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Enabling or hindering environmental protection in South Africa: The role of government

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ABSTRACT

Environmental protection has become a permanent feature in most countries' constitutions since its conceptualisation in the United Nations Conference on the Human Environment (1972) held in Stockholm, Switzerland. After the conceptualisation, the need for environmental protection has been widely written about in international conventions, court judgments and by scholars, yet unjustifiable environmental interference is still witnessed globally. The Constitution of the Republic of South Africa, 1996 (Constitution), in section 24, introduced the concept of environmental protection, called environmental rights. In section 24 of the Constitution, everyone has the right to have the environment protected for the benefit of present and future generations through reasonable legislation and other measures. Section 24(*b*) of the Constitution enabled the promulgation of the National Environmental Management Act 107 of 1998 and other national environmental laws. These laws enable the citizens to rely on section 24 of the Constitution to take decision-makers to court for environmental transgressions. Despite section 24(*b*)(*iii*) of the Constitution's instructive language on the need to promote justifiable economic development in South Africa, it is common to witness unjustified environmental interference in pursuing economic development.

This desktop study explores the South African Government's role in environmental protection, whether enabling or hindering it. This study reviews the literature on environmental protection, national legislation, court judgments, journal articles and international charters on environmental protection. The analysis in this desktop study reveals that there is enough legislation on environmental regimes in South Africa, and the legislation advocates for environmental protection. However, the interpretation and implementation of the legislation leave much to be desired as the South African Government prefers unjustified economic development over environmental protection. This is witnessed in how the South African Government irrationally prefers economic development over environmental protection. Accordingly, the unjustifiable preference for economic development hinders environmental protection in South Africa.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
AJEE	Australian Journal on Environmental Law
ASWR	Air Soil and Water Research
BABC	Bothalia African Biodiversity & Development
CC	Constitutional Court
CCR	Constitutional Court Review
CITES	Convention on International Trade in Endangered Species
DLR	Deakin Law Review
EDS	Environmental Development and Sustainability
FES	Frontiers in Environmental Science
GEP	Global Environmental Politics
IJASS	International Journal of Asian Social Sciences
JCI	Journal of Court Innovation
JSAL	Journal of South African Law
LEADJ	Law, Environment and Development Journal
MEC	Member of the Executive Council
MCEJO	Mfolozi Community Environmental Justice Organisation
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NPO	Non-Profit Organisation
NRJ	Natural Resources Journal
PAJA	Promotion of Administrative Justice Act 3 of 2000
PASA	Petroleum Agency of South Africa
PELJ	Potchefstroom Electronic Law Journal
PULP	Pretoria University Law Press
SADC	South African Development Community
SAJELP	South African Journal of Environmental Law and Policy
SAJEH	South African Journal of Economic History
SAJHR	South African Journal on Human Rights
TAC	Total Allowable Catch

TCPSA	Transformation Critical Perspectives on Southern Africa
TLT	Transactional Legal Theory
UNFCCC	United Nations Framework Convention on Climate Change

CHAPTER 1

INTRODUCTION

I INTRODUCTION

In recent years, the environmental regime in South Africa has undergone significant change, which can be attributed to the entrenchment of environmental rights in section 24 of the Constitution of the Republic of South Africa, 1996.[1] This development has led to the promulgation of a plethora of national environmental statutes. Section 24 of the Constitution and other national environmental statutes place a positive duty on the government to ensure that the environment is not harmful to people's health and well-being. In the past fifteen years or so, there has been a great interest in the environmental decisions taken by the South African Government. Against the backdrop of this interest, this study explores whether the South African Government exercises its role in protecting the environment and whether it enables or hinders environmental protection.

Blackmore establishes that environmental protection means that the 'environment must be safeguarded from being unjustifiably damaged, diminished, attacked, stolen, injured, lost and the like'.[2] The use of 'unjustifiable damage' in this meaning of environmental protection demonstrates that justifiable damage in pursuit of justifiable social and economic development is envisaged.[3] Similarly, Kidd[4] maintains that 'prevention' in the context of environmental protection ought to be interpreted as meaning 'minimisation' of the environmental damage since total elimination of environmental damage is impossible. Further, Feris[5] acknowledges that the three pillars (economic, social and environmental) are equally important in pursuing sustainable development; however, in reality and specific circumstances, one pillar will outweigh the other pillars if its benefit is sufficiently more vigorous. Accordingly, environmental degradation may

[1] Constitution of the Republic of South Africa, 1996, section 24(*a*) states that 'everyone has a right to an environment that is not harmful to their health and well-being'.
[2] Andrew Blackmore 'To be or not to be a protected area: A perverse political threat' (2022) 52(1) *BABC* 2.
[3] Section 24(b)(*iii*) of the Constitution states that '…secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.
[4] Michael Kidd 'Deadly air and the misinterpretation of the section 24 environmental right: The Groundwork case' (2023) 26 *PER/PELJ* 8.
[5] Loretta Feris 'Sustainable development in practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *CCR* 245.

inevitably be justified in some cases if the socio-economic factor promises more benefits to the general public. However, the economic benefit must not be cosmetic.

The essence of this section is to promote the interdependence between social and economic development on the one side and environmental development on the other[6] to lead to sustainable development. The National Environmental Management Act, 107 of 1998 (NEMA) defines 'sustainable development' as integrating social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations.[7] NEMA, in section 2(4)(*i*), acknowledges that sustainable development requires the consideration of all relevant factors, including:

> '[T]he social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment.'

The abovementioned provision is consistent with section 2(1) of the NEMA, which states that the principles set out in this section apply throughout the Republic to the actions of all state organs that may significantly affect the environment. Accordingly, all organs of the state must comply with the NEMA principles when making decisions that may impact the environment. This research intends to answer whether, when making such decisions, organs of state act in accordance with the above NEMA provisions and consequently enable or hinder environmental protection.

Between 2021 and 2022, a number of judgments were handed down in which civil society objected to environmental decisions.[8] These objections relate to ordinary citizens' need for environmental protection. The citizens feel left out by the government's failure to consider their needs when making environmental decisions that may impact their health and well-being. Additionally, certain utterances by government officials are not helping the situation. For example, the Minister of Mineral Resources and Energy, Mr Gwede Mantashe, on social media, recently blasted activists for interdicting Shell Exploration and Production South Africa BV from proceeding with a seismic survey off the eastern coast of South Africa from 2021 to 2022 'as apartheid and colonialism of a special type masqueraded as a great interest for environmental

[6] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).
[7] S1 of National Environmental Management Act 107 of 1998.
[8] *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy* 2022 (2) SA 585 (ECG).

protection'.[9] Such utterances portray environmental human rights defenders (civil society and individuals who promote human rights protection concerning the environment) as people who are insensitive to the social and economic challenges facing mainly black South Africans.[10] Further, these utterances are regarded as [intimidating] tactics meant to dilute the public's attention from the government officials' shortcomings of questionable development claims.[11] This statement by the Minister, objections by civil societies and the recent court judgments point to a need to better understand how government officials play their role in ensuring environmental protection.

Former Chief Justice Ngcobo, navigating the role that government plays in ensuring that environmental decisions are socially, economically and environmentally prudent, held that:[12]

> '[U]nlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction.'

Fundamentally, the right to economic development can be limited like any other right in the Bill of Rights if the damage it will bring outweighs the benefit.

However, it has become evident that despite section 24 of the Constitution and the NEMA principles guiding organs of states' conduct when making environmental decisions in South Africa, recent developments in objections by civil society, utterances by government officials and court judgments on reviews of environmental decisions by administrators are a cause for concern. The tension between economic development and environmental protection that is witnessed in the manner in which the decision-makers favour economic development over environmental protection led to the focus of this study. The study focuses on the South African Government's decisions that lead to trade-offs between perceived development and environmental protection. This will be further illustrated in Chapter 3 of this dissertation, where this 'trade-off'

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[9] Tembile Sgqolana 'Mantashe calls environmental activism 'colonialism and apartheid of a special type' amid opposition to Shell Wild Coast survey' Daily Maverick 10 Dec 2021, available at *https://www.dailymaverick.co.za/article/2021-12-10-mantashe-calls-environmental-activism-colonialism-and-apartheid-of-a-special-type-amid-opposition-to-shell-wild-coast-survey*, accessed 6 September 2024.

[10] Lisa Chamberlain 'Growing threats to environmental human rights defenders: The latest SLAPP suit developments in South Africa' (2020) 26 (5) *SAJELP* 28.

[11] Michael Kidd and the Wessa Environmental Governance Committee 'Are environmental NGOs anti-development, as Gwede Mantashe claims? Wessa responds' Daily Maverick 24 May 2023, available at - *https://www.dailymaverick.co.za/article/2023-05-24-are-environmental-ngos-anti-development-as-gwede-mantashe-claims-wessa-responds* accessed on 10 September 2024.

[12] *Fuel Retailers* case supra note 6 at para 44.

resulted in litigation and a judgment. Hence, the selected case law related to environmental authorisations and mining licenses is further discussed in this study.

II PROBLEM STATEMENT

The legacy of apartheid in South Africa ensured that the socio-economic benefits, as well as the environmental benefits, were distributed along racial lines.[13] This legacy resulted in Black South Africans suffering double jeopardy in the sense that they did not have access to socio-economic benefits or environmental benefits. On this basis, the South African Government must ensure that the marginalised have access to socio-economic benefits as enshrined in the Bill of Rights. However, when the South African Government pursues socio-economic rights, this cannot be undertaken without considering the need for environmental protection, which is also guaranteed in the Bill of Rights. In South Africa, past development injustices should be considered when it comes to alleviating poverty and assisting in job creation. However, poverty alleviation should be sustainable and cater to environmental protection. Humby[14] points out that:

> '[W]here it is necessary to protect ecological integrity, limits must be imposed. This should only be trumped where socioeconomic development is justifiable and considered a right, not merely based on a utilitarian cost-benefit analysis. Socio-economic development would, in turn, be 'justifiable' when it advances, on balance, an environment not harmful to health and well-being.'

The essence of the above reasoning is that the decision-makers must ensure that the development does not lead to environmental degradation and, as such, is sustainable. If the development leads to environmental degradation, the development must be justifiable. This does not mean halting economic development, but ensures that the promised economic benefits and employment should be tangible and not be without compelling justification, particularly if it may impact the environment. This feeds into the theme of interconnectedness between socio-economic development and environmental protection, encapsulated in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*.[15] The development should be ecologically sustainable. Additionally, if the development will have a destructive effect on the environment, the decision-

[13] Jackie Dugard and Anna Alcaro 'Let's work together: Environmental and socio-economic rights in courts' 2013 *SAJHR* 17.
[14] Tracy Humby 'The right to development-in-environment and its ecological and developmental thresholds' (2016) 32(2) *SAJHR* 230.
[15] *Fuel Retailers* case supra note 6.

makers need to consider the degree of the harm and how it can be mitigated. Accordingly, an ecologically destructive development, even if it creates jobs, is not sustainable if the harm it will cause to the environment is not balanced against the positive benefit of the economic factors.

Further, Humby,[16] advocating for substance over form, maintains that:

> 'arguing that an ecologically-destructive development should proceed because it creates jobs would be wrong-headed because what should matter is the quality and longevity of such jobs, the manner in which the development takes away existing livelihoods and jobs that are dependent upon the natural resource base - now and in the future, the impact of the development on food security, access to water, health, education, and so on. This should lead to a far more rigorous review of many current development proposals.'

The essence of the above submission is that when a development that promises employment is undertaken, it is inevitable that the environment may be impacted. Hence, a balancing act is required in the decision-making process. Similarly, the development must not be over-emphasised at the expense of other considerations.

