confusion, not only to developers and authorities, but also to the courts through their sometimes-erroneous interpretations. The provisions were amended four years later in 2008 to address the ambiguities and to refine the administrative fine provisions. However, much more elaborate amendments were made in 2013, and it appears that they addressed most of the concerns relating thereto.

The jurisprudence developed under ECA shows that *ex post facto* authorisations did not fit into the enabling legislative provisions of the time. However, there were contradictions relating to the interpretation of the meaning of 'commencement' of an activity. The gap in legislative provision regarding *ex post facto* authorisation was filled by the promulgation of s24G.

The emerging case law on s24G is still based on the original s24G provisions which, as the different and sometimes contradictory judgements show, were not always interpreted

correctly and consistently. The two key judgements, the *Magaliesberg* and the *Supersize Investment* cases are a clear indication of such inconsistent interpretation. Unfortunately, both these cases left a bitter taste in the mouth for scholars; while they welcomed the outcome in the *Supersize Investment* case, they decried its *ratio*. Regarding the *Magaliesberg* case, the cry was that it did not go far enough to show that the undertaking of listed / specified activities without authorisation shall not be tolerated. Fortunately, some cases show that the courts shall not allow s24G to be used to circumvent judicial orders, while others regrettably suggest that s24G may suffer the faith of unconstitutionality through *autrefois convict*.

Be that as it may, the discussion above in this part of the chapter was able to establish the provisions of s24G and the developing jurisprudence from the ECA era until now. It has therefore addressed one of the research questions of this study, i.e., *what jurisprudence has developed on ex post facto authorisation in South Africa*.

The above discussion is extended further below by consideration of the secondary sources of law, and consideration of whether or not some of the suggestions regarding the possible undesirability of s24G are warranted based on what has been established by the above discussion.

PART B: COMPLIANCE AND ENFORCEMENT MEASURES

Over-and-above the books, chapters within books, journal articles, theses or dissertations, and internet-based sources, the discussions in this part of the chapter largely consider three South African articles which, in the main, focus exclusively and extensively on *ex post facto* authorisations.¹⁴⁰ Though I may not necessarily agree with every point in these articles, they are valuable sources of information.

This part starts by giving a context to *ex post facto* authorisation through providing a broad overview of environmental assessments and authorisation. Thereafter it discusses the various options of dealing with instances where listed / specified activities are undertaken without authorisation. This is the context under which s24G was promulgated and therefore will provided the basis for which it will be interpreted and/or applied in this study.

¹⁴⁰ These are: Basson, (fn 67); Paschke & Glazewski, (fn 67); and Kohn, (fn 24).

2.5 ENVIRONMENTAL ASSESSMENTS AND AUTHORISATION IN SOUTH AFRICA

Generally, an environmental assessment relates to assessments both at project and strategic levels, encompassing ‘a variety of *ex ante* techniques and procedures that seek to predict and evaluate the consequences of certain human actions’ on the environment.¹⁴¹ In South Africa, once such assessment is done, a decision is made relating to whether or not (and under which conditions) such an activity may be undertaken. The widely used environmental assessment tool is the EIA and reports thereof are used to inform decisions on whether or not to grant authorisations.

Environmental authorisation is defined in NEMA as ‘authorisation by a competent authority of a listed activity [...] and includes a similar authorisation contemplated in a specific environmental management Act.’¹⁴² Key features of this definition are: the activity must have been identified either through a listing process and/or specified as an activity that requires authorisation in a particular geographic area; and there must also be an authority tasked with the administration of environmental issues in the jurisdiction within which such an activity is undertaken. It is to be noted that the definition does not specify whether or not authorisation is granted before or after the activity is undertaken. However, the EIA itself precedes commencement of the activity, hence ideally an authorisation should do so as well, more so because it is usually granted with conditions.

The specific environmental management Acts referred to in the definition are identified in NEMA and include statutes which deal with specific environmental media (i.e., land, water, air),¹⁴³ protection of biodiversity,¹⁴⁴ nature conservation,¹⁴⁵ protection of marine resources,¹⁴⁶ and exploitation of heritage resources.¹⁴⁷ There are other statutes which may be viewed as

¹⁴¹ M Kidd & F Retief, ‘Environmental assessment’ in HA Strydom & ND King (eds), *Fuggle & Rabie’s environmental management in South Africa*, 2nd ed, 2009, 971, at p 981. *Ex ante* as used by these authors in this definition and throughout this dissertation refers to proactive or preemptive or measures instituted before the fact, as opposed to reactive or retroactive or measures instituted after the fact.

¹⁴² S1 of NEMA.

¹⁴³ Environment Conservation Act, 73 of 1989 & National Environmental Management: Waste Act, 59 of 2008; National Water Act, 36 of 1998; and National Environmental Management: Air Quality Act, 39 of 2004, respectively.

¹⁴⁴ National Environmental Management: Biodiversity Act, 10 of 2004.

¹⁴⁵ National Environmental Management: Protected Areas Act, 57 of 2003.

¹⁴⁶ National Environmental Management: Integrated Coastal Management Act, 24 of 2008.

¹⁴⁷ World Heritage Convention Act, 49 of 1999.

specific environmental management Acts.¹⁴⁸ Environmental assessment processes and the authorisations¹⁴⁹ thereafter in all the foregoing statutes envisage an *ex ante* process. This is the norm internationally and is in line with the principles developed by the United Nations Conference on Environment and Development.¹⁵⁰

The problem arises when an activity has already been undertaken. Many possibilities may lead to such instances. As a starting point, it is necessary to interpret the word ‘undertake’ correctly. That is, whether or not the commencement of the activity (for instance, the moving-in of heavy-duty machinery or equipment, clearing of vegetation, preparation of the ground, *etc.*, depending on the nature of the activity) constitutes the ‘undertaking’ of the activity. Or, does ‘undertake’ refer only to the completion and/or commissioning.¹⁵¹ Secondly, one must consider whether or not the activity is listed, including instances where there are conflicting views on this. Alternatively, whether or not the activity surpasses the threshold which would trigger authorisation.¹⁵² Thirdly, whether or not there was a *bona fide* ignorance of the law. Finally, whether there was negligence or authorisation requirements were intentionally overlooked. All the foregoing are critical elements that should be taken into consideration when discussing the acceptability or otherwise of *ex post facto* authorisations.

It may seem easy to deal with some of the foregoing considerations, such as those that relate to contravention of authorisation requirements due to negligence or intent because NEMA has clearly spelled out remedies for such instances. However, as it will be shown in the discussion below, legislated remedies thereto may not necessarily be effective. Furthermore, there may be question marks on whether or not such remedies lead to outcomes which are in the interest of the environment.

¹⁴⁸ These may include: Mineral and Petroleum Resources Development Act, 28 of 2002; National Forests Act, 84 of 1998; Marine Living Resources Act, 18 of 1998; National Heritage Resources Act, 25 of 1999, and others.

¹⁴⁹ These include a licence, a permit or an environmental authorisation.

¹⁵⁰ In 1992 the international community converged at a conference in Rio de Janeiro, Brazil and adopted what became known as the Rio Declaration. Principle 17 of this declaration crystallises the centrality of an *ex ante* assessment process.

¹⁵¹ Fortunately, s1 of NEMA defines ‘commence’ and it includes any physical activity on the site, save for activities relating to investigation or feasibility studies which do not constitute a listed / specified activity; see also M Kidd, *Environmental Law*, 2nd ed., Cape Town: Juta, 2011, 368, at p 244 *et seq.*

¹⁵² This is important because some activities may be vague & lead to disputes. Kidd & Retief, (fn 141) at p 987 *et seq.*, point out that one of the reasons the *Silvermine* case is important is because it illustrates the difficulty in ascertaining whether an activity is identified or not in instances where the legislation is not clear enough.

The discussion below considers possible remedies one may apply when listed / identified activities are undertaken without authorisation, in view of the above differing conditions that may lead to such occurrences.

2.6 CONSEQUENCES OF UNDERTAKING LISTED / SPECIFIED ACTIVITIES WITHOUT AUTHORISATION

There is a ‘basket of remedies’ which may be used when someone has contravened the provisions of NEMA or, more specifically, undertaken a listed / specified activity without authorisation. These include criminal measures,¹⁵³ administrative and civil measures¹⁵⁴ and, possibly, incentive-based mechanisms.¹⁵⁵ A lot has been written on the strengths and weaknesses of all the foregoing measures, and their effectiveness or otherwise¹⁵⁶ in addressing environmental crimes and by extension the unlawful undertaking of listed / specified activities without authorisation. These are discussed below, starting with administrative measures.

2.6.1 Administrative measures

Administrative measures have been ‘playing an increasingly important role in facilitating environmental compliance and enforcement, where they are generally used to halt current (or future) illegal or environmentally harmful activity’.¹⁵⁷ They are seen to be more flexible, far more incisive, less acrimonious, inexpensive to administer and offer wider discretion to authorities to ensure environmental protection and remediation.¹⁵⁸ These measures are invoked by authorities and may take various forms, which include environmental directives,

¹⁵³ These seek to punish those ‘causing harm to the environment or disregarding’ environmental legislative provisions. See F Craigie, P Snijman & M Fourie, ‘Dissecting environmental compliance and enforcement’ in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 41, at p 52.

¹⁵⁴ These mainly compel those causing harm to the environment to cease such activities or ‘take measures to prevent, remediate or mitigate’ such harm. See Craigie *et al.*, (fn 153) at p 52.

¹⁵⁵ These have not yet been elaborated upon to deal with the undertaking of listed / specified activities without authorisation.

¹⁵⁶ Craigie *et al.*, (fn 153) at p 53–58; and see generally M Kidd, ‘Environmental crime – Time for a rethink in South Africa’, *SAJELP*, Vol.5:2, 1998, 181; M Kidd, ‘Some thoughts on statutory directives addressing environmental damage in South Africa’, *SAJELP*, Vol.10:2, 2003, 201; M Kidd, ‘Public interest environmental litigation: Recent cases raise possible obstacles’, *PEJ/PER*, Vol.13:5, 2010, 26; and L Feris, ‘Compliance notices – A new tool in environmental enforcement’, Vol.9:3, 2006, 1.

¹⁵⁷ Craigie *et al.*, (fn 153) at p 55.

¹⁵⁸ T Winstanley, ‘Administrative measures’ in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 225 at p 238 *et seq.*

compliance notices, abatement notices, administrative penalties, suspension and ultimately withdrawal of licences, permits or authorisations.¹⁵⁹

Their positive attributes are that they are not instituted through the judicial system as opposed to civil and criminal measures. More than one form may be applied at the same time to address one incident, making them ‘potentially far more expedient and cost-effective’.¹⁶⁰ Also, authorities may apply them based on ‘reasonable grounds’ to believe that a contravention has occurred as opposed to the far more onerous ‘beyond reasonable doubt’ burden of proof requirement in criminal proceedings.¹⁶¹ Failure to comply with administrative measures may lead to authorities taking measures to remedy the situation and claim back the cost from the accused parties. Furthermore, it may be legislated that failure to act on them is an offence, which may lead to further action, usually through the courts in the form of the more acrimonious criminal and civil measures.

By their very nature, administrative measures are an administrative action and therefore proper due process must be followed. This is necessary in order to give effect to a just administrative action required by the Constitution and as codified in the Promotion of Just Administrative Act.¹⁶² It is quite ironic that this important positive aspect of administrative measures seems to be its major disadvantage in the country. This is because a number of decisions by authorities when applying administrative measures have been set aside on review by the courts.¹⁶³ It therefore becomes important for authorities who apply these measures to understand that the procedure followed should be able to withstand judicial scrutiny. Another drawback is that these measures, in some instances, are ignored and authorities would have to go to the courts in order to compel action. An example of a serious drawback is the fact that a directive as provided for under s28 of NEMA could put onerous requirements to someone, irrespective of fault, and failure to comply therewith was not stipulated as an offence under this Act, except for a provision that authorities could remedy the situation and recover costs. Remedying the situation and recovering costs should never be viewed as easily achievable in view of funding constraints which most authorities

¹⁵⁹ Craigie *et al.*, (fn 153) at p 55. These measures are stipulated in a number of provisions in chapter 7 of NEMA, particularly s28(4), s30(6), s30A, s31H, and s31L. Also, s24G provides for these measures as well.

¹⁶⁰ Craigie *et al.*, (fn 153) at p 56.

¹⁶¹ *Ibid.*

¹⁶² Act 3 of 2000; see s33 of the Constitution of the Republic of South Africa, 1996.

¹⁶³ See *Evans and Others v Llandudno/Hout Bay Transitional Metropolitan Substructure and Another* 2001 (2) SA 342 (C) & some of the cases discussed in Part A of this chapter. Also see *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2007 (5) SA 438 (SCA) – though it was reversed on appeal to the Constitutional Court.

experience.¹⁶⁴ This makes these measures, on their own, inadequate to address instances where listed / specified activities are undertaken without authorisation.

2.6.2 Civil measures

Civil measures, in the main, seek to resolve disputes between individuals (both natural and juristic persons) or between individuals and the state through the courts via non-prosecutorial means. There are a number of these measures which lie in both environmental statutes¹⁶⁵ and common law. The widely used measure is the interdict and it may be instituted to obviate, halt or remediate environmental pollution, degradation, or breaches in environmental law, and to claim damages therefrom.¹⁶⁶ It is administered through the courts, whereby authorities, individuals or communities may (with specific reference to the subject matter of this study) 'lodge an application [...] for a prohibitory interdict to stop an ongoing activity, or they can apply for a *mandamus* to compel the respondent to remove the illegal activity and to restore the position *ante*.'¹⁶⁷ Furthermore, the accused party may be liable for environmental damage caused by his / her unlawful action.

One of the positive aspects of civil measures is that the Constitution,¹⁶⁸ NEMA and the long-standing case law, extends *locus standi* for persons seeking civil recourse.¹⁶⁹ In this regard, individuals may seek appropriate relief: i) in their own interest, ii) on behalf of those who cannot do so for themselves, iii) on behalf of those whose interests had been affected, iv) in the public interest, or v) in the interest of protecting the environment.¹⁷⁰ Coupled with this is the fact that costs may not necessarily be awarded against individuals who sought such relief in the event they are not successful. In this regard, a request may be made to the court not to grant costs when 'the matter was brought in good faith, public interest and in the interest of protecting of the environment.'¹⁷¹

¹⁶⁴ For discussions on the limitations of directives & constraints experienced by authorities, see M Kidd, 'Some thoughts on statutory directives addressing environmental damage in South Africa', *SAJELP*, Vol.10:2, 2003. See also fn 156.