This study is premised on the understanding that the state is obligated in terms of section 24 of the Constitution to safeguard the environment by managing, conserving and sustaining it.[17] However, recent developments in South Africa, where administrators' decisions have been constantly and successfully challenged,[18] and the several court judgments setting aside environmental decisions by the administrators, as mentioned above, paint a gloomy picture regarding how the South African Government is playing its role in undertaking this obligation.[19] The link between environmental protection and human rights[20] makes this study significant since there is a need to balance the pursuit of human rights dependent on the environment while ensuring environmental protection for the benefit of present and future generations.

[16] Tracy Humby op cit note 14 at 230.
[17] S3 of NEMA.
[18] Loretta Feris 'The role of good environmental governance in the sustainable development of South Africa' (2010) 13 (1) *PER/PELJ* 70.
[19] The cases include *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W), *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* 2006 (5) SA 483 (SCA), *Fuel Retailers* case.
[20] Chamberlain op cit note 10 at 5.

III CONCEPTUAL FRAMEWORK

The interconnectedness between the concept of sustainable development and environmental rights informed the utilisation of sustainable development as the conceptual framework in this study.[21] Furthermore, section 2(3) of the NEMA addresses sustainable development and instructs the state to consider all relevant factors when deciding to impact the environment.[22] Among other factors is that the use and exploitation of non-renewable natural resources is responsible and equitable, and the use and exploitation of non-renewable natural resources is responsible and equitable and takes into account the consequences of the depletion of the resource.[23] Additionally, sustainable development is closely linked with environmental justice. Environmental justice advocates for the equal distribution of environmental benefits and equal distribution of environmental harm in line with section 24 of the Constitution, which affords everyone the right to an environment that is not harmful to their health or well-being. Both these concepts (sustainable development and environmental justice) have a social dimension attached to them, and equity is the foundation.[24] Likewise, Du Plessis[25] notes the interdependence between these two concepts when she maintains that sustainable development cannot exist without environmental justice. Considering that during the apartheid regime in South Africa, environmental benefits and burdens were allocated along racial lines, this study must explore how the South African government integrates the 'three elements' of sustainable development – economic growth, social concerns and environmental protection in its decision-making,[26] and how the integration leads to environmental justice or injustice. Murcott[27] submits that environmental justice is still elusive for poor South Africans who experience environmental injustice due to the inequitable distribution of environmental benefits.

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[21] Stephen Allister Pete 'Shuffling deckchairs on the titanic? A critique of the assumptions inherent in the South African Fuel Retailers case from the perspective of deep ecology' (2008) 15(1) *SAJELP* 117.

[22] S 2(3) of NEMA states that development must be socially, environmentally and economically sustainable and s (4)(*a*) of NEMA states that sustainable development requires the consideration of all relevant factors.

[23] S 4(*a*)(*v*) of NEMA.

[24] Michelle Toxopeus and Louis Kotze 'Promoting environmental justice through civil-based instruments in South Africa' (2017) 13(1) *LEAD* 51.

[25] Anél du Plessis 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty' (2011) 27 *SAJHR* 279-309 at 290.

[26] Dire Tladi 'Sustainable development in international law: An analysis of key enviro-economic instruments' Pretoria University Law Press (PULP) (2007) 240.

[27] Melanie Murcott 'The role of environmental justice in socio¬-economic rights litigation' (2015) 132 *SAJELP* 877.

IV PURPOSE OF THE STUDY

This study explores how the South African Government plays its role in environmental protection, whether enabling or hindering it. Such exploration will take the form of:

examining environmental laws and selected court judgments where the state's obligation to safeguard the environment is provided.

Unless stipulated otherwise, the concept of 'environmental protection' adopted in this study is encapsulated in the concept of environmental protection in section 24 of the Constitution.[28] In furtherance of the purpose of this study, the researcher further explores how decision-makers interpret and implement the obligation stipulated in section 24 of the Constitution to afford everyone the right:

> *(a)* 'to an environment that is not harmful to their health or well-being.
>
> *(b)* to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that-
>
> *(c)* secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

The environmental protection envisaged in this study is amenable to the reality that environmental damage is acceptable in particular or specific circumstances.[29] Environmental damage is a side effect of development. Without reasonable environmental damage in South Africa, there will be 'no industry, no modern agriculture, and no sewage purification'.[30] However, the envisaged damage to the environment must be ecologically sustainable or, if it is not ecologically sustainable, it must be justifiable, taking into account the three elements of sustainable development. Therefore, ecologically unsustainable development can be authorised but only in those cases where the economic or social development is so important that it outweighs the damage to the environment. Similarly environmental protection must be considered as an element in the pursuit of ecologically sustainable development in section 24(*b*)(*iii*), and this protection is further constrained by the concept of sustainability (justifiable social and economic development). This constraint acknowledges that humans must use and exploit natural resources for survival. However, this use needs to be sustainable.[31]

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[28] S 24 of the Constitution states that '[E]veryone has the right to an environment that is not harmful to their health and well-being'.
[29] Michael Kidd op cit note 4.
[30] Ibid at 18.
[31] Feris op cit note 5 at 248.

This study does not advocate for the total elimination of environmental damage but for balancing the environmental damage resulting from economic activities against society's right to an environment that is not harmful (sustainability). This study further presupposes that ignoring environmental considerations or not affording them proper weight ultimately undermines economic and social goals, and it can eventually lead to environmental degradation. The court in the *WWF South Africa v Minister of Agriculture, Forestry and Fisheries*[32] (*WWF South Africa* case) demonstrated that without proper environmental protection, there would be no long-term economic development in South Africa. The overburdening of natural resources to provide economic benefit will lead to the depletion of natural resources, which will eventually cause natural disasters. Consequently, there would be negative economic results as people who rely on natural resources would be left without a resource to provide for their economic needs.

It is essential to address the interdependence between the three elements of sustainable development: social concern, economic growth, and environmental protection. Scholars and courts in South Africa have warned that the unjustifiable prioritising of one element over the others will defeat the purpose of section 2(3) of NEMA.[33] This warning resulted from the perception that South Africa, like the rest of the world, favours a paradigm that encourages economic policies over environmental protection, and this paradigm can lead to unjustifiable environmental degradation.[34] Recent public utterances by government officials and recent court judgments against government officials' environmental decisions illustrate a gap in expectations between the government's environmental decisions and the citizens' concern for environmental protection. Hence, exploring how the South African government ensures environmental protection is vital.

V RESEARCH QUESTION

This study aims to answer the following question: whether the South African government's role in protecting the environment enables or hinders environmental protection. This will be done by examining whether the government plays its role in line with the Constitution and other national environmental legislation on environmental protection. The question is premised on the mandate afforded to the government by section 24(*b*) of the Constitution, which provides that everyone has

[32] 2019 (2) SA 403 (WCC).
[33] S 2(3) of NEMA states that '[D]evelopment must be socially, environmentally and economically sustainable.'
[34] Tladi op cit note 26 at 20.

the right to an environment that is protected for the benefit of present and future generations.[35] The research question enables the researcher to understand two aspects better: First whether the South African government exercises its role in a manner that demonstrates an appreciation of its role as per the mandate of the Constitution and other national legislation. Second, whether how it exercises its role enables or hinders environmental protection.

- Whether the South African Government complies with the sustainable development obligations imposed on it by section 24(b)(iii) of the Constitution when it exercises its statutory powers to approve activities that may have an impact on the environment.

This study seeks to promote decisions that uphold the law and are consistent with section 24 of the Constitution. These decisions further consider environmental protection as envisaged in section 24 of the Constitution and other national environmental legislation.

VI RESEARCH METHODOLOGY

This desktop study reviews the literature on environmental protection, national legislation, court judgments, journal articles and international charters on environmental protection. This study primarily examines environmental laws and court judgments that consider the decisions taken by South African government officials directly affecting the environment, thus drawing common themes from these judgments. For example, one of the common themes evident from the cases considered in Chapter 3 is that the perceived economic development prioritises environmental protection in a manner that does not feed the fitting application of the principle of sustainable development. The South African Government included environmental rights in section 24 of the Constitution twenty-eight years ago. Consequently, significant developments have been made to protect the environmental space in South Africa. To achieve this purpose, this desktop study considers different environmental laws conferring the obligation on the government to safeguard the environment and the court's pronouncements on the government's obligation to protect the environment.

To ensure a better understanding of whether the government enables or hinders environmental protection, it is imperative to explore whether the government's decisions that may impact the environment conform with section 24 of the Constitution: everyone has the right – (*a*)

[35] S 24(*b*) of the Constitution.

to an environment that is not harmful to their health or well-being. Similarly, other pieces of national legislation empowering government with the obligation to safeguard the environment are further analysed. In considering the above question, this study relies on the interpretive method to analyse whether the South African Government, in undertaking its role in environmental protection, acts in accordance with section 24 of the Constitution, relevant legislation, and court precedents. The analysis of these primary sources in law places this desktop study in doctrinal research as it concerns principles and interpretive guidelines[36] provided by these sources, binding on the state.

VII OVERVIEW OF CHAPTERS

(a) Chapter One - Introduction

The purpose of presenting an overview of this study is to provide its structure. This chapter provides background to introduce the study and further discuss its purpose.

(b) Chapter Two: Law related to environmental protection

This chapter sets the law by discussing the provisions of section 24 of the Constitution, the provisions of the NEMA, in particular, its national environmental management principles. The legislation demonstrates that the South African Government must act according to section 7(2) of the Constitution to respect, protect, promote, and fulfil environmental rights in the Bill of Rights.

(c) Chapter Three: Selected case law related to environmental protection

This chapter discusses selected case law on environmental protection, focusing on 'tension/' trade-offs'. The following cases are discussed in this chapter: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*, *WWF South Africa v Minister of Agriculture, Forestry and Fisheries*, *Mfolozi Community Environmental Justice Organisation v Minister of Minerals and Energy*, *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*, *Sustaining The Wild Coast NPC and Others v Minister of Mineral*

[36] Terry Hutchinson and Nigel Duncan 'Defining and describing what we do: doctrinal legal research' (2012) 17(1) *DLR* 84.

Resources and *Energy and Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy*.

(d) Chapter Four: Critical Analysis of this study.

This chapter summarises the findings of this study. The findings of this study highlight the political will in the promulgation of national legislation on environmental regimes, pressure in meeting people's social and economic needs, government's approach to 'ecologically' sustainable development, government's agenda of perceived economic development, is government's perceived economic development tangible?, government as the trustee of the environment, the need for greening the decision-makers.

(e) Chapter Five: Conclusion and Recommendations

This chapter provides conclusions and recommendations. The chapter recommends a shift from sustainable development to ecologically sustainable development, 'greening the decision-makers', which means that they need to understand the environmental law prescripts and act in line with national legislation on environmental protection.

VIII CONCLUSION

This chapter introduces the topic and provides the background and motivation for this study. The chapter further outlines the study's aims, research questions, methodology, and literature review. Overall, this chapter presupposes that environmental degradation is inevitable when development is undertaken. However, the impact must be justifiable. The next chapter discusses laws related to environmental protection - the international human rights instruments on environmental protection, the provisions of section 24 of the Constitution, the provisions of NEMA and other national environmental statutes.

CHAPTER 2

LAW RELATED TO ENVIRONMENTAL PROTECTION

I INTRODUCTION

The previous chapter dealt with the background and motivation for this study. Significantly, this chapter deals with the law related to environmental protection since the enactment of the environmental laws is mandated by section 24(*b*) of the Constitution.[37] To address the research question, namely, 'whether the manner in which the South African Government plays its role in the protection of the environment enables or hinders environmental protection, this chapter must consider the directive provided by the international human rights instruments, the provisions of the Constitution, the NEMA and its principles. This chapter aims to unpack how the said instruments and legislation define how the government should play its role in environmental protection. This chapter essentially sets the standards that decision-makers should adhere to when carrying out their environmental protection duty. This chapter deals with the international human rights instruments on environmental protection, the provisions of section 24 of the Constitution, the NEMA (an enabling Act) and the national environmental management principles.

II THE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ON ENVIRONMENTAL PROTECTION

The reason for including international human rights instruments in this study is necessitated by the mandate provided in the Constitution, which states that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law.[38] Further, these instruments aim to sustain the planet and serve as a guide for many countries. Though some international human rights instruments on environmental protection are not binding, their existence and the directives they provide are imperative in protecting the environment. The international human rights instruments are concerned with sustainable development. The World Commission on Environment and Development (WCED) introduced the concept of sustainable development and defines it as the development that meets the needs of the present without compromising the ability of future

[37] S 24(*b*) of the Constitution states that 'everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.'
[38] S 39(*b*) of the Constitution.

generations to meet their own needs.[39] This introduces a balancing act between the need for economic development and environmental protection. Though the WCED is not legally binding, it directs countries like South Africa to ensure sustainable development is realised. One WCED principle provides that economic [development] and environmental protection should not be treated separately.[40] However, the inference drawn from the court judgments discussed in chapter three of this study paints a gloomy picture of how the South African Government plays its role in environmental protection.

(a) The 1972 Stockholm Declaration on the Human Environment[41]

The Stockholm Declaration on the Human Environment provides that

> '[M]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and man bears the solemn responsibility to protect and improve the environment for present and future generations.'[42]

The word 'Man' in this section refers to individuals and states. Accordingly, protecting the environment is the responsibility of both man and the government. This Declaration, particularly this principle, led to the development of environmental laws and institutions in most countries, including South Africa. The right to a healthy environment that we see in many environmental treaties and the constitutions of many countries was first conceived in this principle.

(b) The 1992 Rio Declaration on Environment and Development.

The Rio Declaration on Environment and Development[43] (Rio Earth Summit) addresses the right to a healthy environment in an anthropocentric manner[44] when it provides that 'human beings are at the centre of concerns for sustainable development and they are entitled to a healthy and productive life in harmony with nature'.[45] The right to development that caters to economic development and the environment is central to this Declaration (the Rio Declaration). Considering

[39] World Commission on Environment and Development *Our Common Future: The Report of the World Commission on Environment and Development* (1987) (Oxford University Press) 43.
[40] Principle 7 of World Commission of Environment and Development.
[41] UN Doc A/CONF.48/14/Rev.1 (1972).
[42] Principle 1 of the Stockholm Declaration on the Human Environment.
[43] UN Doc A/CONF.151/26 (1992).
[44] Principle 1 of the Rio Earth Summit emphasises on putting human beings at the centre of sustainable development and any environmental decision serve human beings.
[45] Ibid.

the anthropocentric tone in this Declaration, it is not surprising that Tladi[46] observes that this Declaration, like the global world, leans towards the economic leg of sustainable development. The sustainable development concept confirms that the Summit regarded development and environmental protection as intertwined. Furthermore, this Summit confirmed that governments across the globe have the right to exploit their natural resources; however, they have the responsibility to ensure that their activities do not cause environmental damage, and their actions must be guided by the Charter of the United Nations.

(c) The 1981 African Charter on Human and Peoples' Rights[47]

African countries' environmental regimes have endorsed and ratified this Charter.[48] Article 24 of this Charter provides that all people have the right to a generally satisfactory environment favourable to their development. Aguila[49] observes that the African Charter includes individual. Africa boasts the African Charter as the leading human rights instrument on the continent. Most and group rights to a healthy environment. The significance of the environmental right afforded to a group rather than an individual epitomises the African spirit of communalism rather than individualism. It is worth noting that the African Charter advocates for people's rights to an environment but is silent on protecting it. Like the Rio Earth Summit, the African Charter advocates for people's needs, rather than the environment's needs.

(d) The 2002 Johannesburg Declaration on Sustainable Development[50]

The objective of this Summit was to review the progress made towards sustainable development since the Rio Earth Summit ten years previously. Hence, the theme of this Declaration was mainly the eradication of poverty. Among other commitments, at this Summit, the attendees agreed to protect against biodiversity loss by 2010, restore fisheries, and speed up access to sanitation and safe drinking water by 2015.[51] However, twenty-two years later, the aspirations conceived during

[46] Tladi op cit note 26 at 29.
[47] OAU Doc CAB/LEG/67/3 rev 5 (1981).
[48] Emeka P Amechi 'Poverty, socio-political factors and degradation of the environment in Sub-Saharan Africa: The need for a holistic approach to the protection of the environment and realisation of the right to environment' (2009) 5 (2) *LEDJ* 126.
[49] Yann Aguila 'The right to a healthy environment' International Union for Conservation of Nature and Natural Resources 29 October 2021, available at *https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment*, accessed 8 September 2024.
[50] UN Doc A/CONF.199/20 (2002).
[51] Daniella Tilbury 'The World Summit, sustainable development and environmental education' (2003) 19 *AJEE* 110.

this Summit were not realised.[52] The relevance of the above-mentioned international human rights instruments on environmental protection is witnessed globally, continentally and regionally. The international human rights instruments provide the mechanisms and procedures that the states that ratify them follow. They protect citizens whose environmental rights are violated either by private persons or organs of the state as a result of an act or omission. The soft law instruments discussed above, even though not legally binding, underpin these protections. In the analysis chapter, it will be argued that notwithstanding the ratification and the binding nature of these treaties, the South African Government fails to have regard to their commitment to these treaties when it makes decisions that may impact the environment.

(e) The 2014 Southern African Development Community (SADC) *Protocol on Environmental Management for Sustainable Development*

This regional protocol on environmental management aims to protect the environment and improve the livelihoods of people in Southern Africa, particularly people with low incomes. In 2017, South Africa ratified the SADC Protocol on Environmental Management for Sustainable Development to work with SADC region countries to conserve transboundary natural resources in promoting sustainable development within the SADC region.[53]

III SECTION 24 OF THE CONSTITUTION

The need for the inclusion of constitutional provisions in this study is premised on the understanding that section 2 of the Constitution makes it the supreme law of the Republic, any law inconsistent with it is invalid, and its obligations must be fulfilled, including the obligation to ensure environmental protection. The Bill of Rights (section 8(1)) also applies to all laws and binds the legislature, the executive, the judiciary and all state organs. Accordingly, including environmental rights in section 24 of the Constitution enjoys protection: the state must respect, protect, promote, and fulfil the rights in the Bill of Rights.[54] Correspondingly, the state's role in environmental protection is to respect, protect, promote and fulfil the environmental rights as

[52] Germarié Viljoen and Bronwen Qumbu 'Informing the regulatory framework on water and sanitation in Southern Africa: The emerging governance framework accompanying SDG' 2020 (6) 26 *SAJELP* 45.
[53] Phumla Williams 'The South African Development Community (SADC) Protocol on Environmental Management for Sustainable Development' Government of South Africa, 27 September 2017, available at *https://www.gov.za/news/media-statements/cabinet-approves-sadc-protocol-environmental-management-sustainable*, accessed at 5 September 2024.
[54] Section 7(2) of the Constitution.

enshrined in section 24 of the Constitution and other national legislation. This section on constitutional provisions serves as a yardstick to measure whether decision-makers' decisions are consistent with the constitutional imperatives.

Section 24 of the Constitution provides that everyone has the right:

> '(*a*) to an environment that is not harmful to their health or well-being; and
>
> (*b*) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that
>
> (*i*) prevent pollution and ecological degradation;
>
> (*ii*) promote conservation; and
>
> (*iii*) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

This section is two-fold. First, section 24(*a*) guarantees everyone a fundamental right to an environment that is not harmful to their health or well-being (positive obligation). Secondly, section 24(*b*) imposes a duty on the state to prevent pollution and environmental degradation. This is what Du Plessis[55] calls 'rights of action' (people are entitled to environmental protection) and 'rights of recipience' (people have a legitimate expectation that the government will ensure environmental protection). Section 24(*b*) affords the state a positive obligation to ensure the realisation of this right by preventing pollution and ecological degradation and the promotion of conservation and sustainable development.[56] It is worth noting that environmental rights, like most of the Bill of Rights, are not absolute. Including the terms 'environment', 'health' and 'well-being' in section 24(*a*) makes it 'exceptionally broad' and subject to different interpretations.[57] However, one interpretation that this study advocates is that the fulfilment of environmental rights in section 24 of the Constitution is the duty that is placed on all spheres of government. [58] This is further strengthened by section 7(2), which provides that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights, including environmental rights.

Section 24(*b*) imposes a positive obligation on the state that everyone has the right to have the environment protected. Furthermore, section 24(*b*)(*i*)-(*iii*) provides several positive obligations

[55]Anél du Plessis, 'Public participation, good environmental governance and fulfilment of environmental rights' (2008) 2 *PER* 4.
[56] Louis J Kotze and Anél du Plessis, 'Some brief observations on fifteen years of environmental rights jurisprudence in South Africa' (2010) 3(1) *JCI* 167.
[57] Ibid 166.
[58] Ibid 158.

afforded to the state, which are the duty to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development. This positive obligation is placed at the government's doorstep to ensure that the envisaged protection benefits present and future generations. Accordingly, section 24(*b*) imposes a positive obligation related to the fulfilment of section 24(a) and enshrines the government's obligation to ensure that it is afforded to the citizens.[59]

The obligation to protect the environment implies that for the citizens to live in an environment that is not harmful to their health or well-being, it requires protection.[60] The inclusion of the environmental right (section 24) in the Bill of Rights evidences the need to ensure environmental protection in South Africa. The above submission strengthens the link between section 24 of the Constitution and human rights; hence, there is a need for sustainable use of natural resources, which leads to sustainable development.

In carrying out its obligation (protection of environmental rights), the South African Government must enact and adopt legislation to regulate environmental protection; hence, the NEMA was promulgated in 1998. However, Yacoob J[61] cautions against enacting and adopting legislative measures for the sake of legislating:

> '[T]he State must take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State must act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. Formulating a program is only the first stage in meeting the State's obligation. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligation.'

Although Yacoob J made this observation in 2001, it is still relevant to this date considering the several cases on environmental protection, which may suggest that the South African Government failed to comply with section 24 of the Constitution and NEMA principles. The successful

[59] Erika de Wet and Anél du Plessis 'The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10(2) *AHRLJ* 363.
[60] Du Plessis op cit note 25.
[61] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para 42.

challenge of the government's environmental decisions in courts recently vindicates civil society's assertion that such decisions fail to comply with constitutional imperatives. The civil society's assertions are that the decision-makers fail to comply with section 24 of the Constitution and this is evidenced by the opposition of the decisions under review in this study. While the primary challenge to the decisions may have been focused on procedural defects, the opponents of the decisions would have been unlikely to raise these concerns had they been satisfied with the substantive merit of the decisions.

The basis of section 24 is that the government, through its organs of state, is obligated to enable environmental protection while promoting justifiable economic and social development, not in an arbitrary manner that hinders environmental protection.[62] Considering the ordinary citizen's need for socio-economic development vs environmental protection, there will inevitably be an environmental impact. However, the environmental impact must be justifiable and in pursuit of socio-economic development.

IV NEMA (PRINCIPLES)

The enactment of NEMA followed the section 24(*b*) directive to protect the environment through reasonable legislative and other measures. In terms of the extended title of the Act, which illustrates the purpose of the statute, which is:

> '[T]o provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state, to provide for certain aspects of the administration and enforcement of other environmental management laws, and to provide for matters connected therewith.'

In essence, NEMA was promulgated to ensure that the decision-makers make sound and sustainable environmental decisions. The NEMA provides unequivocally, among other things, that it is the role of government to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution.[63]

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[62]Anél du Plessis 'Adding flames to the fuel: Why further constitutional adjudication is required for South Africa's constitutional right' (2008) 15(1) *SAJELP* 69.
[63] S 2(1)(*a*) of the NEMA.