¹⁶⁵ One such measure is provided for in s28(12) of NEMA.

¹⁶⁶ Craigie *et al.*, (fn 153) at p 57.

¹⁶⁷ Basson, (fn 67) at p 137.

¹⁶⁸ See s34 of the Constitution of the Republic of South Africa, 1996.

¹⁶⁹ Craigie *et al.*, (fn 153) at p 57.

¹⁷⁰ S32 of NEMA.

¹⁷¹ Van der Linde, (fn 77) at p 219.

On the negative side, these measures require ‘several substantive and procedural obstacles’ to be met in order to ensure their successful application.¹⁷² Furthermore, proving harm and/or a clear right (as this is one of the requirements in these measures), attributing it to the wrongful conduct of the accused party, and proving that there is no other appropriate relief may sometimes prove to be difficult, time-consuming and costly.¹⁷³ As the case law in part A of this chapter suggests, civil measures such as interdicts are not easily granted by the courts which, it may be argued, makes these measures not appropriately suited for dealing with listed / specified activities undertaken without authorisation.

2.6.3 Criminal sanctions

Criminal sanctions are the mostly used measures in dealing with environmental crimes.¹⁷⁴ Though widely used, Kidd¹⁷⁵ argues that they should be a last resort. This is implicitly supported by Fourie,¹⁷⁶ who cites different scenarios to acknowledge that ‘even where violations constitute a criminal offence, criminal prosecution is not always an appropriate enforcement response’. This is mostly the case in instances where the offence relates to pollution, waste and development activities.¹⁷⁷ This is mainly because of the inherent weakness of criminal sanction in dealing with the foregoing offences, and such weakness are discussed hereunder; but it must be acknowledged that criminal sanctions are viewed as quite simple to understand by the regulated and easy to administer for the regulators, and necessary for any country’s enforcement efforts. Fourie underscores this and argues that ‘surely no environmental enforcement programme can be effective without a criminal component’.¹⁷⁸

Criminal sanctions with respect to environmental offences were first codified into statutory provisions under ECA,¹⁷⁹ which were later incorporated into s34 of NEMA. With regard to the subject matter of this study, a more specific criminalisation is provided for in s24F of

¹⁷² R Summers, ‘Common-law remedies for environmental protection’, in HA Strydom & ND King (eds), *Fuggle & Rabie’s environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 339, at p 368.

¹⁷³ *Ibid.*; see also Y Burns & M Kidd, ‘Administrative Law & Implementation of Environmental Law’, in HA Strydom & ND King (eds), *Fuggle & Rabie’s environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 222, at p 258 *et seq.*

¹⁷⁴ Burns & Kidd, (fn 173) at p 243 *et seq.*; see also Kidd (fn 151) at p 269.

¹⁷⁵ M Kidd, ‘Criminal measures’ in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 240 at p 265; see also Kidd, (fn 151) at p 269.

¹⁷⁶ Fourie, (115) at p 98.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, at p 102.

¹⁷⁹ S29(4) stipulates that it is a criminal offence to commence with a listed or specified activity without authorisation.

NEMA.¹⁸⁰ The *dominus litis* in criminal prosecutions is the National Prosecuting Authority (NPA) which may be viewed as one of its downsides. This is because capacity constraints, political will and prioritisation may not necessarily favour prosecution of environmental crimes. However, private prosecutions with adequate *locus standi* is provided for in NEMA and this is one of positive aspects of our environmental law. The only drawback is that before such prosecutions may be pursued, a certificate *nolle prosequi* must first be issued by the NPA, which may be a time-consuming process.

Other weaknesses of criminal sanctions include the fact that they may be protracted, costly and put the burden of proof on environmental authorities. Also, environmental authorities, prosecutors and the judiciary seem to struggle with applying measures which would ensure that the punishment fits the crime.¹⁸¹ Burns and Kidd¹⁸² lists the weaknesses as: the burden of time and cost, its reactive nature, difficulty in providing proof beyond reasonable doubt,¹⁸³ problems with investigations, lack of expertise of court officials, and inadequate penalties. Compounding matters further is the fact that, one is left with an environment which may have been adversely affected. This is an indication that these measures, as well, may not be adequate to deal with listed / specified activities undertaken without authorisation, and perhaps the introduction of an *ex post facto* authorisation procedure may look appealing, and it is the subject of the next discussion.

2.7 EX POST FACTO ENVIRONMENTAL AUTHORISATION

The remedies discussed above are applied somewhat inconsistently, and to a greater extent, unsuccessfully in dealing with listed / specified activities undertaken without authorisation. There are also concerns that they are not ideally suited for such contraventions.¹⁸⁴ An innovative remedy, the *ex post facto* authorisation process, was introduced through an amendment to NEMA.¹⁸⁵

¹⁸⁰ These provisions are now housed under s49A.

¹⁸¹ Kidd, (fn 175) at p 265.

¹⁸² Burns & Kidd, (fn 173) at p 244–249; see also Kidd, (fn 151) at p 270–274.

¹⁸³ While it may be relatively easy to show *actus reus*, it may be difficult to prove the accompanying *mens rea* for criminal liability to be sustained.

¹⁸⁴ Kidd & Retief, (fn 141) at p 994.

¹⁸⁵ Discussion in part A.

2.7.1 What did s24G seek to address

Perhaps the starting point in analysing *ex post facto* authorisation, as provided for under s24G, is to understand the legislature's reasons for introducing a measure, which has, in some quarters, been referred to as anomalous.¹⁸⁶ Paschke and Glazewski¹⁸⁷ argue that there was no justification or motivation for the introduction of s24G, and that '[a]bsent knowledge of the mischief that the [...] section sought to cure, it is difficult to conceive of a reason' thereof. This is echoed by Kohn¹⁸⁸ who argues that this section 'was introduced in the absence of any meaningful legislative explanation as to the nuisance sought to be addressed'. Strangely, and contrary to the above view, this same author points out that this section was introduced as one of the measures aimed at achieving the broad objective of streamlining 'the process of regulating and administering' EIAs and as a 'legislative answer to the dilemma' emanating from contradictory EIA judgements.¹⁸⁹ Van der Linde identifies the reasons as: the correction of a problem of different court interpretations, and possibly to deal with high volume of EIA applications. In this regard, this author says this process was introduced

[a]s a result of [...] divergent interpretations by our courts as to the possible retrospective authorization of 'prior commenced' [...] activities and potentially the hefty volume of EIA applications before administrators, the legislature aimed to rectify the then current position.¹⁹⁰

Assertions that s24G was introduced without any reason or explanation are disingenuous, because it is clear that s24G was introduced, *inter alia*, to address discrepancies in the interpretation and handling of listed / specified activities undertaken without authorisation. In fact, the broad objectives were outlined in the explanatory Memorandum to the Bill¹⁹¹ and a number of scholars confirm this. In this regard, Kidd and Retief point out that there seemed to be 'widespread non-compliance with the authorisation law'¹⁹² and that the remedies at the time were 'clearly not perceived as being a deterrent', hence the significant power introduced by s24G should be welcomed.¹⁹³ Erasmus¹⁹⁴ identifies the problem, correctly in my view, by pointing out that '[w]hile there was no uncertainty about the wrongfulness of the unlawful

¹⁸⁶ Kohn, (fn 24) terms it the s24G anomaly; Kidd, (fn 151) & Kidd & Retief (fn 141) say it is a 'rather odd' procedure.

¹⁸⁷ Paschke & Glazewski, (fn 67) at p 146.

¹⁸⁸ Kohn, (fn 24) at p 2.

¹⁸⁹ *Ibid.*

¹⁹⁰ Van der Linde, (fn 77) at p 207.

¹⁹¹ Memorandum on the Objects of the National Environmental Management Second Amendment Bill, Clause 2.

¹⁹² Kidd & Retief, (fn 141) at p 296; see also Kidd, (fn 151) at p 246.

¹⁹³ J Glazewski & S Brownlie, 'Environmental assessment' in J Glazewski & L Du Toit (eds), *Environmental Law in South Africa*, 3rd ed., Durban: Butterworths, 2013, 10–1; see also Kidd & Retief, (fn 141) at p 296 & Kidd, (fn 151) at p 246.

¹⁹⁴ Erasmus, (fn 21) at p4.

commencement of a listed activity without prior authorisation, it was rarely clear what the most environmentally accountable response to such unlawful activities should be.’ Finally, Glazewski, quoting the *Silvermine* case, points out that an EIA cannot be required retrospectively but alternative remedies to the EIA provisions had to be sought in seeking redress, and s24G was one such remedy.¹⁹⁵

The suggestion in the passage quoted above that s24G may have been introduced as a means to assist in addressing ‘the hefty volume of EIA applications’ is rather strange. This is because none of the provisions under s24G seek to deal with authorisation *ex ante*. In fact, this suggestion feeds into concerns that s24G allows authorisation through the ‘back door’. I would argue that this study, particularly the assessment of processes in the Province of KwaZulu/Natal presented in the next chapter, does not support this assertion. It follows therefore that the consideration of concerns relating to s24G and their validity may be necessary, and they are discussed next.

2.7.2 Concerns relating to s24G

There are a lot of concerns regarding s24G. Van der Linde states that s24G has ‘proven to be controversial and frustrating in its scope, its application and its operation’.¹⁹⁶ Some of the concerns are discussed below, classified (for the purpose of this discussion) into: potential for abuse, interpretation and constitutionality, inadequacy of the administrative fine, and contravention of sustainable development principles.

Potential for abuse: a lot of concerns have been raised regarding the possibility of unscrupulous developers disregarding the ‘normal’ authorisation and opting for what is viewed as a *fait accompli* process through s24G. Paschke and Glazewski¹⁹⁷ decries this section because, they argue, it may, *inter alia*, ‘in effect encourage [the undertaking of] listed activities [...] and apply for authorisation only after it is too late to halt’ it, which indeed would be tantamount to compliance through the ‘back door’. In my view, this criticism is unwarranted. As shown in part A,¹⁹⁸ this criticism is not borne by the stipulated provisions of s24G, as amended, and also as they were at its introduction, as well as the case law thereto.

¹⁹⁵ Glazewski, (fn 77) at p 239.

¹⁹⁶ Van der Linde, (fn 77) at p 208.

¹⁹⁷ Paschke & Glazweski, (fn 67) at p 124.

¹⁹⁸ See discussion under subheading 2.3.

Interpretation and constitutionality: one of the contentious issues is whether or not s24G provides for a fee or a fine, and there are contradicting interpretations. Some scholars argue that it is a fine, akin to an admission of guilt fine and therefore a criminal sanction, with the effect that it would stay the operation of s24F (*viz.*, criminal prosecution, as was the case at the time).¹⁹⁹ They support this assertion by highlighting the fact that the fine is not a standard fee, but rather a fine determined on a case-by-case basis, presumably based on the extent of the impact caused. Others, however, argue that it is an administrative fine which is not meant to detract from the criminal sanctions.²⁰⁰ Fourie points out that it is ‘not a punitive measure in the conventional sense, as the purpose of paying [...] is merely to trigger’ the consideration of s24G applications.²⁰¹

The correct interpretation is important because the payment of a fine may trigger *autrefois convict* if a sanction in terms of s24F (now s49B) were also to be pursued. This would be contrary to the principle of legality, which is part of the rule of law provided for in the founding provisions of the Constitution.²⁰² As a consequence of the principle of legality, no one could be convicted more than once for the same crime.²⁰³ This would therefore be inconsistent with the founding provisions of the constitution and therefore unconstitutional.

My view is that both interpretations are partly correct: it is true that s24G provides for an administrative fine; it is true that the fine is not standard but determined on a case-by-case basis; also, the amount of the fine may correspond with the severity of the impact on the environment, hence it may be deduced that there may be an element of punishment; and it is also true that the provisions of s24G do not suspend the application of any possible criminal prosecution thereafter. As to whether the latter would trigger *autrefois convict* is not easily apparent and has not yet been tested in the courts, save perhaps for an *obiter* presumption.²⁰⁴ What is clearly decipherable though is that s24G, as amended, explicitly provides for an administrative fine and explicitly provides that provisions thereunder shall not in any way derogate from any possible criminal sanctions. It has to be noted though that this provision is in line with practices in other jurisdictions. For instance, the United States’ Environmental

¹⁹⁹ Van der Linde, (fn 77) at p 208; Paschke & Glazweski, (fn 67) at p 124; Kohn, (fn 24) at p 2 *et seq.*

²⁰⁰ J Glazewski, P Snijman & L Plit, ‘Compliance with and enforcement of environmental laws’, in J Glazewski & L Du Toit (eds), *Environmental Law in South Africa*, 3rd ed, Durban: Butterworths, 2013, 26–1, at p 26–19; Kidd and Retief, (fn 141) at p 995.

²⁰¹ Fourie, (fn 115) at p 113.

²⁰² S1(c) of the Constitution of the Republic of South Africa, 1996.

²⁰³ Glazewski *et al.*, (fn 200) at p 26–19.

²⁰⁴ See the discussion in the *York Timbers* case.

Protection Agency may institute criminal proceedings ‘on top of the administrative proceedings for a fine’ in instances where there is evidence of intent and/or wilful violation of the law.²⁰⁵

Inadequacy of the administrative fine: one of the concerns had been that the administrative fine was too low to act as a deterrent, and unscrupulous developers could easily cover it in their overheads as part of development expenses.²⁰⁶ These concerns, of course, are premised on the administrative fine being a penalty, such as in the form of an admission of guilt fine, as discussed above. On the contrary, however, other scholars view it as a ‘substantial penalty’²⁰⁷ which in other jurisdictions ‘is usually nowhere near as large as that provided for in this section’.²⁰⁸ Some scholars acknowledged it as ‘one of the highest fines of any kind for an environmental legislation’ at the time.²⁰⁹ Be that as it may, concerns on the quantum of the administrative fine were addressed. The maximum fine was increased from R1 Million to R5 Million,²¹⁰ perhaps strengthening the view that it may well be a penalty. Be that as it may, some scholars insist that it is just a measure which should be viewed as an ‘inconvenience fee’ for failure to do an environmental assessment before undertaking an activity, though the high value tends to reinforce the view that it is a punitive measure, and hence an alternative to prosecution.²¹¹

Another matter revolves around the possibility of establishing a ‘fully-fledged’ administrative penalty system to address a broad range of environmental compliance and enforcement problems.²¹² The concern is that the s24G administrative fine, which is ‘the only administrative penalty [...] in South African environmental law’,²¹³ is inadequate in that it does not go far enough and needs to be reframed. The suggestion is that it should be framed along the lines of the country’s well established administrative penalty system under the Competition Act.²¹⁴ Fourie²¹⁵ argues that such a system would relieve the overburdened

²⁰⁵ Fourie, (fn 115) at p 105.