Chapter 1 of NEMA provides for the national environmental management principles. These principles apply throughout the Republic to the actions of all organs of state that may significantly affect the environment[64] and shall apply alongside all other appropriate and relevant considerations. The application of these principles to the actions of all organs of state that may affect the environment presupposes that the state is obliged to act within the confines of the Act.[65] Additionally, Kidd[66] demonstrates that NEMA principles:

> '...require environmental considerations to be integrated fully into any decision-making process which may affect the environment, not only as an unwelcome obstacle to be got out of the way as quickly and inexpensively as possible, but as a fundamental consideration underpinning the whole process.'

The use of 'any' in the above quote requires that organs of state should not pick and choose whether to consider the NEMA principles when it comes to actions that may impact the environment. Therefore, considering these principles is mandatory if there is a potential environmental impact. This should be considered even without certainty as long as the action 'may' impact the environment. Like the Rio Declaration principles, the NEMA principles serve as a general environmental management framework and guide environmental decision-making.[67] The *BP Southern Africa* case court held that the NEMA principles must guide the interpretation of any law concerned with protecting and managing the environment. Further, sustainable development is at the core of the NEMA principles and requires state organs to evaluate activities' socio-economic and environmental impacts. Hence, this section discusses the selected NEMA principles that feed the idea of interconnectedness between the pillars (economic, social and environmental) of sustainable development. The ultimate purpose of the NEMA principles is to pursue sustainable development and to ensure that the decisions taken by organs of the state that may impact the environment are sustainable. Below is a discussion of the selected NEMA principles that best describe the role of the government in environmental protection.

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[64] Ibid

[65] Andrew Blackmore 'The relationship between the NEMA and the public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 (2) *SAJELP* 110.

[66] Michael Kidd 'Vaal environment saved? *Director, Mineral Development, Gauteng Region* v *Save the Vaal Environment* 1999(2) SA 709 (SCA) (1999) 6 *SAJELP* 154.

[67] Section 2(1)(*b*) of the NEMA.

(a) Environmental management principle that is people-centred

Section 2(2) of NEMA states that environmental management must place people and their needs at the forefront of its concern and equitably serve their physical, psychological, developmental, cultural, and social interests.[68] This section introduces the concept of anthropocentrism, where humankind is at the centre of existence and where any environmental decision should be made to serve humankind. The anthropocentric view introduced in this section acknowledges that human beings have socio-economic needs. Still, when the state organs cater to these needs, they should not apply this principle in a manner that does not have regard for environmental protection.[69] The development envisaged in this section promotes justifiable economic and social development. Therefore, there is no unlimited right to socio-economic development, which will compromise future generations' right to an environment that is not harmful.

It is worth noting that 'people' in this section refers to the current and future generations. Accordingly, people have socio-economic and environmental needs that the state must satisfy equally. Placing people and their needs at the forefront of environmental management concerns also means ensuring that people attain the right to an environment that is not harmful. Accordingly, this section introduces the concept of the public trust doctrine, which states that the environment is held in trust by the government for all people.[70] This principle is in line with section 195 of the Constitution, which requires that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following: accountability, transparency and efficiency. Kidd[71] submits that the legislation on protecting the environment, as progressive statutes, were enacted to mitigate harmful activities and their environmental consequences.

(b) Development must be socially, environmentally and economically sustainable[72]

This section addresses the three pillars of sustainable development: social, economic and environmental, emphasising their interconnectedness. The interconnectedness stems from Goal 9 of the United Nations General Assembly:

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[68] S 2(2) of NEMA.
[69] Ibid
[70] Ibid.
[71] Michael Kidd *Environmental law* 2 ed (2011).
[72] Section 2(3) of the NEMA.

> '[W]e envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world in which consumption and production patterns and use of all natural resources - from air to land, from rivers, lakes and aquifers to oceans and seas - are sustainable. One in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. One in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient. One in which humanity lives in harmony with nature and in which wildlife and other living species are protected.'[73]

In agreement with this Goal, Justice Ngcobo, in the *Fuel Retailers* case, maintained that the concept of 'sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and these roots are protected and nurtured so that they may support future socio-economic developments.[74] The government must ensure that the environmental decisions are socially, economically and environmentally prudent since:

> '[U]nlimited development is detrimental to the environment, and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction.'[75]

Notwithstanding this principle pointing out the need to consider the development's social, economic and environmental aspects, recently, a global pattern has been observed where the governments in most countries have shown a resurgence in negotiating compromises between environmental needs and economic demands.[76] However, in most cases, these compromises are undertaken so that economic development is not regarded as a factor to be weighed in the decision-making process, together with environmental and social concerns.

The thesis of this principle is that state actions that may significantly affect the environment must be sustainable. The reliance on socio-economic development by organs of the

[73] United Nations *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc A/RES/70/1 (2015).
[74] *Fuel Retailers* case supra note 6 at 57.
[75] Ibid.
[76] Klaus Bosselmann 'Environmental trusteeship and state sovereignty: Can they be reconciled'? (2020) 11(1) *TLT* 47-61 at 48.

state cannot be used as an excuse if it will unjustifiably lead to environmental degradation.[77] Hence, the three pillars of sustainable development (social, economic and environmental) are equally important. This importance is based on the understanding that many environmental impacts that are harmful to people's health and well-being and the environment itself result from activities that come with social and economic benefits.[78] This calls for a balancing act to ensure economic development while protecting the environment. The essence of this principle is encapsulated in the definition of sustainable development, which provides for integrating social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations.

(c) That the use and exploitation of non-renewable natural resources is responsible and equitable, and considers the consequences of resource depletion[79]

The consequences for socio-economic development, whether positive or negative, need to be considered and evaluated well in advance. Since Earth cannot be expanded, decision-makers need to consider alternative ideas for economic development, failing which future generations will be left with a degraded environment. However, this does not mean an unlimited environmental protection right exists. The interconnectedness between socioeconomic and environmental protection informs the genesis of this principle. Ordinarily, something economically beneficial may impact livelihoods as people are sometimes adversely affected by a development, such as displacement to accommodate the establishment of mines. Equally so, something that is environmentally beneficial may have an impact on the livelihoods as well.

Considering the legacy of apartheid in South Africa, where environmental benefits were allocated along racial lines, the responsible and equitable use of natural resources should be undertaken fairly and impartially.[80] The use and exploitation of non-renewable natural resources must be sustainable, meaning it also considers future generations' needs. Likewise, the environmental impact is a cause for consideration since it can affect the health and well-being of the current and future generations.

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[77] *WWF South Africa* case supra note 32 at 31.
[78] *Trustees for the time being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 208 (18 March 2022).
[79] Section 2(4)(*v*) of the NEMA.
[80] Blackmore op cit note 65 at 103.

(d) A risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions[81]

This principle is a preventative and proactive measure, and it presupposes that avoiding possible environmental harm is a cheaper option than remedying the harm once it materialises. This principle intends to prevent harm to the environment from materialising rather than deal with the consequences of harm. The significance of this principle is that, at times, environmental harm can be irreversible. Like all NEMA principles, they are also not absolute. This principle does not advocate for zero impact on the environment. Still, it considers that environmental impact must be reasonable in that it should not compromise the ability of the environment to accommodate socio-economic development in the future.[82] The undertaking of environmental impact assessment before a significant development project that may significantly impact the environment commences is based on this principle. Hence, it is imperative that the decision makers identify and predict the actual or potential impact on the environment and further consider the means to minimise negative impacts on the environment. In the *WWF South Africa* case, even though the risk-averse approach was not necessarily required as there was scientific evidence provided, the court cited an Australian case where the risk-averse and cautious approach was used and held that:

> '…prudence suggests that 'some margin of error should be retained' until all consequences of the activity are known. Potential errors are 'weighted in favour of environmental protection', the object being 'to safeguard ecological space or environmental room for manoeuvre.'[83]

This principle provides the platform for the decision-makers to undertake the precautionary approach. The precautionary rule alludes that if a chemical substance's safety or hazardous nature has not been proven by science, it ought to be treated as hazardous until it is proven safe.[84] Justice Sachs, in the *Fuel Retailers* case, in his dissenting judgement, demonstrated that if the risk is minimal, it should be given the green light: thus, an enterprise that promised long-term employment and significant social improvement at a relatively small cost to the environment, with damage reduced to the minimum, could well be compatible with NEMA.[85]

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[81] Section 2(4)(*a*)(*vii*) of the NEMA.
[82] Johannes Hendrik Coetzee *Sustainable development in South African environmental law and its relationship with the National Development Plan* (unpublished LLM thesis, North-West University, 2016) at 3.
[83] *Telstra Corporation Limited v Hornsby Shire Council*, Judgment, [2006] NSWLEC 133.
[84] Kidd op cit note 71.
[85] *Fuel Retailers* case supra note 6 at 6.

The above-mentioned principles confer on the state the obligation to ensure sustainable development and manage the environment in line with the directives of section 24 of the Constitution and the NEMA principles. Hence, integrating social, economic and environmental factors into planning, implementation, and decision-making is mandatory. This role affords the state the opportunity to prevent individuals and organs of states from making decisions that may impact the environment in an unsustainable manner. If the environment is impacted sustainably, the three pillars of sustainable development are considered in the decision-making, and the present and future generations' benefit is catered for. Consequently, a development that considers one pillar of sustainable development over the other justifiable and caters for both current and future generations is permissible.

A specific awareness is required for decision-makers to appreciate their role in environmental protection. That is the appreciation that the decision-makers act as the custodians of the environment on behalf of current and future generations. This awareness will enable organs of state to realise that natural resources, irrespective of their ownership, are considered part of an inalienable public trust, and the government, acting through its organs of the state, is the public trustee on behalf of every citizen.[86]

The central beneficiary in protecting the environment is human beings, given the use of 'everyone' and 'present and future generations' in section 24 of the Constitution. Suppose the environment is not protected in a manner that satisfies the citizens. In that case, the citizens have a right to hold the government accountable for their environmental decisions or indecisions that impact the environment. Justice Moseneke entrenched the citizen's rights to hold the state accountable when he held in *Thusi v Minister of Home Affairs*[87] that:

> '…it is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or to not make a particular decision or an order declaring rights or an injunction to furnish reasons for any adverse decision. Ultimately, the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, and to entrench the rule of law.'

[86] Blackmore op cit note 65.
[87] 2011 (2) SA 561 (KZP) at para 52.

The above quotation confirms that since the state is obligated to protect the environment, the citizens have a role to play in holding the organs of the state accountable for their actions or inactions that may impact the environment. By holding the state accountable, the citizens enable the realisation of sustainable development and further protect the environmental needs of present and future generations.

V CONCLUSION

This chapter deals with international legal instruments, the provisions of section 24 of the Constitution, the NEMA, and national environmental management principles. This chapter demonstrates that the South African Government is obligated to act according to the provisions of the abovementioned legislation. This is mandated by section 7(2) of the Constitution, which states that the state must respect, protect, promote, and fulfil environmental rights in the Bill of Rights. Furthermore, their decisions or indecisions should comply with section 24 of the Constitution and the NEMA principles mandate. Based on this, chapter four will deal with this study's critical analysis and explore whether the South African Government's role enables or hinders environmental protection. This will be done by discussing the selected case law in the environmental law regime where there was a trade-off between development and environmental protection.

CHAPTER THREE

CASE LAW RELATED TO ENVIRONMENTAL PROTECTION

I INTRODUCTION

The previous chapter dealt with the International Human Instruments on environmental protection, the provisions of section 24 of the Constitution (environmental rights) and the national environmental management principles. In essence, the previous chapter outlines what the law expects of the government in carrying out its environmental protection mandate. Unlike the previous chapter, which deals with expectations, this chapter examines how the expectations in the relevant laws are translated through environmental decision-making. This chapter raises the question as to whether the organs of state comply with the standards set out in the previous chapter when making decisions that may significantly affect the environment. Although it is not possible to establish this beyond reasonable doubt, I suggest that the cases discussed in this dissertation seem to illustrate a worrying trend to favour economic benefits over environmental benefits in a way that is not mandated by the law. Even though it is not possible in this dissertation to explore the substantive details of the cases themselves, the fact that there are opponents whom are willing to challenge these decisions in court on the basis that they are insufficiently protective of the environment is at least prima facie evidence. The common thread in these cases is the trade-off between perceived economic development and environmental protection.

However, it is worth noting that most of these court judgments do not include direct scrutiny of the trade-offs themselves. The trade-off in most of these cases is evident from the facts due to the nature of judicial review, which focuses on procedural regularity rather than the merits (whether the decisions are right or wrong). This is necessitated by the fact that the courts are not empowered to consider the merits of administrators' decisions but the regularity thereof. In these cases, the courts do not focus directly on the merits of how the trade-off has been made. The citizens challenge the decisions because they are dissatisfied with how they are made. Ordinarily, citizens do not challenge if they are happy with those decisions.

For this reason, several cases have been decided on issues such as the absence of procedural fairness rather than the inappropriate balancing of relevant interests - particularly the elevation of economic considerations and lack of public participation.

The choice of discussing only a few cases is informed by the nature of this study, which is a desktop study. Consequently, this does not allow for a comprehensive discussion of a whole array of cases on environmental regimes; hence, it focuses on the trade-off between perceived economic development and environmental protection. The discussion of the selected court judgments reveals the South African courts' critical role in fulfilling the right to an environment that is not harmful to everyone's health and well-being. Regarding the role of courts, Kidd[88] provides that the judiciary needs to be well-versed in environmental law prescripts. He calls this 'greening the judiciary', which transcends to judges' proper consideration, interpretation and application of the relevant environmental law.

Further, in the *Fuel Retailers* case, the Constitutional Court held that the role of the courts is central to protecting the environment and giving effect to the principle of sustainable development. The significance of the discussion of the selected case law is that ordinary citizens rely on the courts when dissatisfied with decision-making and implementation. The discussion of the selected case law is premised on sustainable development, which stresses the relationship between development and environmental protection. This relationship ensures that the development caters for the need to protect the environment for the benefit of ordinary citizens.

II FUEL RETAILERS CASE[89]

This ground-breaking case on environmental regime emphasises the importance of appropriately balancing sustainable development's three pillars (social, economic and environmental). The case demonstrates that all three pillars of sustainable development are essential and must all be considered when an action that may affect the environment is to be undertaken. This is a rare case where socio-economic considerations were the issue, as most of the case law considers environmental matters. Accordingly, this emphasises that all three pillars of sustainable development are essential. Notwithstanding that, this case is not an example of the trade-off that is the focus of this dissertation. Its significance is based on the fact that it is the leading case advocating for the appropriate balancing of the three pillars of sustainable development.

[88] Michael Kidd 'Greening the judiciary' (2006) 9(3) *PER/PELJ* at 72.
[89] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).

In this case, the applicants opposed the approval of an application to build a new filling station in White River, Mpumalanga.[90] The Constitutional Court considered and applied section 24 of the Constitution and the NEMA principles.[91] The case explored the relationship between social and economic development and the protection of the environment. The applicants maintained that the environmental authorities were obliged to consider the socio-economic impact of the decision to construct the proposed filling station, but failed to consider the socio-economic impact. This case reaffirmed the decision-maker's duty to ensure that environmental and socioeconomic factors are considered due to their interconnectedness.[92]

(a) The High Court and the Supreme Court of Appeal's decision

In this case the courts considered the nature and scope of the obligations of environmental authorities when they make decisions that may affect the environment, particularly the tension between economic development and the environmental protection. The High Court accepted that there was no need to consider the need, desirability and sustainability of the proposed project, since consideration of this falls within the local authority's jurisdiction when a rezoning application is made, and consequently it is not necessary for the environmental authorities to consider it. The Court dismissed the application with costs but granted the applicant leave to appeal. In the appeal, the Supreme Court of Appeal accepted the practice of the environmental authorities to leave the consideration of need, desirability and sustainability to the local authority. It held that the environmental authority's task is to ascertain whether the local authority has addressed need and desirability.[93] Considering the local authority's responsibility regarding need, desirability and sustainability, the court concluded that the environmental authorities had applied their mind to socio-economic considerations. Hence, the appeal court dismissed the appeal with costs.

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[90] Ibid at 1.
[91] Ibid.
[92] Ed Couzens 'Filling Station Jurisprudence: Environmental Law in South African courts and the judgment in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Provinc*e' (2008) 15 (1) *SAJELP* 28.
[93] *Fuel Retailers* case supra note 89 at para 27.

(b) The Constitutional Court's decision

In the *Fuel Retailers* case, the apex court considered sustainable development using the lenses of International Human Rights Instruments on environmental protection. It concluded that integrating environmental protection and socio-economic development is mandatory for sustainable development.[94] Unlike the High Court and the Supreme Court of Appeal, the Constitutional Court reasoned that the environmental authorities misconstrued the nature of their obligations under NEMA and consequently failed to apply their minds to the socio-economic impact of the proposed filling station, a matter they were required to consider.[95] The Constitutional Court held that the High Court erred by dismissing the application for review, and the Supreme Court of Appeal also erred by upholding the decision of the High Court. The Constitutional Court emphasised the need to consider all three pillars of sustainable development. It held that the failure by the decision-makers to consider socio-economic development is inconsistent with sections 7(2) and 24(*b*)(*iii*) of the Constitution.

This judgment emphasised the importance of integrating socio-economic development and environmental protection as enshrined in section 2(3) of the NEMA, which states that development must be socially, environmentally, and economically sustainable. Nevertheless, Tladi cautions that this integration has shortcomings if used rigidly since it can suppress environmental protection to economic development or *vice versa*.[96] The genesis of this integration is considering the adaptive and dynamic nature of the sustainable development concept, which does not support the rigid balancing of the economic, social, and environmental concerns but presupposes that in certain circumstances, one element will be given preference over others. Environmental protection will inevitably be suppressed in pursuit of economic development or vice versa. However, the desirable suppression is the one that is justifiable and the one that will benefit the greater good of the citizens, not only the developers. The *Fuel Retailers* case discussed above strengthens the importance of having regard to section 24 of the Constitution and the NEMA principles in ensuring that all three pillars of sustainable development are balanced and justifiable.

[94] Ibid at para 53.
[95] Ibid at para 86.
[96] Tladi op cit note 26 at 14.

III THE "TRADE-OFF" BETWEEN ECONOMIC DEVELOPMENT AND ENVIRONMENTAL PROTECTION

The selected cases discussed below are not discussed based on the legal reasoning in the judgments since the cases focused on judicial review aspects other than the trade-off mentioned above, something that is not directly relevant to this study. The facts of these cases illustrate the trade-off in that, in all cases, the decision has clearly favoured economic considerations in the face of significant environmental concerns raised by the opponents. However, it was impossible to challenge the trade-off directly due to the nature of judicial review. The cases were decided on regularity. It is worth noting that the administrative decisions favoured the developers in all these cases, and as such, the decisions favour economic considerations. In most of these cases, major projects were undertaken without environmental authorisations, and this rush favours the perceived economic consideration over environmental protection. Though not fully ventilated, the trade-off is evidenced in how the different parties canvas the economic benefit and environmental protection. The diverse standpoints between the developers and civil society feed into the narrative that there seems to be a conflict between economic rights and environmental protection. The selected cases provide cause for reflection as to whether the organs of the state unjustifiably prefer perceived economic development when they approve major projects without complying with the balancing of economic, social and environmental concerns that NEMA requires. This is suggested by the position taken by opponents of the decisions to the effect that there have been failures to integrate appropriately and sufficiently environmental considerations into their decision-making processes. This is evidenced in their failure to integrate environmental considerations into their decision-making processes that may affect the environment.[97]

(a) *WWF South Africa* case[98]

This case concerns an application by WWF South Africa to set aside and declare invalid the total allowable catch (TAC) of lobster for the 2017/18 season, which was determined at 790 tons, as well as all conduct of the Department predicated on a total allowable catch of more than 790 tons.[99] Unlike in the other cases, the merits were indirectly considered in this case. The trade-off was considered through the lens of the rationality of the decision. The trade-off was the protection of

[97] Kidd op cit note 66.
[98] *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 (2) SA 403 (WCC).
[99] Ibid at para 9.

the integrity of this scarce resource (lobster) advanced by the applicant versus the socio-economic benefits accruing to the fishers in the fishing sector advanced by the respondent. The court held that the minister's setting of the TAC at 1924.08 tons, above the level recommended by scientists was arbitrary, irrational and offended various principles of environmental law. Held further, the minister's failed to observe the mandated precautionary approach, and thus made a decision which no reasonable person could have made. The court held further that the submission by the Minister that the decision to increase the TAC to 1924.08 tons would assist and contribute to 'food security, socio-economic development and the alleviation of poverty'[100] is misplaced since an already critically depleted resource jeopardises rather than enhances food security and is the reverse of 'development'. This case raises important questions about alleged non-compliance by the respondent of binding constitutional and statutory objectives and principles in determining the TAC of a highly depleted resource.[101] This case raises the question of whether the South African Government's role in protecting the environment enables or hinders environmental protection.

WWF South Africa advanced the environmental considerations and maintained that the total allowable catch of more than 790 tons was unsustainable, as it would lead to the depletion of lobster resources which had dropped 1.9% of its pristine level.[102] Consequently, the collapse of the lobster resource was imminent unless it was attended to.[103] Contrastingly, the respondents cited economic considerations and argued that fisheries management contributes to food security, socio-economic development and poverty alleviation.[104]

It is worth noting that the South African Government is a signatory to the United Nations Convention on the Law of the Sea and the Southern African Development Commission Protocol. However, the failure of the administrators to have regard to the commitment to this Convention and the Protocol, respectively, when they make decisions that may impact the environment, hinders environmental protection and further shows that the signatory status is just window dressing. Article 61 of this Convention states that the South African Government determines the TAC of living resources (lobster) in its exclusive economic zone. However, this determination should be based on the scientific evidence available. In *casu*, the best scientific

[100] Ibid at para 89.
[101] Ibid at para 78.
[102] Ibid at para 36.
[103] Ibid at para 41
[104] Ibid at para 89.

evidence available to the Minister, which was not considered, was that the lobster resource grows slowly, was critically depleted, and was at only 1.9% of pristine level.

The court, citing the irrationality of the Minister's decision, held that:

> '…the need to use marine living resources 'to achieve economic growth and 'employment creation', none of these things is promoted by allowing an already endangered resource to be further depleted. In the medium to long term, that is the path to economic contraction and the disappearance of jobs. When the lobsters are gone, there will be no employment in lobster fishing and no economic returns from the extinct resource.'[105]

The Minister took a permanent solution to a temporal problem and failed to appreciate the consequences of such a decision in the long term. Consequently, the Minister acted inconsistently with section 2(4)(*a*)(*vii*) of the NEMA.[106]

In essence, this judgment strengthens the findings based on the literature reviewed in this study, which states that the South African government considers socio-economic development objectives to conflict with environmental protection objectives. Consequently, this unjustifiable preference for economic development at the expense of environmental protection hinders environmental protection. This position adopted by the South African Government fails to consider that the environment is not infinite; as such, they have a role in protecting the environment for the present and future generations. Correspondingly, this judgement presupposes that economic development requires a nurtured environment to grow on, as there will be no economic development if the environment is not protected.

(b) The fossil fuel cases and climate change impact

This section discusses the fossil fuel cases and the impact of fossil fuel extraction on climate change, as well as the global position on addressing the effect of climate change impact. South Africa must utilise mitigating measures to respond to climate change. South Africa is a Party to the United Nations Framework Convention on Climate Change (UNFCCC), and as such, it is expected to implement climate change measures.[107] However, in South Africa, recently, we have

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[105] Ibid at para 88.

[106] 'That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.'