²⁰⁶ Paschke & Glazewski, (fn 67) at p 145; Kohn, (fn 24) at p 20.

²⁰⁷ Van der Linde, (fn 77) at p 206.

²⁰⁸ Kidd & Retief, (fn 141) at p 994; see also Kidd (fn 151) at p 247.

²⁰⁹ Fourie, (fn 115) at p 113.

²¹⁰ Through the National Environmental Management Laws Amendment Act, 30 of 2013.

²¹¹ Kidd, (fn 25) at p 395.

²¹² Kohn, (fn 24) at p 20.

²¹³ *Ibid.*; see also Kidd, (fn 151) at p 279.

²¹⁴ Act 89 of 1998.

²¹⁵ Fourie, (fn 115) at p 125.

criminal justice system which, in any event, is not adequately resourced and appropriately suited for the prosecution of environmental contraventions.

The suggestions relating to the establishment of a ‘fully-fledged’ overarching administrative penalty system within the environment domain cannot be faulted. In fact, such systems in other jurisdictions show positive outcomes, not only for the environment, but the entire criminal justice system.²¹⁶ However, my view is that any criticisms of s24G regarding the foregoing is misdirected and rather unfair. Certainly, s24G was never meant to be a panacea for our environmental compliance and enforcement problems. In any event, any system as suggested above should never be pegged on, or use as its point of departure, s24G and its administrative fine; but rather, should establish its own compliance and enforcement administrative penalty structure. Moreover, the country’s administrative penalty system under competition laws has its own weaknesses. Our recent discourse is littered with news of monopolistic tendencies, uncompetitive behaviour, cartels, collusion, market sharing, and excessive profiteering.²¹⁷ Certainly, failures of such nature are not what an environmental administrative penalty system should seek to emulate, but indeed its successes may be used as a point of reference rather than the s24G administrative fine provisions.

Contravention of sustainable development principles: the contention is that s24G is inimical to the objectives of an EIA, which explicitly calls for assessment of potential impacts prior to commencement.²¹⁸ Furthermore, some argue that prior authorisation and the conducting of EIAs before the commencement of an activity are the hallmarks of the enabling provisions of integrated environmental management in chapter 5 of NEMA. This, thus the argument goes, is where environmental authorisation is located, and therefore authorisation *ex post facto* is counter to the enabling legislative strictures in s23 of NEMA.²¹⁹ This is supported by Glazewski who, though not referring specifically to s24G, argues that the amendments, of which s24G was part, may be *ultra vires* because they were not in line with s23 which outlines the purpose of chapter 5.²²⁰

²¹⁶ See generally Fourie, (fn 115).

²¹⁷ See Appendix III, which is a picture of Newspaper clips taken from page 20 of the *Competition News*, September 2017 Special Edition, which is the Official Newsletter of the Competition Commission of South Africa. This special edition covered the 11th Annual Competition Law, Economics & Policy Conference.

²¹⁸ Paschke & Glazewski, (fn 67) at p 143.

²¹⁹ *Ibid.*

²²⁰ Glazewski, (fn 77) at p 248.

Another argument goes thus: any conduct which may seek to encourage authorisation *ex post facto* would undoubtedly ‘undermine the very essence of the fundamental right to environmental protection [and] cannot be justified’ under the Constitution.²²¹ This is because (so it is argued) an environmental assessment prior to the commencement of an activity

is an established legal element of the principle of sustainable development. Given that s24(b) of the Constitution read with s2(4)(a) of NEMA makes sustainable development the foundation of South African environmental law, prior authorization and the conducting of an EIA must form an essential part of the right to the environmental protection.²²²

Although the foregoing concerns may seem convincing, and perhaps warranted with regard to the possibility of inconsistency between the objectives of chapter 5 of NEMA as outlined in s23 and some provisions of s24G, my view is that they are misdirected and are informed by a misunderstanding of the objectives of the s24G process. Of course, if one interprets it as a means where one may commence a development without undertaking the prerequisite authorisation requirements with the view that such can be corrected through s24G, the foregoing concerns are warranted and indeed s24G would be counter to the values espoused by NEMA, and by extension the Constitution. However, I would argue that such an interpretation is incorrect. The s24G process, in my view, is meant to be a remedy which may be applied in dealing with an already existing failure, *viz.*, a listed / specified activity having been undertaken without authorisation. In this regard, the starting point should be: the environment has already been impacted upon,²²³ and what tools could be used to deal with such a situation. I submit that s24G is one such tool.

It is worth noting that through s24G, environmental authorities may be able to use the sustainable development principles stipulated in s2 of NEMA to come to a determination on whether or not, *inter alia*, it would be in the interest of the environment to allow such unlawfully undertaken activity to proceed. This alone should dispel the concerns that s24G is contrary to the principles espoused in s2 of NEMA. In my view, what drives some of these concerns is the idea that demolition and rehabilitation of such activities is the only acceptable option, forgetting that such an option may not necessarily be in the interest of the environment. As shown in part A, the courts have cautioned against such rigid fixation when dealing with environmental issues. But most importantly, s24G does not detract from the

²²¹ *Ibid.*

²²² *Ibid.*, at 209; see also Paschke & Glazewski, (fn 67) at p 130–132.

²²³ The impacts may be positive, negative, or both; and, in my view, the s24G process presents an opportunity to identify & quantify such impacts and allow authorities to take the most appropriate decision regarding the activity, which include directing that it be ceased & the environment rehabilitated, or alternatively authorised.

application of any other measure to deal with the original unlawfulness, viz., undertaking a listed / specified activity without authorisation.

2.8 PART B CONCLUSION

This part of the chapter spells out the legal definition of environmental authorisation, and it is worth noting that it does not make reference to whether or not authorisation is issued pre- or post- the undertaking of an activity. However, authorisation before commencement is ideal because of the conditions attached thereto. When activities are undertaken without the prerequisite authorisation, there are a number of measures that may be instituted to deal with them. These include: administrative remedies which are more flexible and cost-effective; civil measures which are instituted through the courts and are available to individuals and authorities alike; and criminal sanctions which are widely used but costly and acrimonious. These measures have been found to be inadequate in addressing listed / specified activities undertaken without authorisation.

The s24G process was promulgated to fill this inadequacy; however, it proved to be quite controversial and many concerns were raised against it. The concerns range from its possible unconstitutionality, potential for abuse, possible contravention of sustainable development principles, etc. This part of the chapter argues that these concerns are misplaced, misdirected and unwarranted. In the main, this is because s24G can be applied without suspending the possibility of applying any of the other measures to deal with the original unlawfulness.

One of the criticism of s24G is that it does not fit into the scheme of legislative strictures and objectives of chapter 5 of NEMA where it is located. There might be merit to this and perhaps it may be better for the legislature to find an appropriate location for it. The above discussion in this part of the chapter presented a lot of information from different angles on what scholars and commentators say about s24G. It indeed brought to the fore information in response to one of the research questions of this study, i.e., *what information has been published on ex post facto authorisation in South Africa.*

The next chapter looks into the Province of KwaZulu/Natal and considers its data on s24G applications and broadly the interaction that authorities in this province have with the s24G process.

CHAPTER 3: ANALYSIS OF SECTION 24G APPLICATIONS IN KZN

This chapter analyses s24G authorisation process in the Province of KwaZulu-Natal, with focus on environmental considerations. This is done by first providing an overview of the administration of the s24G process and then analysing s24G applications data, in order to assess whether or not environmental considerations are taken into account in the ultimate decision.

This chapter also outlines the study limitations and assumptions, and revisits the study methodology, as suggested in chapter 1.²²⁴ This is done by describing the determination of the sample size and reasons thereof.

3.1 BACKGROUND

Data covering the entire period since the implementation of s24G in the province was sourced. From the data, a sample of files was analysed further by focussing on environmental matters. A spreadsheet of s24G data was obtained from the provincial head of Compliance Monitoring and Enforcement.²²⁵ The data contained the identity of the applicant, development activity, the district and official processing or who processed it, reference code, status of the application, *etc.* Further information was sourced from the regional and district offices and from environmental consultancies who undertake s24G assessments in the province to plug any gaps in the data.

Regarding the determination of the sample, it is worth noting that scientific studies, even if it were possible, do not necessarily collect data from each and everyone in the study area or community to get valid findings.²²⁶ In most cases, a sample of the community suffices; but this does not mean there must be a complete disregard of the entire community or blind consideration of the selected sample. Prior knowledge and understanding of the study community is essential.²²⁷ This is necessary to understand potential variability, diversity and the size of the community,²²⁸ which are all critical in the determination of the appropriate

²²⁴ See paragraph 1.4 of the first chapter.

²²⁵ A censored version of the data is presented in Appendix IV in line with the requirement relating to non-disclosure of confidential / sensitive information.

²²⁶ Denzin & Lincoln, (fn 11) at p 1.

²²⁷ T Rapley, 'Sampling strategies in qualitative research' in U Flick (ed), *The Sage Handbook of Qualitative Data Analysis*, London: Sage Publications, 2014, 49.

²²⁸ *Ibid.*

sample. This is precisely what was done in this study. An analysis of the entire provincial data from different aspects, focussing on different parameters was undertaken. This ultimately informed the focus on the selected sample.

In this study, the ‘community’ is the s24G applications filed with the Department from the inception of the process²²⁹ until the end of 2017 when final data was collected. Sampling was therefore based on prior understanding of the administration of the s24G process and the statistical analysis of the different parameters of the data. These are discussed hereunder; however, it is important to first consider limitations and assumptions that this study makes, and these are outlined next.

3.2 LIMITATIONS AND ASSUMPTIONS

This study is limited to applications that were accessible or made available for analysis by the Department. It is worth noting that the Department regards s24G applications as confidential and access by external parties thereto is strictly controlled. This is based on the fact that an activity may have been undertaken unlawfully before an s24G application is filed, and therefore by filing such an application, an applicant may be acquiescing to contravening the law. This makes it difficult for most applicants to go through with the process. It follows therefore that applicants might be wary of filing applications if they knew that their ‘acquiescence’ may be opened to scrutiny by ‘outsiders’; hence, the Department was unwilling to give unfettered access to s24G files.

Furthermore, the study was limited to the analysis of finalised applications, and further limitations include, incomplete / illegible information in the files, missing information / files, unavailability of departmental officials to provide supervised access and time limitations.

It is assumed that data provided by the Department, particularly on files which could not be accessed, was accurate, and that any errors were due to honest mistakes and not intentionally provided to skew the outcomes of the study. An assumption is also made that all districts consistently follow the same process when dealing with s24G applications, including those whose files could not be accessed. The process, in broad terms, is thus outlined next.

²²⁹ While s24G was promulgated in 2005 & implemented in 2006, data supplied by the Department indicates that the first applications were filed in 2007.

3.3 DATA AND THE ADMINISTRATION OF S24G PROVISIONS IN THE PROVINCE OF KWAZULU-NATAL

In the discussion below, a broad overview of the s24G application process is given, followed by statistical analysis of the data received from the Department. Data is analysed from a variety of angles and compared with data from similar studies in other provinces and data from the annual national compliance and enforcement reports.²³⁰

3.3.1 S24G application process in the Province of Kwazulu-Natal

Anecdotal evidence suggests that s24G provisions were introduced to be implemented for a period of six months from the proclamation date, *viz.*, from 7 January 2006 until 6 July 2005. However, this was not to be because the provisions still apply to date. Seemingly this was only a matter of different interpretations. In KZN, the communiqué was that a six-month grace period was provided for individuals to come forward, disclose their unlawful means, ‘correct’ them through s24G, pay a minimal fine, and any possible sanctions would be waived.²³¹

S24G applications are administered by the Compliance Monitoring and Enforcement component of the Department,²³² under the oversight of a senior manager. The process itself is implemented in each of the 11 districts offices, whose jurisdictions correspond with the province’s 11 main municipalities.²³³ Generally, the process begins when an application is filed in the prescribed application form²³⁴ in one of the two regional offices,²³⁵ where it is

²³⁰ The national Department of Environmental Affairs has been generating annual reports relating to compliance & enforcement since 2007.

²³¹ *Cf.*, fn 46.

²³² This is only for activities which fall within the Department’s jurisdiction. The handling of applications & the process followed as presented herein is anecdotal evidence provided by the Senior Manager responsible for Compliance Monitoring & Enforcement.

²³³ Ten Districts & 1 Metropolitan Municipality, *viz.*, uGu (in & around Port Shepstone), uMgungundlovu (in & around Pietermaritzburg), uThukela (in & around Ladysmith), uMzinyathi (in & around Dundee), aMajuba (in & around Newcastle), Zululand (in & around Ulundi), uMkhanyakude (in & around Jozini), King Cetshwayo (in & around Richards Bay), iLembe (in & around Stanger), Harry Gwala (in & around Kokstad) & eThekweni (in & around Durban).

²³⁴ The application form gives an applicant the opportunity to outline the activity/ies that has / have been undertaken, its / their environmental impact/s, measures undertaken to address such impact/s, reason/s why an EIA wasn’t done, whether or not the activity/ies has / have been suspended pending the outcome of the application, details of the EAP handling the process, *etc.*

²³⁵ Region 1 deals with applications for uGu, uMgungundlovu, uThukela, iLembe, eThekweni & Harry Gwala, and Region 2 deals with the rest.

given a unique reference²³⁶ and uploaded into the national database for traceability purposes.²³⁷ The application is then allocated to the district office which has jurisdiction over the activity. The district office, after reviewing the details provided in the application, sends the environmental assessment practitioner (EAP) managing the process an official communiqué,²³⁸ citing the application's allocated reference code.