[107] South Africa ratified the Convention on 1 November 2016: UNFCCC website at https://unfccc.int/node/61201(accessed 28 July 2025).

witnessed cases wherein there is prioritisation of further exploitation of fossil fuels even though there is a global call to mitigate climate change impact. The UNFCCC does not advocate for the total elimination of fossil fuel exploitation but calls for the proper scrutiny of the economic benefits to be accrued from future exploitation of fossil fuels. This will significantly negatively impact South Africa's ability to meet its obligations in terms of international climate law.

(c) *Mfolozi Community Environmental Justice Organisation v Minister of Minerals and Energy*[108] (*Tendele Coal Mining* case).

This case concerns an application brought by Mfolozi Community Environmental Justice Organisation (MCEJO) and others to oppose the extension of coal-mining operations by (Tendele Coal Mining (Pty) Ltd). The extension was opposed because the coal-mining right was issued despite deficiencies in various environmental impact studies, such as air quality and climate impact, and several of these studies were undertaken without public participation. In essence, there was non-compliance with the legal requirements when such applications were undertaken. The environmental considerations were that Tendele Coal Mining extended the mine without environmental authorisations. Further, that it failed to comply with land use regulations, as it operated new mines without permission in terms of the Spatial Planning and Land Use Management Act (SPLUMA).[109] Also, it interfered with traditional graves without authorisation in terms of section 35 of the KwaZulu-Natal Heritage Act.[110] And failed to comply with waste management requirements since Tendele Coal Mining did not have a Waste Management licence required in terms of section 43(1) of the National Environmental: Waste Act.[111] Despite the glaring deficiencies in the various environmental impact studies, Tendele Coal Mining vouched for economic benefit as the reason for the extension of the coal mining operations.

Considering that an organ of the state approved the application for the extension of coal-mining operations despite the glaring failure to comply with essential legal requirements, this decision is evidence of the South African Government's preference for economic development at all costs. The non-compliance was of such a nature that the court stated that the 'attitude of Tendele Coal Mining during the scoping phase of its application process was offensive and it portrays them

[108] [2022] ZAGPPHC 305 (4 May2022).
[109] Act 16 of 2013.
[110] Act 4 of 2008.
[111] Act 9 of 2008.

as an 'unbridled horse' that showed little or no regard for section 24 of the Constitution and NEMA principles.[112] The decision to extend the coal mining operations was set aside. In the same way, as in most of the court judgments in this study, this judgment did not directly concern the trade-off between economic development and environmental considerations.

Judge Bam is critical of the Department of Mineral Resources and Energy's decision to accept Tendele Coal Mining's application despite glaring deficiencies and violating the law. The Department failed to appreciate its role as the enabler of environmental protection and violated its constitutional obligation and NEMA principles. Consequently, this conduct hinders environmental protection. Tendele Coal Mining's push for the extension of mining rights without consulting the local communities shows the influence of powerful corporations on government and how the influence hinders environmental protection and unjustifiably favours economic development over environmental protection.

In the *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, case,[113] the applicant opposed the environmental authorisation for constructing a 1200-MW coal-fired power station by Thabametsi when it was issued without considering the impact of climate change (a relevant factor). The applicant alleged that the environmental authorisation was defective due to the failure to consider a climate change impact assessment as a relevant factor before the environmental authorisation was granted. The decision was inconsistent with section 24(*o*) of NEMA, which provides that it is peremptory for the administrators to consider all relevant factors, with climate change impact being one of the factors when approving an application for environmental authorisation.

The negative environmental impact advanced by the applicant was that coal-fired power stations are not sustainable since they damage the environment and significantly contribute to CO2 emissions globally. The impact of climate change on water resources, air quality, human health, biodiversity and marine fisheries will be felt. This case is relevant in this study since it sets a precedent that in future, all major projects (fossil fuel) that may have a significant climate change impact will be subjected to the climate change assessment.

[112] *Tendele Coal* case supra note 108 at para 37.
[113] [2017] 2 All SA 519 (GP)

The *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*[114] (*Mabola* case) has analogous facts with the *Thabametsi* case. The decision-maker ignored the precautionary principle in terms of section 2(4)(*a*)(*ii*) of NEMA. The *Mabola* case concerns the review and setting aside of the Member of Executive Council (MEC) for Forestry, Fisheries and the Environment' decision to exclude four properties from the Mabola Protected Environment, thus permitting coal-mining activities in the protected wetlands area.[115] Once more, in this case, the economic considerations were pitted against environmental protection. According to the respondents, this project would ensure that the natural resources are used for the community's socio-economic benefits and to promote the economy's growth.

However, the balancing act requires that the envisaged socio-economic benefits to the community due to the proposed mine must be weighed against the disadvantages of the proposed mine.[116] Accordingly, if the economic benefits to the community warrant environmental interference, it is acceptable in section 24(*b*)(*iii*) of the Constitution.[117] On the contrary, the applicants submitted that the proposed coal mine would have a long-term adverse environmental impact on biodiversity and water resources.[118] In line with the genesis of this study, which is not calling for the total halt of coal mines, the court pointed out that the declaration of Mabola Protected Environment does not constitute a complete ban on mining activities. Still, the MEC was mandated to balance the need to establish the coal mine against the interests of the citizens and NEMA principles, which the MEC failed to consider. The decision of the MEC was reviewed and set aside.

The divergent views between the administrators and the developers on one side and the communities on the other in the pursuit of economic development versus environmental protection were at stake. Significantly, once more, the administrators' decision favoured the establishment of the coal mine (development) at the expense of critical environmental resources. This decision was made with flagrant disregard for international responsibilities, section 24 of the Constitution, and the legislation on protecting the environment.

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[114] [2018] ZAGPPHC 807 (8 November 2018).
[115] Ibid at para 1.
[116] Ibid at para 33.
[117] '…secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'
[118] *Mabola* case supra note 114 at para 18.

In *the Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries and the Environment*[119] *(Ellof Landgoed* case*),* the applicant was opposed to the respondent's decision to grant an environmental authorisation to operate an open-cast coal mine on land adjacent to part of its farm.[120] The application was opposed based on irrationality since the administrator granted the authorisation when they were not adequately apprised of its consequences. The authorisation was granted when section 2(4)(*i*) of NEMA[121] was not considered, which is ordinarily a requirement. The court branded this conduct 'inappropriate' for failing to consider, assess and evaluate the authorisation's social, economic and environmental impacts.[122] Similar to the *WWF South Africa* case, the court held that the decision of the Minister to grant authorisation was not rationally connected to the information before her for failure to take into account a range of relevant factors as required in section 2(3) of NEMA. This case laid bare the tension between the need to ensure a secure coal supply for South Africa's coal-fired power stations (a socio-economic concern) and the need to ensure the productivity of land environmental concern).[123] Civil society's concern is climate change's impact, not necessarily to halt the establishment of coal-fired power stations.

Notable, the above-discussed cases involving mining for fossil fuels were decided at a time when global scrutiny of activities may significantly impact climate change. Significantly, in all the cases discussed above where climate change was an issue, the developers and administrators failed to consider its impact and consequences. These cases were decided based on administrative action. However, underlying competing factors of economic development versus environmental protection (trade-off) exist. Notably, in every case discussed above, the decision-makers favoured the developers. This raises the question of whether the administrators appreciate their role as environment trustees.

The cases have significant implications for future fossil fuel development in an era with an emphasis on countries like South Africa to meet their obligations in terms of international climate law. The administrator's insistence on the need for fossil fuels to enhance economic development should not be undertaken at the expense of environmental protection. It should not trump national legislation on environmental regimes. The perceived economic development could

[119] [2023] ZAGPPHC 434 (19 June 2023).
[120] Ibid at para 1.
[121] This principle requires that social economic and environmental impacts of activities are considered.
[122] *Eloff Landgoed* case supra note 119 at para 26.
[123] Ibid at para 32.

be that community members would benefit if the proposed mines commenced. However, the significance of the economic stimulation to the community brought by the proposed mining should outweigh the importance of protecting the environment. In line with the position adopted in this study, the courts demonstrate that the economic benefit should be such a nature that it warrants interference with environmental protection.

The court in the *Mineral Development, Gauteng Region v Save the Vaal Environment*[124] (*SAVE* case) acknowledged the need for a paradigm shift in advancing economic development at the expense of the environment. It went on to state that: 'together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns'.[125] However, twenty-five years later, our courts are still grappling with administrators' decisions that fail to regard climate change's impact. The following case(s) further reveal the favouritism of developers by administrators at the expense of the citizens and the environment about significant projects.

(d) *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*[126]

In this case, the applicant sought an interim interdict to oppose the commencement of a seismic survey without an environmental authorisation prescribed in section 24(1) of NEMA.[127] The applicant contended that the consultation process undertaken by Shell had an array of deficiencies as they were inadequate and substantially flawed, and consequently, the exploration right should not have been granted.[128] Due to the extent of the non-compliance with the legal requirements for the application for a seismic survey, the financial loss which was alleged to be suffered by the respondent could not be weighed against the infringement of the constitutional rights in question since the breach of such right threatens the livelihoods and the well-being of the communities.[129] Once more, the need for economic development was considered against the right to an environment that is not harmful to the citizens' well-being, and the development did not warrant infringement of the environment. Accordingly, due to the lack of environmental authorisation, the interdict was granted because the consultation process was inadequate and unlawful.

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[124] 1999 (2) SA 709 (SCA).
[125] Ibid at para 15.
[126] 2022 (2) SA 585 (ECG) (28 December 2021).
[127] Ibid at para 1.
[128] Ibid at para 25
[129] Ibid at para 68.

(e) *Sustaining the Wild Coast* Full Bench decision[130]

This appeal case is premised on the right to procedurally fair administrative action of the decision. However, like in other selected cases discussed above, the underlying trade-off between economic development and environmental protection was at stake. The applicants contended that the Minister should consider the anticipated harm to marine and bird life, the communities' spiritual and cultural rights, proper livelihoods and climate change impact.[131] Contrastingly, the opponents of the decision maintained that seismic surveys would create jobs and increase government revenues. Like in the judgment of the court a quo, the non-compliance with the legal requirements and the reliance on unsubstantiated economic benefit were so glaring that the court stated that:

> '[M]uch as there were statements made in the EMPr that the seismic survey would create jobs and increase government revenues, no detail to substantiate these claims is made; no explanation as to how the jobs will be created, and how the economy will be stimulated, or how the seismic survey will improve the socio-economic circumstances in which most South Africans live are provided.'[132]

This superficial promise was made despite section 24(*b*)(*iii*) of the Constitution instructing that environmental rights infringement should be based on justifiable economic development. Save to say that if economic benefit and employment are promised, it should be tangible and not be without compelling justification, particularly if it may impact the environment. This court's reasoning is significant, considering that there has been a pattern whereby a promise of employment is made without proper plans. This is evidenced in how a promise of employment is over-prioritised at all costs, irrespective of the quality and the justifiable negative environmental impact.

Despite this case being decided on procedural fairness in terms of the Promotion of Administrative Justice Act (PAJA)[133] and section 33(1) of the Constitution,[134] the parties, like in the *Mfolozi* case and the *WWF South Africa* case, advanced environmental considerations and economic considerations differently. The environmental concerns, among others, were that the seismic survey threatened significant disruptions to the prevailing ecological, marine life and socio-economic conditions in and around their community.[135] Contrastingly, Shell and Impact Africa advanced the economic considerations. The impact assessment pointed out that the project

[130] 2022 (6) SA 589 (ECMk).
[131] Ibid.
[132] Ibid at para 135.
[133] Act 3 of 2000.
[134] 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'
[135] *WWF South Africa* supra note 98 at para 16.

will potentially impact the topography, vegetation, fauna, aquatic systems, soil and agriculture and archaeological, cultural and paleontological sites. However, the respondent still chose to favour economic considerations. This demonstrates the conflict between civil societies, the government, and developers regarding how they perceive socio-economic and environmental concerns as conflicting. This conflict feeds into a trade-off between economic development and environmental protection.

Worth noting is that the abovementioned cases were decided on the basis that an environmental authorisation was not provided, and where it was provided, relevant considerations were not considered, as well as based on inadequate public participation. These cases laid bare the trade-off between the South African Government and the corporations, on the one hand, advocating for economic needs and the civil societies and the ordinary citizens, on the other hand, advocating for environmental protection. The reasons the cases were decided on the lack of environmental authorisations and inadequate public participation, respectively, was because of the rush by the South African Government and the developers to ensure that the projects perceived to contribute to the economic development are prioritised over the environmental protection. This rush led to the South African Government failing to adhere to administrative requirements and hindering environmental protection. This is evidenced in the respective administrators' insistence on appealing the court decisions. Shell Exploration and Impact Africa maintained that seismic surveying is bound to continue as the economic need arises to explore energy reserves below the sea.[136]

Likewise, *Tendele Coal Mining* case submitted that mining is the area's primary driver of economic activity. The developer's basis of their decisions on the need for job opportunities, food security, socio-economic development and the alleviation of poverty and the potential economic development is not an absolute consideration. However, justifiable economic development requires consideration of the quality and longevity of the proposed job opportunities. It is the quality of the jobs that will outweigh environmental concerns. The court judgments discussed above and the genesis of this study do not call for the total halt of mining; however, developers and decision-makers must provide justifiable reasons for development that outweigh the environmental harm. Accordingly, even where economic development has a negative effect on

[136] *Sustaining the Wild* Coast case supra note 130 at para 68.

the environment, this does not always means that economic development is undesirable. The effect should be adequately justified with reference to the benefits that will outweigh the environmental harm and will, overall lead to the upliftment of ordinary citizens. The court judgments direct the decision-makers to comply with section 24 of the Constitution and the NEMA principles when decisions that may have significantly affected the environment are taken.

The facts of the selected cases discussed in this section reveal a trade-off between the perceived economic development and environmental protection. The courts were constrained by the nature of the judicial review, which confines the court to consider specific requirements, and as such, the actual trade-off was never fully ventilated. This trade-off is not unique in the selected cases discussed above. Further, in the *SAVE* case,[137] Sasol Mining intended to start mining (perceived economic consideration) in an environmentally sensitive area close to the Vaal River. Save the Vaal raised environmental considerations and submitted that the mining will impact the river (environmental protection).

The decision-makers in the above cases failed to consider the concept of sustainable development, which provides for the integration and consideration of socio-economic development and environmental protection when decisions that may impact the environment are taken. Overall, the selected cases point to a relationship of 'us and them' between the government and the developers on one side and the civil societies and the ordinary citizens on the other. This relationship informs the stance and how the South African Government plays its role in environmental protection, that it hinders environmental protection.

IV CONCLUSION

This chapter discussed the selected case law on the lack of environmental authorisation that led to a trade-off between perceived economic development and environmental protection. The selected cases discussed above demonstrate the divergent positions between the administrators and developers on the one hand and important parts of civil society and citizens on the other hand regarding environmental protection. The South African Government appears in several cases to prefer economic development over environmental protection in a manner that does not adhere to the provisions of section 24 of the Constitution and the NEMA principles. In many cases, the insistence on economic development (job creation) is not adequately justified. This kind of

[137] *SAVE* case supra note 124 at para 3.

development is imaginary and shows an obsession with meeting the needs of the present generations at the expense of the future generations to meet their own needs. The preference for economic development by the South African Government demonstrates that how they play their role in environmental protection hinders rather than enables environmental protection. The decision-makers do not regard the entrenched fundamental rule in an environmental regime that compliance with NEMA principles is mandatory. This compliance ultimately leads to environmental protection. The next chapter provides a critical analysis of this study.

CHAPTER 4

CRITICAL ANALYSIS

I INTRODUCTION

The previous chapter evaluated selected case law with a special focus on the trade-off between perceived economic development and environmental protection. This chapter critically assesses the question: whether the South African Government's role in protecting the environment enable or hinder environmental protection? The critical analysis in this study is informed by the literature reviewed throughout this dissertation, law related to environmental protection, and the selected case law on the trade-off between perceived economic development and environmental protection. The critical analysis explores whether the South African Government have regard to their commitment to section 24 of the Constitution, NEMA principles, the international instruments on environmental protection, and court judgements on the environmental regime. Further, this chapter also engages with the writings of scholars in the environmental regime who have assessed the varying and somewhat inconsistent governmental stance on environmental protection.

Chapter three demonstrated that the South African Government and the developers agree to the commencement of significant projects without environmental authorisation, and where environmental authorisation is provided, specific considerations are not considered, and this leads to a trade-off that is inconsistent with section 24 of the Constitution as well as NEMA principles. The selected case law further reveals that the South African Government unjustifiably prefers economic development over environmental protection. In response to the research question, this chapter (critical analysis) assesses whether the South African Government enables environmental protection as envisaged by the Constitution or it impedes its duty as contained in the Constitution by discussing the following: willingness to promulgate that lacks implementation; pressure in meeting people's social and economic needs; government's approach to 'ecologically' sustainable development; government's agenda of perceived economic development; whether Government's perceived economic development is tangible; and government as the trustee of the environment and the need for greening the decision-makers.

II WILLINGNESS TO PROMULGATE THAT LACKS IMPLEMENTATION

Including the environmental right in section 24 of the Constitution demonstrates that the drafters had a progressive intent to enable environmental protection. Further, the promulgation of several of national environmental legislation,[138] in compliance with the mandate of section 24(*b*) of the Constitution,[139] was intended to enable environmental protection. Kidd calls the national legislation on environmental protection progressive statutes which intended to mitigate environmental degradation and the associated consequences thereof.[140] Hence, the common thread in the national legislation is facilitating and enabling environmental protection. In addition to the promulgation of national legislation, the ratification of international human rights treaties on environmental protection evidences courage and willpower to enable environmental protection.

In supporting the promulgation, Yacoob J submits that the promulgation of the plethora of legislation by the South African Government is a step towards the right direction.[141] In contrast, Kotze observes that in the South African environmental regime, these statutes are fragmented. Yacoob J further cautions that legislation should not be symbolic; it must achieve what it was promulgated to achieve: environmental protection.[142] Mere legislation that is not reasonably implemented[143] is not good enough and, as such, does not constitute compliance with the state's obligation to ensure environmental protection. Similarly, De Wet and Du Plessis maintain that the current South African legislative framework provides necessary preliminary steps for ensuring that the state gives effect to section 24 (*b*) of the Constitution.[144] However, Weis suggests that the legislation promulgated because the constitutional imperatives demand promulgation does not necessarily ensure constitutional compliance, but its enactment is constitutionally required.[145] In essence, the promulgated legislation must achieve that which it was promulgated to achieve, that is to ensure compliance with constitutional imperatives. The proper interpretation and implementation of legislation gives effect to constitutional obligations and makes such legislation relevant and practical, not just mere enactment.

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[138] Hutchinson and Duncan op cit note 36.
[139] 'Everyone has the right to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures'
[140] Kidd op cit note 71
[141] *Grootboom* case supra note 61.
[142] Ibid at para 42
[143] Ibid at para 42.
[144] de Wet and du Plessis op cit note 59 at 367.
[145] Lael Weis 'Environmental constitutionalism: Aspiration or transformation? (2018) 16(3) *I•CON* 35.

The first leg of environmental protection (which was to promulgate environmental legislation) has been achieved in the South African context. The second leg is for the South African Government to move swiftly towards ensuring sustainable development[146] and showing the willingness and commitment witnessed in the promulgation stage to put the promulgated legislation into practice. Rights that are not adequately enforced[147] are not worth the paper they are written on. In South Africa, there is no shortage of legislation on the environmental regime; however, much is required when it comes to interpretation and proper implementation.[148] Still, the implementation of the same will have an impact on the economy.[149] The selected cases discussed in Chapter Three demonstrated this observation when decision-makers and developers advocated for economic development at the expense of the environment.

III PRESSURE IN MEETING PEOPLE'S SOCIAL AND ECONOMIC NEEDS

Currently, the South African Government faces various challenges in meeting people's socio-economic needs. At the same time, the need to manage the depletion of natural resources in compliance with section 24 (*b*)(*ii*) of the Constitution is a reality. Coetzee acknowledges that in South Africa, there is pressure to meet socio-economic demands, and this pressure has led to the government making development a short-term political issue, which can potentially hinder environmental protection.[150] Cabelkova *et al.* demonstrate that in developing countries like South Africa, a good balance between economic development and environmental protection is not achieved; it is only in developed countries that we can see such a balance.[151] Similarly, Kidd, affirming section 24 of the Constitution and NEMA principles, acknowledges that the emphasis on socio-economic development that we currently witness in South Africa must be sustainable.[152] Likewise, Awan maintains that economic growth is vital, particularly for poor communities;

[146]Anthony Lumby 'Government and sustainable development in South Africa: The environmental legislative framework in historical context' (2005) 20 (1) *SAJEH* 65–82.
[147] Louis Kotze 'Judicial intervention in constitutional environmental governance-how is South Africa Doing' (2007) 7 *Cadernos da Escola de Direito Erelacoes Internacionals da Unibrasil* 379-405 at 403.
[148] Ibid.
[149] OECD, 'Assessing the Economic Impacts of Environmental Policies: Evidence from a Decade of OECD Research', (2021) OECD Publishing, Paris, available at, https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/05/assessing-the-economic-impacts-of-environmental-policies_d55646c6/bf2fb156-en.pdf, accessed on 4 September 2024.
[150] Coetzee op cit note 82 at 3.
[151] Inna Cabelkova *et al* 'Environmental protection or economic growth? The effects of preferences for individual freedoms' 2023 *FES* 1-15.
[152] Kidd op cit note 71.

however, their development models must be environmentally sound.[153] Thus, notwithstanding the need for socio-economic development, this need must also be ecologically sustainable. The South African Government must meet the citizen's social and economic needs as mandated by sections 26, 27 and 29 of the Constitution.[154] However, meeting the social and economic needs must comply with section 24(*b*)(*iii*) of the Constitution. Similarly, interference with natural resources is acceptable, provided it pursues justifiable economic and social development. The selected case law in this study suggest that, in several cases, the preference for economic development over environmental protection is not justifiable.

Textually, the law related to environmental protection is sound and sufficient. However, practically, the decision-makers misconstrue and misinterpret these laws, which hurts environmental protection. Consequently, failure to correctly interpret and implement environmental legislation renders the legislation ineffective and fails to consider that ecologically sustainable development is critical in environmental protection.

IV GOVERNMENT'S APPROACH TO 'ECOLOGICALLY' SUSTAINABLE DEVELOPMENT

As a signatory of most international human rights instruments on environmental protection, South Africa included the environmental right in section 24 of the Constitution and further incorporates ecologically sustainable development in section 24(*b*)(*iii*) of the Constitution. Section 24 of the Constitution, NEMA principles and other national legislation on the environmental regime discussed in this study, without any contradiction, point to the need to consider the ecological sustainability of the development.[155] As alluded to in the previous chapters, this study does not advocate for the total halt of economic development but for ecologically sustainable development. It is worth noting, though, that section 24 of the Constitution does not refer to sustainable development but refers to 'ecologically sustainable development'.[156] Ecologically sustainable development is defined in 1987 Brundtland Report as the development that meets the needs of the

[153]Abdul Ghafoor Awan 'Relationship between environment and sustainable economic development: a theoretical approach to environmental problems' (2013) 3(3): *IJASS* 747.
[154] Everyone has the right to have access to adequate housing, health care, food, water and social security as well as the right to basic education.
[155] S 2(3) of NEMA.
[156] 'Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

present generations without compromising the needs of the future generations. The insertion of the prefix 'ecologically' to sustainable development indicates a shift from the rigidly used sustainable development to the ecologically sustainable development concept. However, this shift can only be witnessed textually as the decision-makers and the judiciary are yet to refer to ecologically sustainable development. Section 24(*b*)(*iii*) acknowledges that the concept of sustainable development is evolving,[157] but the South African Government does not seem to appreciate and act in appreciation of this evolution.