The applicant, through its EAP, then undertakes the necessary study/ies, including the public participation process, and ultimately furnishes the district office with the required information / report for consideration and decision-making (there is no legislated process that one has to follow, save for the fact that the legislated *ex ante* EIA process seems to be followed). At the same time, the authority subjects all applications to the provincial Fine Committee, which makes determinations relating to the amount of fine to be levied for each application, using a standardised tool referred to as the fine calculator.²³⁹ Site visits may be undertaken, and further information requested to inform the decisions of the Fine Committee. The Fine Committee then drafts a report on its determinations and recommended fine amount for each application and submit to the accounting officer of the Department for consideration and approval.

Once the accounting officer approves the fine, the information is communicated back to the EAP. The communication points out that report/s shall only be considered once the fine has been paid in full within a specified period. Details of the authority's bank account, reference code, office where proof of payment is to be submitted, *etc.*, are included in the communication. It also points out that failure to pay within specified period renders the application abandoned and the possible consequence thereof. Finally, it outlines the appeals process – the MEC²⁴⁰ is the appeals authority – should one seek to appeal the fine amount.

²³⁶ The reference begins with the generic district code, followed by s24G, then four numerical figures beginning at 0001 & allocated consecutively as successive applications are filed & ends with the year the application was filed.

²³⁷ This is a nation-wide electronic system, which facilitates the administration of environmental authorisation, record-keeping & traceability.

²³⁸ This communiqué seems to be the point which initiates the process. It outlines the applicable legal precripts, crystallises the environmental issues which need consideration or the process to be followed & the information / reports required. It also indicates timelines by which required report/s should be filed & the requirement to pay a fine, including any additional information that may be required to facilitate the determination of the fine amount.

²³⁹ The fine calculator is a generic template which may require its own discussion, but such is beyond the scope of this study, save to say that it automatically calculates / determines fines, penalties or militates against such based on the information gleaned from the application, site visit reports / further information inputted thereon.

²⁴⁰ Member of the Executive Council responsible for Environmental Affairs in the Province.

Adherence to the process outlined above is important because most applicants seem to use the appeals process and their appeals are, more likely than not, successful. Applicants usually ask for the reasons for the fine decision and the process followed. Then they usually find grounds to file an appeal and the appeals are, in most of the cases, upheld,²⁴¹ resulting in a substantial reduction of the fine amount. Sometimes appeals which, at face value, seem to be groundless²⁴² are upheld. While the administration of the s24G fine and the processes related thereto are outside the scope of this study, it may be necessary to undertake a comprehensive analysis of this aspect of the s24G process in future studies, particularly the appeals process and the basis for the substantial reduction of fines when appeals are upheld.²⁴³

Once the fine is paid, the environmental assessment reports are evaluated, and authorisation decision made. The decision usually comes with reasons and, if authorised, conditions as well. I would argue that this is one of the most positive aspects of the s24G process. This is because it is an addition to the measures which may be applied when one has undertaken a listed / specified activity without authorisation. As indicated in the previous chapter,²⁴⁴ some of the measures may not necessarily be effective, efficient or in the interest of the environment. S24G authorisation and conditions thereto may therefore ensure that such activities are brought into the post-authorisation follow-up processes,²⁴⁵ presenting an opportunity for authorities to ensure that negative impacts may be avoided, if not, then mitigated / offset.²⁴⁶

The foregoing process, therefore, sets out the administrative arrangements within the Department under which the s24G applications and the data generated therefrom, which is discussed next, is anchored.

3.3.2 Analysis of s24G data

Data received from the Department comprehensively covered the entire period of the implementation of s24G; however, it was incomplete. Some data elements were missing; hence, regional and district offices were approached to verify and update their respective

²⁴¹ In fact, in all the case files I accessed, which had appeals, all appeals were upheld.

²⁴² Particularly if one considers the *ratio* in the *Timber Treeters* case discussed in chapter 2.

²⁴³ S24G regulations, (fn 16) may render such a study academic.

²⁴⁴ As discussed in chapter 2, administrative, civil & criminal measures have their own limitations.

²⁴⁵ These may include environmental auditing, monitoring & evaluation, environmental reporting, etc.

²⁴⁶ Post-authorisation follow-up activities also have their own problems, and capacity constraints to continuously monitor & evaluate implementation thereof is one of them.

data. This, however, proved to be a difficult exercise. Not all districts fully cooperated and those who did, had incomplete data, while others took quite a long time to give feedback. This was possibly due to indifference, but in the main, it was because of capacity constraints. The result was that gaps still persisted.²⁴⁷ EAPs who operate in KZN were also approached, but they were also unhelpful (confidentiality was cited as the reason they were unable to cooperate).

Data shows that there was a total of 190 applications filed from 2007 to 2017, and a brief overview of these are presented in figure 3.1 below. The different entities that applied are grouped as company,²⁴⁸ government,²⁴⁹ family trusts and individuals.²⁵⁰ In some instances the data provided, as outlined above, was incomplete and there were some applications where the applicants were not identified. These accounted for 3% of the applications, a percentage which is not very significant and may not substantially affect the figures quoted above.

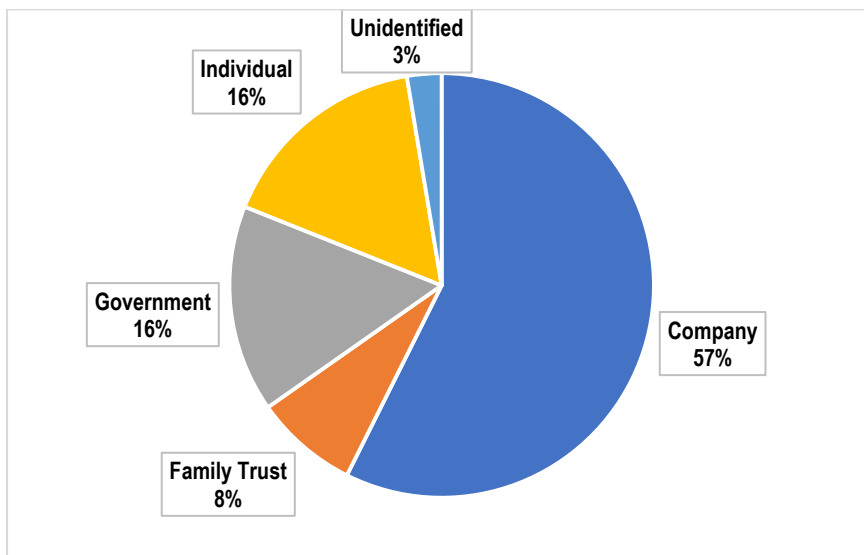


Figure 3.1: Categories of applicants

These figures can be compared to studies of a similar nature undertaken in Gauteng²⁵¹ and Western Cape²⁵² provinces, and these are highlighted in figure 3.2 hereunder. The Gauteng

²⁴⁷ Based on the consecutive numbering system of the unique reference, if for the same district, in the same year, a file allocated 0001 is followed by one allocated 0005, it may be deduced that 3 files (*viz.*, 0002; 0003 & 0004) are missing.

²⁴⁸ These were the most number of applicants & include both close corporations & proprietary limited, which accounted for 57% of the applications.

²⁴⁹ These were mainly municipalities & accounted for 16%.

²⁵⁰ Family trusts & individuals accounted for 8% & 16%, respectively.

²⁵¹ LMF September, 'A critical analysis of the application of s24G provisions of the National Environmental Management Act (NEMA): The Gauteng Province Experience', Unpublished Master's Dissertation, Potchefstroom: University of the North-West, 2012. Data from this Gauteng study which is used herein to plot figure 3.2 and discussion thereof is sourced from page 49.

study covered the period from 2006 to 2010, and overwhelmingly companies were the most applicants at 80%. Individuals and family trusts accounted for 4% and 2%, respectively, and government accounted for 7%. Regarding the Western Cape study, which covered the period from 2006 to 2014, again the most applicants (64%) were companies. Individuals and family trusts were 21% and 6%, respectively, and government accounted for 8%. This is an indication that different entities or sectors do find themselves in the wrong side of environmental legislation, and seemingly companies are the main contraveners. This may be because the private sector is always a major player in development activities, hence most likely to breach environmental laws. Significantly, these figures point to a relatively low volume of applications in KZN per year, with the highest number being 25 recorded in 2008; Gauteng on the other hand recorded 81 in the same year, its highest; while the Western Cape has 76 as its highest, which was recorded in 2012.

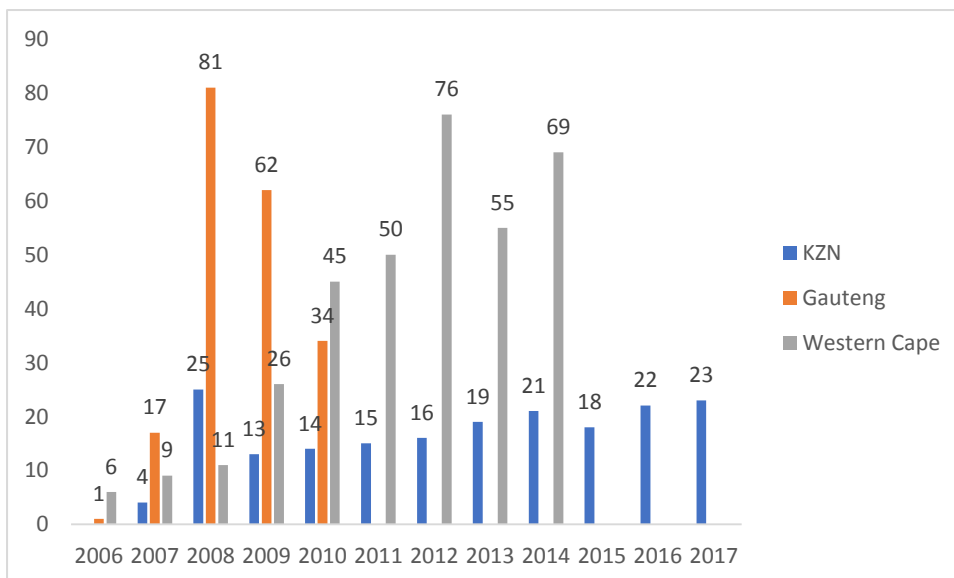


Figure 3.2: Provincial comparison of the number of applications per year

The data also shows the status or outcomes of applications. Figure 3.3 on the next page presents the different outcomes of the applications, grouped as authorised,²⁵³ pending,²⁵⁴ and abandoned or withdrawn.²⁵⁵ Likewise, in some instances the data was incomplete and there

²⁵² J du Toit, 'A Critical Evaluation of the National Environmental Management Act (NEMA) Section 24G: Retrospective Environmental Authorisation', Unpublished Master's Dissertation, Cape Town: University of Stellenbosch, 2016. Data from this Western Cape study which is used herein to plot figure 3.2 and discussion thereof is sourced from page 33.

²⁵³ These were the most number of applicants & accounted for 38%.

²⁵⁴ These accounted for 22% & a number of them were not pending because had been recently filed, or the decision was still being considered; they in fact had been pending for a year or two & the reasons are not apparent, but what could be gleaned is that appeal of the fine does delay the process.

²⁵⁵ Withdrawn or abandoned applications account for 9%. Most applications were withdrawn / abandoned because they no longer met EIA threshold or activity had been discontinued; while others the reasons were not

were some applications where the status or outcomes of the application were not indicated and significantly, these accounted for 31%. What is worth noting is that there was no data indicating that an applicant was denied authorisation. The Gauteng study indicates that more than 90% of the applications were authorised and also no indication that any application was not authorised. This may be misconstrued as confirmation that the s24G process is indeed a *fait accompli*.²⁵⁶ However, as argued previously, if analysed accurately, s24G may be viewed as a means of ensuring that all listed / specified activities are brought into the fold of proper environmental management processes, such as the post-authorisation follow-up activities. Furthermore, most *ex ante* authorisations themselves are authorised,²⁵⁷ the key lies in the authorisation conditions which must ensure that environmental impacts are avoided or mitigated.²⁵⁸

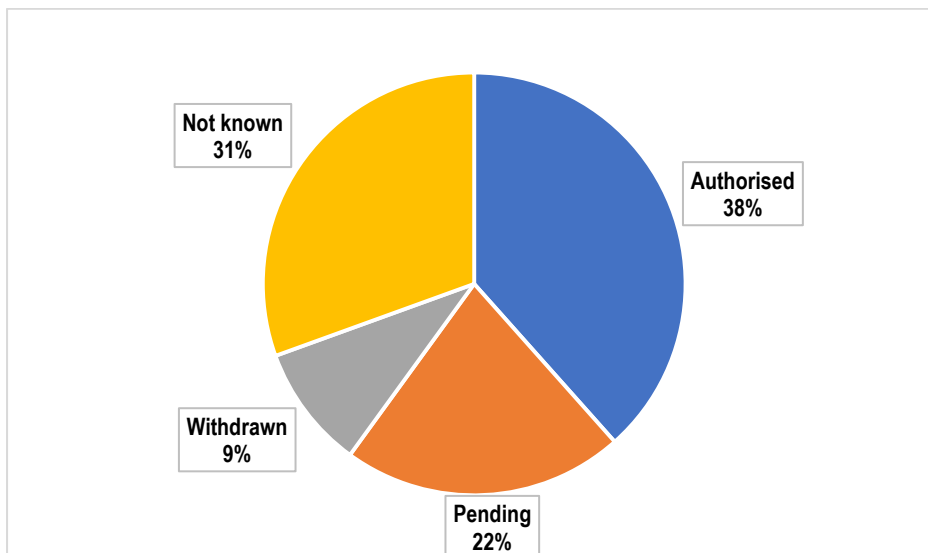


Figure 3.3: Status of s24G applications

Data was analysed further to ascertain the number of applications per district and the number of applications per year, and this is presented in figure 3.4 on the next page. EThekweni district (the economic hub of the province) has the highest number of applications (more than double the second highest) and accounts for almost 32% of applications in the province. The mostly rural district of uMkhanyakude has the lowest number, but aMajuba and King

clear. Furthermore, there were no indications on the files as to what happens to the environment in cases where the activity was discontinued.

²⁵⁶ My view is that this conclusion is informed by the misconception that an EIA is a tool used to either authorise or deny authorisation of certain activities, while in fact it is a tool that aids decision-making; its fundamental object is to ensure that environmental considerations are taken into account in order that activities that may have negative environmental impacts are authorised with conditions that facilitate mitigation against such impacts.

²⁵⁷ Kidd & Retief, (fn 141) at p1030.

²⁵⁸ *Ibid.*

Cetshwayo, which are slightly more developed, have fewer applications than Harry Gwala and significantly far less than uThukela, which are considered to be less economically active. Furthermore, the highly developing corridor between Durban and Richards Bay (iLembe district) also shows quite a lot of applications, relative to its small geographical size. Be that as it may, the possible inaccuracies and incompleteness of the data as outlined above may affect the figures presented for each district.²⁵⁹

Regarding the yearly distribution of applications, there seems to be no clear trend, as shown in figure 3.5 below, and there is no indication that unlawful development of listed / specified activities is tapering off. In fact, 2017 recorded the second highest number of applications (viz., twenty-three). The least number of applications was recorded in 2007 (only four), with the highest year (2008) more than six times that of 2007. This may suggest that the uptake of this process, which was promulgated in 2004, but implemented in 2005 was cautious, but anecdotal evidence suggests otherwise.²⁶⁰

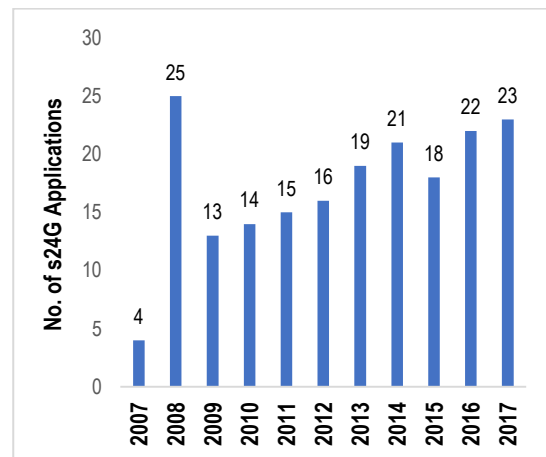
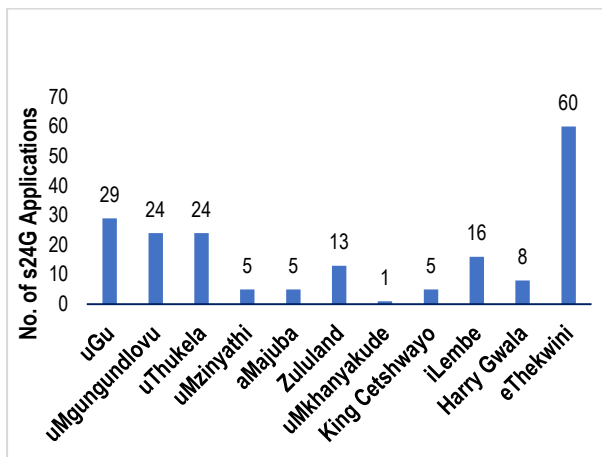


Figure 3.4: Number of applications per district **Figure 3.5:** Number of applications per year

Regarding other studies (presented in figure 3.2 above): the Gauteng study suggests a cautious uptake of the process in 2005/2006, with 2008 recording the most number of applications. The two years thereafter show a considerable decrease (applications fell by 58% in 2010 from the high of 2008);²⁶¹ however, the timelines are not considerable enough to suggest a tapering off. The Western Cape study shows a dramatic increase from 2006 to

²⁵⁹ It can be concluded from the file numbering system (see fn 247) that 7 applications were missing from uMgungundlovu's 2007 data, which would push its figures to 21 in figure 3.4, thereby being the district with the second highest applications after eThekweni.

²⁶⁰ Departmental officials suggest that at the inception of this process applicants were given a 6-month grace period (January – June 2006) to apply and pay a standard minimal fine of R100.00. Many applicants took this opportunity, but seemingly these are not reflected on the data received from the Department. According to the same anecdotal evidence, s24G was introduced as an interim measure to be phased out at a certain stage.

²⁶¹ September, (fn 251) at p 49.

2012 (a 1,167% increase, with 2012 recording the highest number of 76 applications). These fell by 28% in 2013 and then went back up by 25% in 2014²⁶² – another indication that there is no tapering off.

Finally, some s24G files accessed in eThekweni, uMgungundlovu and Harry Gwala districts were scrutinised further, with particular focus on environmental issues, and a sample of them is discussed below, starting with the determination of the sample size, including reasons thereof.

3.4 DETERMINATION OF THE SAMPLE SIZE

In line with the study methodology outlined in chapter 1, a purposive sampling technique was used. In this regard, the sample size was not pre-determined, and data was analysed as it was being collected. Rapley²⁶³ points out that ‘sampling should never be the product of *ad hoc* decisions or left solely to chance. It needs to be thoughtful and rigorous.’²⁶⁴ One also has to acknowledge the ‘iterative relationship between sampling and analysis.’²⁶⁵ Therefore, samples were not chosen haphazardly, but deliberately identified as data was being collected and analysed. Part of the criteria was to strive for an even distribution of samples over the study period. The analysis covers the period from the proclamation of the process in 2005 to the end of 2017, therefore samples were deliberately selected to cover the initiation of the provisions, mid-way, and tail end of the study period. This was meant to assess the possible variations during the life of this process, and the possible implications of various amendments. Some aspects which contributed to selection were: availability, accessibility and completeness of the files; elaborateness and sensitivity of environmental matters under consideration; and proximity to the University of the district offices where the files were located.

In view of the criteria outlined above, the sample population was limited to applications filed in uMgungundlovu, Harry Gwala, & eThekweni district offices.²⁶⁶ These districts account for 48% of all s24G applications in the province. As data was being collected and analysed, it became clear that the processing of applications as set out under subparagraph 3.3.1 above

²⁶² Du Toit, (fn 252) at p 33.

²⁶³ Rapley, (fn 227) at p 52.

²⁶⁴ *Ibid.*, at p 49.

²⁶⁵ *Ibid.*

²⁶⁶ These district offices are located within 10; 78 & 82 kilometres, respectively from the University, and time limitations, location, inadequate cooperation & inaccessibility made it impossible to cover each district.

was applied consistently and the files show that there were absolutely no deviations, hence this study assumes that information gleaned from these districts reflects the practices in the entire province.

Preliminary analysis of environmental matters showed that they receive the same level of consideration and hence the saturation point²⁶⁷ could easily be established. In this regard, no further insights into the research questions could be established by scrutinising any more than two s24G files. In view of this, the sample was limited to four s24G applications; the first focussing on the early years (*viz.*, 2007), the second and third focussing on the middle years (*viz.*, 2012 & 2014) and the fourth on the last years of the study period (*viz.*, 2016). The four selected s24G files are discussed next.

3.5 DISCUSSION OF A SAMPLE OF S24G APPLICATIONS

The discussion hereunder first analyses an activity which relates to the densification of poultry units. This application was filed in 2007 and is discussed next. The second analysis is an application dealing with the construction of a pipeline within a water course, which was filed in 2012. The third analysis is the development of above-ground fuel storage tanks which was filed in 2014. Finally, the last analysis is the development of a motor vehicle bridge, which was filed in 2016. In line with the confidentiality commitments made to the Department and the provisions in Appendix II, the analysis below will not cover sensitive matters, or information considered confidential.²⁶⁸

3.5.1 Densification of poultry units without authorisation

In this application, the applicant extended capacity of its poultry farming enterprise²⁶⁹ without getting the requisite authorisation. In this regard, the applicable provisions of NEMA²⁷⁰ were contravened and the EIA regulations²⁷¹ were not followed. In order to

²⁶⁷ This is a point where additional data no longer brings additional insight into the research question/s.

²⁶⁸ A lot of information in the discussion of s24G files was sourced directly from the respective files, documents, reports or correspondences between the parties involved in the process. Direct quotations are therefore a reflection of what is contained therein.

²⁶⁹ The applicant had six housing infrastructure with a capacity of 3,000 chicken each and these were extended by three with a capacity of 13,000 each.

²⁷⁰ At the time, s24F(1) prohibited anyone to commence or continue with a listed / specified activity without authorisation, or unless such an activity is done in terms of applicable norms & standards; and s24F(2)(a) & (b) made it an offence to contravene the aforementioned provisions.

²⁷¹ The 2006 EIA Regulations (GN R.386 of 21 April 2006), in Activity 1(h)(v) of the Listing Notice 1, lists 'The construction of facilities or infrastructure, including associated structures or infrastructure, for the concentration of animals for the purposes of commercial production in densities that exceed 3 m² per head of

‘correct’ this, the applicant undertook an *ex post facto* authorisation process through the provisions of s24G and was subsequently given authorisation in terms of s24G(2)(b).²⁷²

The application was filed following an observation of on-site piling of chicken manure, offensive odour, and contamination of soil and water, particularly due to water run-off during rainy days. This became a source of consternation to such an extent that neighbours and adjoining communities lodged complaints to health authorities and the Department. On inspection, the Department found that there were indeed contraventions of many environmental provisions. It found that the applicant had expanded its farming enterprise without authorisation. The applicant was advised of this and informed of its unlawful act, to which it pleaded ignorance. The Department further advised the applicant about the duty of care to protect the environment in terms of s28 of NEMA²⁷³ and the s24G provisions relating to ‘correcting’ listed / specified activities undertaken without authorisation. The applicant cooperated and followed the Department’s advice by appointing an EAP and filed an s24G application. The trigger to the initiation of the s24G process was therefore adverse impacts on the environment.

An impact assessment report, which also included provisions relating to remediation of the already damaged environment were submitted. They were evaluated, and authorisation was granted. The s24G process, like *ex ante* authorisation, also gives opportunity to I&AP to participate in the process,²⁷⁴ and give inputs and comments on draft documents submitted to authorities. This is one of the positive attributes of this process because parties who may have been adversely affected, as was the case in this application, would have an opportunity to contribute towards measures which seek to address such adverse impacts.

Some of the concerns raised in the original complaint to the Department and inputs from I&APs were included in the authorisation as part of conditions thereof. These covered issues such as:

poultry and more than 250 poultry per facility at any time, excluding chicks younger than 20 days,’ as one of the activities which may not be undertaken without authorisation.

²⁷² This provision allowed the Minister or MEC to consider reports or information received from an applicant and issue authorisation subject to conditions they deem necessary.

²⁷³ Sub-section 28(1) provides that ‘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.’

²⁷⁴ As provided for under s24G(1)(b)(vii)(dd), authorities usually direct the s24G applicant to undertake the public participation process in line with EIA regulations. Records from the file show that adequate public participation process was undertaken, which followed the provisions of *ex ante* EIA consultation processes.

- the prohibition of development of any activity within 30 metres²⁷⁵ of a water resource,
- waste, including chicken manure, was to be appropriately stored on-site and regularly transferred to registered landfill sites for disposal,
- dead chicken was to be disposed of in mortality pits and measures taken to prevent breeding of flies and odour, and
- adherence to s28 duty of care provisions was also underscored in instances of decommissioning or environmental damage.

The authorisation also provides for reporting of any contravention or emergencies to the authorities, reasons thereof and measures to address them, in order to avoid recurrence. Precisely because of the conditions attached to the authorisation, the applicant found it difficult to sustain its operations. The file reflects that the Department consistently undertook its post-authorisation monitoring obligations and applied different tools to enforce compliance with authorisation conditions. The applicant struggled to survive, and the operation was decommissioned few years down the line. The decommissioning process had to follow strict environmental prescripts as part of the conditions of authorisation in order to preserve environmental integrity of the site and its surroundings.

The s24G file did not have any entries relating to the decommissioning exercise, but from analysis thereof, it can be argued that this application led to the protection of the environment and does present a positive outcome of the s24G process.

3.5.2 Construction of a stormwater pipeline within a watercourse

In this application, an approximately 74-metre long pipeline with a diameter of 400 millimetres had been constructed without authorisation. Records found in the file show that construction was discontinued when unlawfulness thereof was brought to the attention of the applicant. Subsequently, the applicant appointed an EAP and filed an s24G application in order to ‘correct’ the unlawfully initiated activity and thereafter complete it. The remaining portion of construction was approximately 55 metres.

The applicable activity in this application was Activity 18 of Listing Notice 1 of the 2010 EIA Regulations.²⁷⁶ Records found in the file show that the intention of the applicant,

²⁷⁵ A 30-metre distance from a water course / resource was a threshold, but the current EIA listing provides for 32-metre development setback.

through its unlawful act, was to stabilise the land of a highly eroded watercourse and thereby prevent further degradation. The applicant had noted a scour on the watercourse which was, presumably, caused by high rainfall eroding a steep bank. This prompted the applicant to begin the construction of the stormwater pipeline. The file also shows that the discontinuation of the activity had severe negative impacts on the environment, such as: sediment deposits within the catchment of the activity and erosion of the site increased, the footprint of the construction area became overgrown and was invaded by alien species, and downstream rivers in the catchment were also negatively affected.

The Department highlighted the need for the assessment report to outline the ‘nature, extent, duration and significance of the consequences of or impacts on the environment’ of the already initiated activity and mitigation measures thereof.²⁷⁷ It also underscored the need of ‘including the cumulative effects’ of such activities.²⁷⁸ The assessment reports concluded that the watercourse was a ‘nonperennial or seasonal stream, relying on rainfall to sufficiently provide run-off’, hence impacts on downstream activities were only seasonal and therefore highly unlikely to affect the catchment as a whole.²⁷⁹ The erosion however worsened since the discontinuation of the activity. The effect would therefore be that once the development is restarted, the banks of the watercourse would require stabilisation as well as rehabilitation.

The activity was authorised and critical issues relating to the environment were central in the authorisation, and these include:

- the rehabilitation of the pipeline route to ensure that erosion along the disturbed areas was prevented,
- removal of the alien invasive vegetation and the re-establishment of indigenous riparian vegetation,
- construction of the stormwater pipeline as well as its operation had to be carried out with least possible impacts on the surrounding environment, and

²⁷⁶ GN R544 of 18 June 2010, the activity reads thus: ‘*The infilling or depositing of any material of more than 5 m³ into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock from: (i) a watercourse; ... but excluding where such infilling, depositing, dredging, excavation, removal or moving: (i) is for maintenance purposes undertaken in accordance with a management plan agreed to by the relevant environmental authority; or (ii) occurs behind the development setback line.*’

²⁷⁷ See s24G file, viz., the Department’s letter to the EAP handling the s24G application.

²⁷⁸ *Ibid.*

²⁷⁹ See s24G file, viz., environmental impact assessment report prepared for the application.

- enhancement of positive impacts associated with the activity, which included the control of stormwater along the drainage line as well as reducing the high level of erosion on site.

This application is a classic example of what may go wrong when authorities (in a knee-jerk reaction) decide to discontinue an activity pending the processing of the s24G application. This application also shows that no matter how good the intentions are for the environment, if an activity is commenced with unlawfully, such intentions may end up being the worst for the environment. It is also worth noting that some interventions to protect the environment had social benefits, such as increased safety on the site for residents from stabilisation and evening the ground surface and in-filling of the deep erosion dongas.²⁸⁰

This application also confirms that environmental matters play a significant role in the s24G process. The downside is that no clear guidance was given to ensure that the environment is not adversely affected by the discontinuation of the activity pursuant to the application for authorisation. It follows therefore that the suspension of the development in instances where an unlawfully initiated activity is still underway should not be automatic, and measures should be put in place to ensure that the environment is safely guarded during the suspension period. Post-authorisation activities are not reflected in the file of this application.

3.5.3 Installation of above-ground fuel storage tanks without authorisation

This application relates to the development of a petroleum station in a sensitive environment without authorisation. This was caused by the preparation of the site through the initiation of earthworks, which involved clearing of indigenous vegetation after the *ex ante* EIA process had been completed, but the authorisation had yet to be issued.²⁸¹ When this unlawful conduct was brought to the attention of the applicant, the explanation was that the site was overgrown and had been invaded by vagrants who were posing a security risk to adjacent properties. The initiated earthworks were meant to address this and were immediately abandoned. The already prepared assessment reports were replaced by an assessment of the impacts of the developments which had already commenced.

²⁸⁰ *Ibid.*

²⁸¹ The applicant had started the preparation of the ground with the understanding that authorisation was imminent & its conditions were along similar lines as those identified in the EIA report.

The applicable activity in this application was Activity 3 of Listing Notice 2 of the 2010 EIA Regulations,²⁸² and Activity 13(c)(iii)(dd) of Listing Notice 3 of the 2010 EIA Regulation.²⁸³

The development, which had gone through the EIA process, encompassed the installation of eight above-ground fuel storage tanks with a combined capacity of 664 cubic metres, hardened impermeable bund surface to support the fuel tanks, fuel discharge and dispatching bays with associated pipelines, pumps and dispensing equipment, customer collection facility, warehouse and administrative office with associated access roads, parking areas and services, and wash bays and emergency facility. At face value, the forgoing development suggests that potential impact on the environment would be significant. The fact that the activity had been sited in an environment that was identified as sensitive would make impacts even more pronounced.

The developments which had already commenced were the clearing of vegetation and the preparation of the ground by removing the topsoil. Construction of the main activities concerning the installation of fuel tanks had not yet started. In this regard, the imputed environmental impacts were mainly limited to the removal of indigenous vegetation. Compliance notice, in terms of s31L(1)(a) of NEMA,²⁸⁴ relating to the unlawful conduct of the applicant was issued. Pursuant to the compliance notice, the applicant withdrew the EIA application and filed an application for authorisation in terms of s24G. The activity was subsequently authorised in December 2015 and the authorisation acknowledged that the activity was also in line with Activity 4 of Listing Notice 2 of the 2014 EIA Regulations,²⁸⁵ which had since replaced the 2010 listing notices. Likewise, an EMF of the municipality which was promulgated in 2015, more than a year after the application was filed in early 2014, was acknowledged as well. In this regard, the authorisation acknowledges that this activity falls within an environmentally sensitive area in terms of the EMF.

²⁸² GN R545 of 18 June 2010, the activity reads: ‘*The construction of facilities or infrastructure for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of more than 500 m³.*’

²⁸³ GN R546 of 18 June 2010, viz.: ‘*The clearance of an area of 1 hectare or more of vegetation where 75% or more of the vegetative cover constitute indigenous vegetation ... (c) in Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Limpopo, Northern Cape & Western Cape: ... (iii) inside urban areas, the following: ... (dd) areas on the watercourse side of the development setback line or within 100 m from the edge of a watercourse where no such a setback line has been determined.*’

²⁸⁴ This section provides that ‘*An environmental management inspector ... may issue a compliance notice ... if there are reasonable grounds for believing that a person has not complied (a) with a provision of the law for which that inspector has been designated*’

²⁸⁵ GN R984 of 4 December 2014, which is: ‘*The development of facilities or infrastructure, for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of more than 500 m³.*’

As part of the conditions of authorisation, critical aspects which relate to the environment were underscored, covering:

- collection drains and oil/water separators to be installed in order to prevent storm water contamination by hydrocarbons and other chemicals or contaminants,
- oil/water separator tanks to be serviced regularly by registered hazardous waste service providers,
- hazardous and construction material to be stored in appropriate storage areas or containers and disposed of in registered landfill sites, and recyclable material to be recycled, and
- promotion and adherence to green design principles and best practices in order to minimise environmental impacts and resource use. These included measures which sought to reduce electricity and water use, and promotion of recycling and water harvesting.

The authorisation also underscores the duty of care provisions to remedy environmental damage in terms of s28 of NEMA.²⁸⁶ It must be noted that specialist biodiversity studies undertaken prior to the unlawful initiation of the activity identified plant and animal species of significant conservation value. These were lost when the applicant cleared the site. The result was that species of conservation significance were no longer present and biodiversity value of the site was considered to be irreversibly transformed. Records in the file suggest that rehabilitation could create a functional grassland, but it would have poor species composition which would be of limited biodiversity value. In this regard, the municipality as an I&AP suggested that this impact be offset; however, the authorisation did not incorporate this. In fact, authorities argued that: because of the size and nature of the impact; the absence of a clear municipal biodiversity offset policy; and the substantial amount of the administrative fine paid;²⁸⁷ it would not be appropriate to enforce biodiversity offsets.

While one may not necessarily agree with the reasons of the authorities to exclude possible biodiversity of-sets as adduced in the latter part of the foregoing paragraph, it may, however, be difficult for one to conclude that matters of the environment were not given appropriate consideration. The peculiarity in this application, in my view, is the fact that while the

²⁸⁶ Cf., fn 273.

²⁸⁷ Reference to the amount of fine paid as militating against institution of stringent measures to protect the environment is rather strange and incorrectly, in my view, interprets the administrative fine; hence the misconstrued undertones of double punishment in the authorities' reasoning.

previous EIA process had been complete (save for the ultimate decision), it was almost abandoned because of an impact on indigenous vegetation, which ultimately was not incorporated into the final authorisation. It may have been better for the authorities to make their decision based on information at their disposal and assess whether their decision or conditions thereof might have to be varied based on the developments which had been unlawfully initiated.²⁸⁸ Furthermore, it may have been useful to commission an assessment specifically on the impacts of the unlawfully initiated developments. Be that as it may, this application also confirms that s24G does provide for the protection of the environment, albeit with misinterpretation of the administrative fine.

3.5.4 Development of a motor vehicle bridge without authorisation

This development relates to the construction of approximately 66 metre long, 11 metre wide and 9 metre high bridge across a river for pedestrians and vehicle crossing. Like the above application, an EIA had been undertaken and documents thereto submitted to authorities for decision-making. The s24G application was filed following complaints alleging that construction had been initiated without authorisation. The allegations were confirmed during a site visit, which was followed by issuing of pre-compliance notice.²⁸⁹ Records from the file show that the aforementioned notice advised that the initiated activities be discontinued and an s24G application filed. The developer abided the directions in the pre-compliance notice, with regard to stopping construction and filing s24G application.

The applicable activities in this development were Activity12,²⁹⁰ and Activity 19(i)²⁹¹ of Listing Notice 1 of the 2014 EIA Regulations. Records from the file show that authorities required additional information to be included into the EIA reports and environmental management programme (EMPr) which had already been prepared and submitted during the *ex ante* EIA process. Authorities acknowledged that the documents at their disposal from the EIA process would provide ‘key baseline information’ against which the impacts of the

²⁸⁸ Though the facts may not necessarily be the same, this application is reminiscent of the *Supersize Investments* case discussed in chapter 2 & the rigid application of s24G provisions as discussed thereunder may be a concern in this application as well.

²⁸⁹ *Cf.*, fn 284; sometimes a compliance notice is preceded by a pre-compliance notice, as it was in this application.

²⁹⁰ GN R983 of 4 December 2014, which reads: ‘*The development of - ... (iii) bridges exceeding 100 m² in size; ... (xii) infrastructure or structures with a physical footprint of 100 m² or more; where such development occurs (a) within a watercourse;*’ Also *cf.*, fn 275 for this activity in the previous listing.

²⁹¹ GN R983 of 4 December 2014, *viz.*: ‘*The infilling or depositing of any material of more than 5 m³ into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 5 m³ from (i) a watercourse;*’

unlawfully initiated activities would be measured.²⁹² These were to be supplemented by details on the activities which had already been unlawfully initiated, impacts and mitigation measures thereof. The unlawfully initiated activities in question included the invasion of the construction site by temporary structures to accommodate construction workers, clearing of indigenous vegetation and the disturbance of the watercourse.

Considering that the site was viewed as of low biodiversity value and its wetland system characterised by fewer indigenous species,²⁹³ the EIA reports recommended authorisation and the EMPr outlined mitigation measures. In the authorisation, the need to preserve the integrity of the area and to protect the environment was underscored. In this regard, the following conditions with respect to the environment were attached to the authorisation:

- waste and construction rubble had to be managed and disposed of properly, and prohibited from within 32 metres of the watercourse and sensitive areas,
- hazardous material, including contaminated soil and substances had to be stored in sealed containers and disposed of in appropriate disposal facilities,
- soil erosion control measures were to be implemented throughout all the phases of the development, including landscaping and re-vegetation with indigenous species,
- no nuisance was to be caused to neighbouring properties, including following stringent dust control measures.

This application is significant for acknowledging the preceding EIA process and only requesting reports on the unlawfully initiated activities to supplement the documents which were already filed. It may be concluded from the discussion and analysis thereof that, like the ones above, the environment played a critical role in determining the outcome. However, aspects which relate to the confusion and concerns associated with the s24G process still linger in the background. In this regard, while evaluating different alternatives to the development, the authorities made the following input regarding the unlawfully initiated activities: ‘[i]mportantly the new structure has already commenced and removing it is nonsensical as the impact has already occurred’. Though they further explained that the impacts would be minimal on the environment, the fact that an impression is created that an unlawfully initiated activity may as well be authorised because impacts have already been

²⁹² Reasons advanced by authorities for granting authority sourced from the file. This is a welcome improvised approach as opposed to the ‘rigid’ response by authorities seen in other applications.

²⁹³ This was on account that there was already a road and a river crossing, albeit of a lesser footprint, adjacent to the site which may have altered biodiversity of the area and introduced alien vegetation.

realised may strengthen the argument that the s24G process is indeed a *fait accompli* authorisation.

3.6 CHAPTER CONCLUSION

This chapter presented a broad overview of the s24G dispensation in KZN, and one may conclude that its provisions are applied consistently throughout the province, with practical administration facilitated by 11 district offices. There have been 190 applications or more filed over a 10-year period, from 2007 to 2017. At the inception of the process in 2006, the number of applications is unclear. Comparatively, this figure is far lower than applications in Gauteng and Western Cape, whose statistics span a significantly shorter timeframe. However, in broad terms, the sector from which applicants operate and the outcome of the process seem to be aligned.

This chapter also identified an appropriate number of samples in line with a purposive sampling method. Pursuant to this, four activities: the extension of a poultry farm, construction of a stormwater pipeline, installation of fuel storage tanks, and construction of a vehicle crossing bridge were analysed in detail. Through these applications, it may be concluded that environmental considerations do indeed play a significant role in the s24G authorisation decision-making process. The process itself does consider the impacts caused by the unlawfully initiated activity and does consider the possible mitigation measures. The process also ensures that the authorisation comes with conditions that seek to protect the environment.

The analysis suggests the importance of a nuanced application of s24G provisions based on the merits of each application, as opposed to a ‘one size fits all’ approach. For instance, a blanket suspension of the development pending the outcome of the s24G application in cases where it was still ongoing may not necessarily be in the interest of the environment. In fact, in some instances it may be detrimental. Likewise, abandoning / overlooking information generated during an *ex ante* assessment process on account that some activity has been initiated unlawfully may not always effectively and efficiently address environmental concerns.

Finally, the downside to the analysis above is that it may not be comprehensive enough because of the possibility of incomplete records in the files that were analysed. For instance,

records relating to post-authorisation activities and commissioning or decommission reports were not available to make the analysis complete. Be that as it may, this chapter responds in the affirmative to the study question as to *‘whether environmental considerations do play a role in the decision on s24G applications’*.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

This chapter presents an overview of what has been found and what could be inferred from the body of information obtained during this study, from literature review in chapter 2 to the case study analysis in the previous chapter. Infused in this are my views and observations based on what I could decipher from the information and findings of this study. The study conclusions and my recommendations are also presented.

4.1 OVERVIEW OF THE STUDY FINDINGS

This study undertook an extensive review of literature, legislation and case law analysis to answer specific questions which relate to s24G and *ex post facto* authorisation in South Africa. It also analysed data on s24G applications received from environmental authorities in KZN and further scrutinised some s24G application files to assess if environmental considerations are taken into account in the ultimate decision. This was found to be the case, and this study also found that most of the concerns relating to s24G are unwarranted, while those relating to its housing in chapter 5 of NEMA and the possibility of being sanctioned twice for the same crime may need further scrutiny.

With regard to providing and scrutinising information that has been published on *ex post facto* authorisation in this country, this study has indeed achieved this objective and expressed itself *vis-à-vis* the views of other researchers, scholars and commentators. Clearly, this study will provide a significant input into the body of knowledge which already exists, and perhaps fill the gap in knowledge with regard to the latest amendments, latest developments and case law which may not have been extensively analysed before.

This study also considered the jurisprudence which has developed on *ex post facto* authorisation pre- and post- the ECA era. It was able to highlight areas of disagreements and common cause issues, including areas that may be viewed as reflecting the provisions of s24G, as amended. Finally, the consideration of s24G data confirms that the type of applicants and the outcomes thereof are in line with the observations in other provinces. It also found that matters which relate to the protection of the environment are taken into consideration in the authorisation decision and expressly attached as conditions thereof. Missing from most application files, however, are post authorisation activities.

4.2 STUDY CONCLUSIONS

This study shows that concerns relating to the possible abuse of s24G for ulterior purposes, its potential unconstitutionality, and its contravention of the sustainable development principles are unwarranted. This may have had merit at the time of its initial promulgation because of some ambiguities. S24G provisions have been refined and crystallised by successive legislative amendments which have been promulgated since its introduction. Furthermore, the jurisprudence that is developing also serves to address the problems associated with its interpretation or application, though sometimes the interpretations are erroneous and contradictory.

In view of all discussions in this study, it may be concluded that depending on one's vantage point, s24G can be incorrectly maligned or acknowledge as a necessary remedy amongst the battery of other remedies in the country. For instance, if one considers a development which has been undertaken without authorisation on misconception that it shall be brought into lawfulness thereafter through s24G, it may be concluded that definitely s24G must be frowned upon. However, if the point of departure is that a development has been undertaken and s24G may be used to inform a decision on whether or not it should be authorised, without detracting from the original unlawfulness (which unlawfulness may be addressed through a variety of other remedies), then s24G must be welcomed.

This study has also shown that s24G as it was at its inception might not have been clear enough and indeed the ambiguity of some provisions led to different interpretations by the courts. Of critical importance, however, is that they have been addressed through amendments and hopefully a clear jurisprudence will develop, including clarity on the possibility of *autrefois convict* with regard to the requirement to pay an administrative fine and the possible institution of other remedies, including criminal sanctions thereafter.

Finally, it must be borne in mind that no single remedy can be a panacea to the country's environmental problems, none of the other remedies are. Even the 'normal' authorisation has its own weaknesses; weaknesses, by the way, which may have led to the promulgation of s24G. Likewise, s24G obviously has its shortcomings and therefore it may be concluded that s24G is also not the one and only solution to all problems emanating from listed / specified activities undertaken without authorisation. It is unrealistic and possibly an absurdity to expect it to be.

4.3 RECOMMENDATIONS

The recommendations hereunder are meant to reinforce the s24G process and facilitate its application and implementation by environmental authorities. What clearly seems to be of great concern is the lack of transparency in some aspects of this process and the inaccessibility of data thereof. Furthermore, verification of data and its accuracy is questionable, even authorities themselves, in some instances, are not confident of their data. This is a major area that needs to be addressed as a matter of urgency. My recommendations, based on the views, discussions and conclusions expressed in this study, are therefore categorised into: transparency and accessibility, application and implementation, legislative reform and amendment, and judicial certainty and confirmation, and are outlined below.

Transparency and accessibility: it is recommended that the s24G process should be made transparent, particularly the quantum of fines which are charged should be accessible and the appeals process as well, together with the reasons for reaching reduced amounts. The compilation and upkeep of s24G applications data must be strengthened and made easily accessible on request. Furthermore, a thorough-going study of the s24G appeals process in the province should be explored by researchers.

Application and/or implementation: it is recommended that the s24G process continue to be applied and implemented consistently throughout the country. The 2013 amendments seem to address its major concerns and should be applied to the letter. The newly developed regulations relating to the administration of the s24G administrative fine should be implemented as a matter of urgency, and all structures which must be established in pursuance thereof must be established. Follow-up activities once authorisation is granted should be filed and made easily accessible where there is a need. Authorities should be able to account for applications which were withdrawn or abandoned, particularly with regard to what ultimately happened thereto.

Legislative reform and/or refinement: it appears that s24G may be better housed under the compliance and enforcement chapter of NEMA and it is recommended that the possibility of moving it should be explored by legislatures. Furthermore, the possibility of amending s24G(5) to incorporate provision/s which explicitly provide/s for the incorporation of environmental management principles as provided for under s2 of NEMA as part of the considerations which must be taken into account in deciding whether or not to grant

authorisation, should also be explored. Another area that needs consideration in terms of legislation is the possible development of s24G regulations which would outline the process to be followed in carrying-out an environmental assessment *ex post facto*, in order to do away with undertaking an s24G process through the legislated *ex ante* EIA process.

Judicial certainty and/or confirmation: there are conflicting views on the lawfulness or otherwise of requiring an administrative fine at the same time accepting that criminal sanctions may also be instituted thereafter. It may be necessary to test this in court. It is therefore recommended that the high court should be approached to seek confirmation or a declaratory order on these provisions. Alternatively, developers or environmental bodies should pursue a case to test these provisions.

The foregoing recommendations are not necessarily exhaustive, but if considered, they may be an important step towards improving the effectiveness of the s24G process, which is a necessary and welcome inclusion into our body of environmental laws.

BIBLIOGRAPHY

Books

Glazewski J, '*Environmental Law in South Africa*', 2nd ed, Durban: Butterworths, 2005, 664.

Kidd M, '*Environmental Law*', 2nd ed, Cape Town: Juta, 2011, 368.

Kotze LJ, Du Plessis W, Feris L & M Olivier, '*South African Environmental Law Through the Cases*', 1st ed, Durban: LexisNexis, 2008, 235.

Chapters within books

Burns Y & M Kidd, 'Administrative Law & Implementation of Environmental Law', in HA Strydom & ND King (eds), *Fuggle & Rabie's environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 222.

Craigie F, Snijman P & M Fourie, 'Dissecting environmental compliance and enforcement' in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 41.

Denzin NK & YS Lincoln, 'Introduction: The discipline and practice of qualitative research' in NK Denzin & YS Lincoln (eds), *The Sage Handbook of Qualitative Research*, 5th ed, London: Sage Publications, 2018, 1.

Glazewski J & S Brownlie, 'Environmental assessment' in J Glazewski & L Du Toit (eds), *Environmental Law in South Africa*, 3rd ed, Durban: Butterworths, 2013, 10-1.

Glazewski J, Snijman P & L Plit, 'Compliance with and enforcement of environmental laws', in J Glazewski & L Du Toit (eds), *Environmental Law in South Africa*, 3rd ed, Durban: Butterworths, 2013, 26-1

Kidd M, 'Criminal measures' in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 240.

Kidd M & F Retief, 'Environmental assessment' in HA Strydom & ND King (eds), *Fuggle & Rabie's environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 699.

Rapley T, 'Sampling strategies in qualitative research' in U Flick (ed), *The Sage Handbook of Qualitative Data Analysis*, London: Sage Publications, 2014, 49.

Summers R, 'Common-law remedies for environmental protection', in HA Strydom & ND King (eds), *Fuggle & Rabie's environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 339.

Van der Linde M, 'National Environmental Management Act 107 of 1998 (NEMA)' in HA Strydom & ND King (eds), *Fuggle & Rabie's environmental management in South Africa*, 2nd ed, Cape Town: Juta, 2009, 193.

Winstanley T, 'Administrative measures' in A Paterson & LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, Cape Town: Juta, 2009, 225.

Journal articles

Basson JHE, 'Retrospective Authorisation of Identified Activities for the purposes of environmental impact assessment', *SAJELP*, Vol.10:2, 2003, 133.

Devers KJ & RM Frankel, 'Study Design in Qualitative Research – 2: Sampling and Data Collection Strategies', *Education for Health*, Vol.13:2, 2000, 263.

Feris L, 'Compliance notices – A new tool in environmental enforcement', *SAJELP*, Vol.9:3, 2006, 1.

Fourie M, 'How civil and administrative penalties can change the face of environmental compliance in South Africa', *SAJELP*, Vol.16:2, 2009, 93.

Frankel RM & KJ Devers, 'Qualitative research: a consumer's guide', *Education for Health*, Vol.13:1, 2000, 113.

Kidd M, 'Environmental crime – Time for a rethink in South Africa', *SAJELP*, Vol.5:2, 1998, 181.

Kidd M, 'Some thoughts on statutory directives addressing environmental damage in South Africa', Vol.10, 2003, 201.

Kidd M, 'Public interest environmental litigation: Recent cases raise possible obstacles', *PEJ/PER*, Vol.13:5, 2010, 26.

Kohn L, 'The anomaly that is section 24G of the NEMA: An Impediment to Sustainable Development', *SAJELP*, Vol.19:1, 2012, 1.

Paschke R & J Glazewski, 'Ex post facto authorisation in South African environmental assessment legislation: a critical review', *PER/PEJ*, Vol.1:1, 2006, 120.

Statutes

Constitution of the Republic of South Africa, 1996.

Environmental Conservation Act, 1989 (Act 73 of 1989).

National Environmental Management Amendment Act, 2004 (Act 8 of 2004).

National Environmental Management Amendment Act, 2008 (Act 62 of 2008).

National Environmental Management Laws Second Amendment Act, 2013 (30 of 2013).

National Environmental Management Laws Amendment Act, 2014 (25 of 2014).

National Environment Management Act, 1998 (Act 107 of 1998).

Cases

Body Corporate of Dolphin Cove v KwaDukuza Municipality 2012 JDR 0387 (KZD).

Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd and Others [unreported] [2007] JOL 20072 (T).

Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (T).

Evans and Others v Llandudno/Hout Bay Transitional Metropolitan Substructure and Another 2001 (2) SA 342 (C).

Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd T/A Pelts Products and Others 2004 (2) SA 393 (EC).

HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2007 (5) SA 438 (SCA).

Interwaste (Pty) Ltd v Coetzee [2013] ZAGPJHC 89.

Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd & Others [2008] JOL 22537 (T).

Magaliesberg Protection Association v MEC, Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and others [2013] 3 All SA 416 (SCA).

Noordhoek Environmental Action Group v Wiley & Others [2008] JOL 21943 (C).

Pretoria Timber Treaters CC v Mosunkuto NO 2009 JDR 0953 (GNP).

Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others 2002 (1) SA 478 (C).

Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and Another [2013] JOL 30257 (GNP).

York Timbers (Pty) Ltd v National Director of Public Prosecutions 2015 SACR 384 (GP).

Case notes

Du Plessis W, 'Hichange – A new direction in environmental matters? – *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd T/A Pelts Products and Others*', *SAJELP*, Vol.11:1, 2004, 135.

Young M, 'Are we greening our court rooms? An analysis of the recent decisions in *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development*', *SAJELP*, Vol.19:1, 2012, 63.

Dissertations

Du Toit J, 'A Critical Evaluation of the National Environmental Management Act (NEMA) Section 24G: Retrospective Environmental Authorisation', Unpublished Master's Dissertation, Cape Town: University of Stellenbosch, 2016.

Hugo RE, 'Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes', Unpublished Master's Dissertation, Cape Town: University of Cape Town, 2014.

Pule K, 'The obligation on environmental authorities to consider socio-economic factors in EIAs: A critical examination of s24 of NEMA', Unpublished Master's Dissertation, Pietermaritzburg: University of KwaZulu-Natal, 2014.

September LMF, 'A critical analysis of the application of s24G provisions of the National Environmental Management Act (NEMA): The Gauteng Province Experience', Unpublished Master's Dissertation, Potchefstroom: University of the North-West, 2012.

Internet sources

Editor, '11th Annual Competition Law, Economics & Policy Conference, 2017', September 2017 Special Edition, *Competition News: Official Newsletter of the Competition Commission of South Africa*, <http://www.compcom.co.za/wp-content/uploads/2017/03/5142-COMPCOM-SEPTEMBER-FINAL.pdf>, Accessed on 22/11/2017.

Erasmus GJ, 'An Analysis of Section 24G of the National Environmental Management Act', http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120828analysis_0.pdf, 2011, Accessed on 08/09/2017.

S24G files reference numbers

DC22/s24G/0001/2007

DM/s24G/0002/2012

DC22/s24G/0001/2014

DC43/s24G/0002/2016

APPENDICES

Appendix I: Ethical clearance



29 June 2017

Mr Sgananda Malibongwe Lwazi Jikijela (963081851)
School of Law
Pietermaritzburg Campus

Dear Mr Jikijela,

Protocol reference number: HSS/0926/017M

Project title: Protection of the environment through the application of the provisions of section 24G of the National Environmental Management Act, 107 of 1998

Approval Notification – No Risk / Exempt Application

In response to your application received on 29 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Professor Michael Kidd and Mr A Ramdhin
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Ms Robynne Louw

Appendix II: Permission to access departmental s24G application files



edtea

Department :
Economic Development, Tourism and
Environmental Affairs

PROVINCE OF KWAZULU-NATAL

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DATE: 28 JULY 2017

TO WHOM IT MAY CONCERN:

Mr. Sgananda ML Jikijela, student number 963081851 is a candidate for a Master of Laws (Environmental Law) degree at the University of KwaZulu Natal - Pietermaritzburg campus. We (KZN EDTEA) acknowledge and understand that his research project will contribute towards his Master of Laws thesis project titled: **PROTECTION OF THE ENVIRONMENT THROUGH THE APPLICATION OF SECTION 24G OF THE NATIONAL ENVIRONMENTAL ACT, 107 OF 1998.**

The KZN Department of EDTEA is aware that the study will take place during office hours for which he will be collecting data by means of interviewing key person(s) in the Department which he deems necessary to achieve the objectives of this research.

The KZN Department of EDTEA supports and understands that this project involves accessing personal views and information from (people/persons) from KZN EDTEA. Such data will be provided to the researcher with all personally identifying information; however during the data presentation in the form of the final thesis for example, names shall be removed so that the data cannot be traced to any individual.

I support and grant permission for Mr. Sgananda ML Jikijela to conduct this research at the KZN Department of EDTEA in accordance with the prescribed guidelines.

Sincerely

Ms. Pumla Ncapayi
Head of Department

Department of KZN: Economic Development, Tourism and Environmental Affairs

OFFICE OF THE HOD
RECEIVED
2017 -07- 28
DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM & ENVIRONMENTAL AFFAIRS

Appendix III: Newspaper clips from p 20 of *Competition News*, an official Newsletter of the Competition Commission of South Africa



CONFERENCE IN THE NEWS



Southern African competition agencies join forces

Banks 'collude on responses

Competition Commission sets sights on high data costs

The Competition Commission has set its sights on high data costs, which it says are a form of collusion between banks. The Commission says that banks are colluding to keep data costs high, which is a form of collusion. The Commission says that banks are colluding to keep data costs high, which is a form of collusion. The Commission says that banks are colluding to keep data costs high, which is a form of collusion.

Cartels, collusion a concern as business mergers soar – competition body

The Competition Commission has expressed concern over the rise in cartels and collusion as business mergers soar. The Commission says that the increase in mergers is a concern because it can lead to collusion and cartels. The Commission says that the increase in mergers is a concern because it can lead to collusion and cartels.

Competition Commission won't take it easy on banks

The Competition Commission has said it will not take it easy on banks. The Commission says that it will continue to investigate banks for collusion and cartels. The Commission says that it will continue to investigate banks for collusion and cartels.

Cheap data 'vital for SA's future'

Cheap data is vital for South Africa's future, says the Competition Commission. The Commission says that high data costs are a barrier to growth and innovation. The Commission says that high data costs are a barrier to growth and innovation.

Body concerned about the rise of cartels, collusion

The Competition Commission is concerned about the rise of cartels and collusion. The Commission says that the increase in cartels and collusion is a concern because it can lead to higher prices and lower quality. The Commission says that the increase in cartels and collusion is a concern because it can lead to higher prices and lower quality.

CRUNCHING CARTELS



Sharp rise in cartel probes

The Competition Commission has reported a sharp rise in cartel probes. The Commission says that the number of cartel probes has increased significantly. The Commission says that the number of cartel probes has increased significantly.

Ramaphosa eyes 'explosive' growth for SA

President Ramaphosa has expressed optimism about the future of South Africa. He says that the country is on a path to economic growth and development. He says that the country is on a path to economic growth and development.

Corruption stifles development

R27bn spent on corruption in 2016

The infographic shows that R27 billion was spent on corruption in 2016. It also shows that corruption is a major barrier to development in South Africa. The infographic shows that corruption is a major barrier to development in South Africa.

BANKS BEING LITIGATED, SAYS COMMISSION



MINISTER PRAKASH RAMPHOSA

Minister Prakash Ramaphosa has said that banks are being litigated. He says that the Competition Commission is taking action against banks for collusion and cartels. He says that the Competition Commission is taking action against banks for collusion and cartels.

THE FUTURE OF COMPETITION POLICY

The graphic discusses the future of competition policy in South Africa. It highlights the need for a strong competition law and the role of the Competition Commission. The graphic discusses the future of competition policy in South Africa.

Cyril lashes cartels, price-fixing practices



Patel seeks equality remedial role for watchdog

Cyril Ramaphosa has lashed out against cartels and price-fixing practices. He says that these practices are a barrier to economic growth and development. He says that these practices are a barrier to economic growth and development.

Companies pay the price for cartel practices

Companies are paying the price for cartel practices, says the Competition Commission. The Commission says that cartels and collusion lead to higher prices and lower quality. The Commission says that cartels and collusion lead to higher prices and lower quality.

High data prices bad for future progress

High data prices are bad for future progress, says the Competition Commission. The Commission says that high data costs are a barrier to growth and innovation. The Commission says that high data costs are a barrier to growth and innovation.

Commission ends talks with banks

The Competition Commission has ended its talks with banks. The Commission says that it has failed to reach an agreement with the banks. The Commission says that it has failed to reach an agreement with the banks.

Blow for banks: no more deals on rand-rigging

There is a blow for banks as the Competition Commission has ruled against them on rand-rigging. The Commission says that the banks' practices are illegal. The Commission says that the banks' practices are illegal.

Appendix IV: s24G Applications Data

District	Applicant	Activity	Status
eThekweni	Family Trust	Burning of dumped garden waste & cutting of vegetation	Authorised
	Company	Construction of a steel monopole mast & prefabricated shelter	Authorised
	Individual	Construction in close proximity to the beach	Authorised
	Company	Development of an oil separation facility	Not known
	Company	Development of waste area and effluent plant	Withdrawn
	Government	Housing project & taxi route construction in a wetland	Authorised
	Company	Removal of alien vegetation	Not known
	Company	Internal road construction	Not known
	Individual	Construction of infrastructure for the storage of hazardous materials	Authorised
	Family Trust	Construction of a road on a portion of specified erf	Authorised
	Company	Installation of an above ground storage tank	Authorised
	Company	Construction & clearing of a taxi layby on existing provincial road	Authorised
	Government	Development of residential units	Authorised
	Company	Construction of roads, earthworks & storm water infrastructure	Authorised
	Government	Construction of the residential units	Authorised
	Government	Development of residential units on specified erven	Authorised
	Government	Development of residential units on specified erven	Authorised
	Company	Development of two underground storage tanks	Authorised
	Individual	Commencement of site clearance and earth works	Authorised
	Company	Commencement of the oil dewatering and effluent plant	Authorised
	Government	Construction of a storm water culvert	Authorised
	Company	Manufacturing of flocculent for portable water treatment	Not known
	Company	Clearing of vacant land, construction of a guard & employee quarters	Authorised
	Company	Construction of the light industrial development	Not known
	Company	Above ground chemicals & goods installation	Not known
	Company	Commencement of waste management activities	Authorised
	Company	Relocation & installation of underground tank	Authorised
	Individual	Alterations & extensions of an existing property	Not known
	Company	Development of an existing oil recycling facility	Not known
	Government	Construction of an evaporation / seepage pit	Not known
	Company	Commencement of materials recovery facility	Not known
	Company	Excavation of gravel from a site for another development 3km away	Not known
	Company	Commencement of pipeline within a water course	Authorised
	Company	Construction & operation of an evapo-transpiration & soak-pit system	Withdrawn
	Individual	Commencement of the construction of a deck & swimming pool	Authorised
	Family Trust	Construction of underground tanks	Withdrawn
	Company	Construction of a single lane pedestrian bridge across a drainage line	Not known
	Company	Unlawful commencement of listed activities	Withdrawn
	Government	Construction of communal ablution facilities	Authorised
	Individual	Clearance of indigenous vegetation	Withdrawn
	Company	Proposed multi storey factory development	Withdrawn
	Company	Construction of a settlement & internal access road on specified erven	Withdrawn
	Company	Construction of the residential estate	Not known
	Government	Installation of pipelines & construction of a bridge	Not known
	Company	Illegal sand mining	Not known
	Company	Construction of a housing development	Not known
	Company	Development of a road service station	Not known
Company	Construction of the aquaculture facility	Authorised	
Company	Commencement of waste management activities	Withdrawn	
Company	Development of a listed activity for a business entity	Not known	
Family Trust	Construction of a workshop and offices	Not known	
Company	Clearing of vegetation & moving of soil in a wetland area	Withdrawn	
Company	Manufacturing of aluminium, copper & fibre optic wire & cable products	Pending	
Company	Commencement of an activity without an atmospheric emission licence	Pending	
Company	Construction of a warehouse	Pending	

	Company	Production & processing of products for road construction industry	Pending
	Company	Commencement of a waste management facility	Authorised
	Company	Construction works on a warehouses & chemical flammable store	Pending
	Company	Commencement of underground storage tanks	Withdrawn
	Company	Construction of a multi-storey residential complex	Pending
uMkhanyakude	Company	Construction of a filling station	Authorised
iLembe	Family Trust	Unspecified	Not known
	Company	Residential & light commercial activities	Authorised
	Company	Extension / upgrading of the double storey residential property	Not known
	Company	Extension / upgrade of a residential property	Authorised
	Company	Construction of a defense system & renovation of an existing home	Not known
	Company	Development of asphalt plant & associated structures	Authorised
	Company	Commencement for the construction of the large pond	Not known
	Company	Commencement for the construction of a dam wall within the wetlands	Not known
	Company	Construction of a business production activity	Authorised
	Family Trust	Construction of the small dam	Authorised
	Company	Construction of dams for a residential development estate	Authorised
	Government	Development of an activity after the lapsing of authorisation	Pending
	Family Trust	Construction of small dams	Pending
	Company	Infilling & depositing of more than 5 m ³ of material	Pending
	Company	Construction of sport fields & pre-school & associated facilities	Pending
	Government	Construction & expansion of crematorium	Pending
uGu	Family Trust	Construction of two apartment blocks & a garage building	Authorised
	Government	Installation of three water supply pipelines	Not known
	Individual	Construction of an off-road motorcycle training & recreational track	Not known
	Individual	Construction of facilities for treatment of effluent	Authorised
	Government	Development of wastewater treatment works	Authorised
	Government	Upgrading & blacktopping of an existing provincial gravel road	Authorised
	Company	Commencement of the removal or damaging of indigenous vegetation	Not known
	Individual	Construction of a concrete wall & destruction of indigenous vegetation	Authorised
	Individual	Construction of a veranda	Authorised
	Company	Commencement of the waste removal management room	Not known
	Individual	Commencement of the extensions to a building	Authorised
	Company	Commencement on the construction of the Chapel	Not Known
	Company	Renovation & upgrading of existing facilities	Authorised
	Government	Construction of a cemetery	Authorised
	Company	Commencement of the construction of three tanks for holding water	Not known
	Company	Construction of a lodge	Not known
	Individual	Construction of a boundary wall & wooden deck with a swimming pool	Not known
	Company	Construction of free-standing housing project	Not known
	Company	Construction of a concrete fence & re-channelling of a stream	Not known
	Individual	Construction of two bedroom flat, a braai facility & a fence in a wetland	Not known
	Company	Commencement & continuation of listed activities at a service station	Not known
	Company	Clearing of indigenous vegetation & concentration of animals	Pending
	Company	Development within a wetland	Pending
	Company	Development of a race track	Pending
	Government	Development of a sport field	Pending
	Individual	Clearing of indigenous vegetation for the planting of macadamia nuts	Pending
	Individual	Clearing of vegetation within an estuarine	Pending
	Family Trust	Construction of a parking lot within a wetland	Pending
	Company	Excavation, moving of soil & infilling of a wetland	Pending
	Harry Gwala	Government	Construction of pedestrian bridge
Company		Construction of shedding structures on a wetland	Pending
Company		Historical continuation of a listed activity	Authorised
Government		Construction of a water supply scheme & clearance of a forest	Pending
Company		Expansion & related activities of the concentration of animals	Authorised
Government		Construction of a river bridge	Authorised
	Family Trust	Expansion of a dam within a watercourse	Pending

	Government	Construction of a sports complex	Authorised	
King Cetshwayo	Company	Installation of storage tanks	Authorised	
	Unidentified	Expansion of existing box culverts & realignment	Not known	
	Company	Destruction of a wetland	Authorised	
	Individual	Construction of a truck stop	Authorised	
	Individual	Construction of a dealership	Pending	
Zululand	Individual	Construction of breeding dams, hatching facility & fishing ponds	Authorised	
	Company	Construction of a weir in a river	Pending	
	Individual	Establishment of a crocodile grow out & production facility	Authorised	
	Company	Construction of access roads & transformation of undeveloped land	Authorised	
	Company	Construction of a colliery, access roads & discard dumps	Authorised	
	Unidentified	Clearing of indigenous vegetation for sugar cane farming	Not known	
	Unidentified	Construction of a road	Not known	
	Unidentified	Upgrade of a road	Not known	
	Government	Construction of a road causeway	Authorised	
	Unidentified	Development of a grass airfield on the farm	Not known	
	Government	Construction of a causeway	Pending	
	Company	Construction of a bridge, infilling & depositing of material	Authorised	
	Government	Construction of a housing development	Pending	
	uThukela	Company	Installation of 60 m ³ paraffin & 23 m ³ diesel tanks & bund	Authorised
		Company	Development of the infrastructure (roads, services & storm water)	Pending
Government		Construction of 9 new houses	Pending	
Company		Construction of the soya bean processing plant	Pending	
Family Trust		Construction of a dam	Authorised	
Company		Construction of houses on a specified land	Not known	
Company		Upgrading of existing tank & installation of additional tanks	Not known	
Company		Construction of storm water & sewer pipelines for a resort	Not known	
Company		Continuation of temporary storage & recycling of waste plastics	Not known	
Company		Temporary storage & recycling of waste plastics to roof tiles	Not known	
Company		Operation of a static industrial plant	Authorised	
Individual		Erection of an industrial activity	Not known	
Government		Construction of the 5 illegal structure that was constructed	Authorised	
Company		Construction of a dam	Authorised	
Individual		Construction of a dam wall located on a tributary	Authorised	
Individual		Construction of a dam for irrigation purposes	Authorised	
Company		Construction of houses	Not known	
Company		Clearance of natural vegetation on an area bigger than 1 hectare	Not known	
Individual		Development of a feedlot	Authorised	
Government		Construction of a temporary bridge over the stream	Not known	
Individual		Construction of a dam	Not known	
Individual		Construction of a dam	Pending	
Individual		Construction of an off-stream water storage dam	Pending	
Individual		Cultivation of virgin land & 50,000 m ³ water storage dam	Pending	
uMzinyathi		Family Trust	Raising of a dam wall	Pending
	Individual	Construction of three Dams	Pending	
	Individual	Rebuild & upgrade of the existing weir within a river	Pending	
	Company	Commencement of listed activities on coal fields	Pending	
	Government	Commencement on gravel road standard style	Pending	
aMajuba	Company	Installation of a storage tank	withdrawn	
	Company	Commencement of 3 x 108 cubic metre above ground storage tanks	Authorised	
	Company	Development of an industrial plant	Not known	
	Company	Unspecified	Not known	
	Individual	Development of a wholesale store park	Authorised	
uMgungundlovu	Company	Commencement of the densification of poultry units	Authorised	
	Company	Commencement of a wood pellet plant	Authorised	
	Company	Temporary storage of hazardous and general waste	Authorised	
	Company	Installation of bulk service infrastructure and connection	Authorised	
	Company	Development of a concrete manufacturing plant	Abandoned	

Company	Commencement of a broiler breeder operation	Authorised
Company	Development of a re-handling plant	Authorised
Company	Treatment of solvents, thinners & operating of a wood fired furnace	Abandoned
Family Trust	Upgrade & widening of an existing road to greater than 4 m	Authorised
Family Trust	Cultivation of virgin land	Withdrawn
Individual	Construction of the grass landing strip	Abandoned
Company	Construction of a building within 32 m of a wetland	Withdrawn
Government	Upgrade of a waterborne sewer reticulation system	Authorised
Company	Development of an office park	Authorised
Company	Cemetery expansion	Not known
Company	Expansion of facilities for agri-industrial purposes	Authorised
Company	Installation of fuel storage tanks	Authorised
Company	Commencement / continuation of a listed activity for a service station	Withdrawn
Company	Construction of poultry sheds & associated automated infrastructure	Pending
Individual	Expansion of a piggery	Withdrawn
Individual	Construction of a water reservoir	Pending
Company	Construction of a hospitality facility within 32m of a water course	Pending
Company	Commencement of an industrial park	Withdrawn
Government	Construction of infrastructure for a housing development	Pending