The inclusion of the prefix 'ecologically' shows that, on paper, the South African government advocates for a certain kind of sustainable development, an ecologically sustainable development.[158] However, in reality, the case law evaluated in this study reveals that the decision-makers fail to show an understanding of the ecologically sustainable development concept. Ecologically sustainable development advocates for promoting social and economic development that complies with section 24(*b*)(*iii*) of the Constitution. This development warrants that the environment is only infringed upon if a justifiable economic benefit is accrued to the citizens.[159] The quality and longevity of economic development should be of such a nature that it warrants interference with the environment. This is something that the South African Government fails to act in appreciation of. Ecologically sustainable development indicates that economic development and environmental protection must be ecologically sustainable. The decision-makers should always ensure that the envisaged economic development benefit warrants harmful environmental interference. The essence of ecologically sustainable development is that economic development that causes environmental degradation is justifiable under exceptional circumstances. However, in the South African context, it is the direct opposite, as economic development is over-prioritised and is pursued irrespective of the costs it will have on the environment.

The South African Government's conduct of unjustifiable prioritising economic development fails to appreciate that the drafters of NEMA had environmental protection in mind when it was promulgated; hence, it is called the National Environmental Management Act. The purpose of NEMA is to provide for cooperative environmental governance by establishing

[157]Andrew Muir 'An interpretation of the South African constitutional 'environmental right' (section 24 of the Constitution of the Republic of South Africa, 1996) and an assessment of its relationship to sustainable development' (Unpublished LLM thesis, University of KwaZulu-Natal, 2014) 29.
[158]Rufaro Emily Chikurowo 'Ecologically sustainable development as a constitutional value: South African perspectives' (Unpublished LLD thesis, North West University).
[159] Ibid.

principles for decision-making on environmental matters. Tladi[160] submits that [ecological] sustainable development was conceived because humanity felt the global development pattern threatened the environment.

It is worth noting that in the South African environmental regime, the decision makers' decisions that may significantly affect the environment are not ecologically sustainable. This is attributable to the fact that on paper, the law related to environmental protection says one thing, but practically, the decision-makers often do the direct opposite. Hence, their role hinders environmental protection.

V GOVERNMENT'S AGENDA OF PERCEIVED ECONOMIC DEVELOPMENT

Despite section 24(*b*)(*iii*) of the Constitution being instructive, the South African Government still prefers economic development over environmental protection. This is evidenced in the discussion of the selected case law in chapter three of this study, where the decision-makers unjustifiably prioritised economic development over environmental protection as if the environmental right is not a constitutional right. This was despite the civil society's strong environmental protection concerns, particularly regarding climate change considerations. In most, if not all, of the selected case law discussed in chapter three of this study, the decisions were set aside based on procedural regularity, such as inadequate procedural fairness. However, in the *WWF South Africa* case, the court considered the rationality of the trade-off between the need to protect the integrity of the lobster resource versus the socioeconomic benefits accruing to the fishers. The court decided this case based on irrationality. The decision-making process informed by rationality is mandatory in the current context of the climate change crisis. Accordingly, the default position should be that a decision allowing for interference with the environment, particularly fossil fuel exploitation, should *prima facie* be irrational unless there are demonstrably necessary and tangible economic benefits that accrue from the activities to the benefit of the citizens.

Humby[161] maintains that environmental interference is justified in exceptional cases where economic development is justifiable. This is consistent with the South African

[160] Tladi op cit note 26 at 34.
[161] Humby op cit note 14.

Government's responsibilities in section 24 of the Constitution, section 2 of NEMA, and the responsibilities imposed by international law (Paris Agreement).

On 14th September 2023, the *Mail and Guardian* quoted Gwede Mantashe, Minister of Minerals and Energy, advocating for socio-economic development when he stated that environmental non-profit organisations (NPOs) block development in South Africa. He further alleged that:

> '…mostly foreign-funded (NPOs) serve a deliberate programme to block development in South Africa, and this pits the development needs of poor communities against their own self-serving and self-proclaimed protection of the environment. And their funding has to be scrutinised to ensure that the NPOs do not have unfettered veto powers over development in South Africa.'

The above-mentioned statement by the Minister feeds into the South African Government's socio-economic development agenda at all costs. The Minister's narrative creates a gap between civil society and decision-makers in the environmental regime. As such, it is intended to threaten the environmentalists from doing their work, which is to protect the environment.

Though the Minister is not advocating for litigation against the NPOs, such utterances are similar to what Chamberlain calls strategic litigation against public participation (SLAPP suits), a ploy to intimidate civil societies fighting for environmental protection.[162] SLAPP suits can be brought for various reasons, for example, 'surveillance, harassment on social media, discreditation attempts and restrictions on access to funding'.[163] The Minister's utterances, particularly where he questions the funding of the NPOs, resemble the SLAPP suit strategy and, as such, hinder environmental protection. Furthermore, this narrative depicts environmental development as a white middle-class issue[164] and socio-economic development as a poor black issue. The South African government's pursuit of a socio-economic agenda feeds into Field's observation that environmental protection in South Africa is at risk due to being viewed as a stumbling block to social and economic development.[165]

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[162] Chamberlain op cit note 10.
[163] Ibid 8.
[164] RP Wynberg and D. Fig (2014) 'Realising Environmental Rights in South Africa: Civic Action, Leverage and Litigation', pp. -314 in Langford, M., J. Dugard, B. Cousins and T. Madlingozi, Socio-Economic Rights in South Africa: Symbols or Substance? New York: Cambridge University Press 23.
[165] Tracy-Lyn Field 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA' (2006) 123(3) *SALJ* 416.

Statements like these fail to consider the preamble of our Constitution, which aims to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. Furthermore, such narratives are incongruent with former Chief Justice Sandile Ngcobo's reasoning that promoting development requires protecting the environment.[166]

This statement is consistent with the position adopted in this study that justifiable interference with the environment is acceptable; hence, development and environmental protection are interconnected. The perpetuation of the socio-economic development agenda is not new in the South African context. In the State of the Nation address of 8 February 1998, former president Thabo Mbeki, in support of the socio-economic agenda, stated that the main categories to be prioritised amongst others were: 'further acceleration of our economic growth and development', 'speeding up the process of building the infrastructure we need to achieve our economic and social goals as well as 'improving the effectiveness of our interventions directed at the second economy, and poverty eradication'.[167]

These statements by Minister Gwede Mantashe and the former president of the Republic of South Africa confirm that the South African Government's economic development agenda at the expense of the environment is still in motion. This agenda fails to consider that maximising economic growth leads to maximised utilisation of natural resources, which always hurts the environment.[168] Generally, an environmentally beneficial development tends to have an impact on livelihoods. The benefits can be positive or negative depending on how the development is undertaken. In most cases, in South Africa, the development yields negative benefits due to how economic development is pursued. The unjustifiable maximised economic growth leads to excessive use of natural resources, ultimately leading to environmental degradation. Infrastructural development will always be required in a developing country like South Africa, and the consequences will be negative environmental impacts. However, the environmental infringement must be justifiable.

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[166] *Fuel Retailers* case supra note 93 at para 44.

[167] Thabo Mbeki *State of the Nation Address* (8 February 2008), available at https://www.sahistory.org.za/archive/2008-president-mbeki-state-nation-address-8-february-2008, accessed 4 September 2024.

[168] Awan op cit note 153 at 751.

The agenda of socio-economic development that the South African government adopts fails to consider that the need for development must be determined by its impact on the environment. The South African Government pursues the economic development factor of sustainable development as if it were the only factor. The South African Government must consider the preamble of NEMA.[169] This agenda fails to consider the interconnectedness between social, economic and environmental development. The preference for socioeconomic development over environmental concerns ignores the sad reality that, often, something that is economically beneficial has a negative impact on livelihoods. Ironically, the preferred economic development pursued to benefit the citizens may, at best, be benefit that does not accrue to them but to others, and, at worst, may actually cause them harm such as displacement from homes and livelihoods. Accordingly, the kind of development adopted by the South African Government does not enable or hinder environmental protection.

VI IS GOVERNMENT'S PERCEIVED ECONOMIC DEVELOPMENT TANGIBLE?

As of the third quarter of 2024, the unemployment rate in South Africa was 32.1%, which shows that the South African Government's socio-economic development agenda is failing to yield positive results. The challenge in South Africa is that the South African Government's socioeconomic development agenda is not sound, as the desired economic growth is still elusive. Since the South African Government's agenda of economic development is failing, it is high time that the decision-makers focus on the quality of economic growth.[170] In the *BP Southern Africa* case,[171] the applicant submitted that the Department of Agriculture, Conservation, Environment and Land Affairs made a decision that was motivated by socio-economic considerations. Still, it was disguised as motivated by environmental considerations. The court pointed out that in the future, the soundness of development will no longer be considered by using only economic considerations; the environmental impact should also be considered.[172]

[169] 'Whereas many inhabitants of South Africa live in an environment that is harmful to their health and well-being.'
[170] Geoffrey Glasby 'Environment, development and sustainability: the need for a new paradigm' (2002) *EDS* 339.
[171] *BP Southern Africa* supra note 19 at para 12.
[172] Ed Cousens op cit note 92 at 31.

Over and above the lack of proper mechanisms, the government's agenda fails to consider the 'risk-averse approach' as provided for in NEMA.[173] The *Sustaining Wild Coast* case[174] cited principle 15 of the 1992 Rio Declaration, which held that where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used to postpone cost-effective measures to protect against environmental degradation. In essence, the South African Government's socio-economic development agenda does not meet the ecologically sustainable development requirements, which is the development's sustainability. Consequently, this agenda fails the sustainable development test (integration) and the ecologically sustainable development test (sustainability). The irony with the South African Government's socio-economic development agenda is that it also fails to improve the country's and its citizens' economic status. Accordingly, as a country, we are losing on all three fronts (socially, economically and environmentally). Economically, socially and environmentally, there is no meaningful development.

VII GOVERNMENT AS THE TRUSTEE OF THE ENVIRONMENT

The national legislation on environmental protection, without any contradiction, confers the obligation on the government to act as the trustee of the environment, acting through the respective Cabinet Ministers to ensure environmental protection. The government must act in the citizens' best interests as a trustee of the environment. Likewise, the citizens are the beneficiaries of the trust and, as such, have a right to hold the trustees (government) accountable and approach the courts to enforce environmental protection. Hence, Chapter Three of this study discusses many cases where citizens approached courts to enforce environmental protection. Blackmore calls the ability of the public to hold the state accountable for their actions or omissions in protecting the environment a 'public surveillance role'.[175] The 'public surveillance' role is critical in South Africa, where a brewing unholy alliance between politicians and private interests hinders environmental protection.[176] This 'unholy alliance' frustrates citizens since they are not consulted when decisions that will affect them and the environment are taken. The law related to environmental protection, case law, and the literature evaluated in this study reveal that the South

[173] Section 2(4)(*a*)(*vii*) provides that sustainable development requires the consideration of all relevant factors including the following: that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.
[174] *Sustaining Wild Coast* case supra note 130 at para 69.
[175] Blackmore op cit note 65 at 97.
[176] Bosselmann op cit note 76 at 59.

African government and its state organs fail to act in the public interest. Accordingly, this failure hinders environmental protection.

VIII THE NEED FOR GREENING THE DECISION-MAKERS

There is a body of literature about the role of courts in the environmental protection regime, which led to the concept of 'greening the judiciary'.[177] However, the provisions of the legislation on the environmental regime and the case law evaluated in this study demonstrate that decision-makers require 'greening' of their own to ensure that their role in environmental protection passes constitutional muster.[178] Kidd[179] demonstrates that in the environmental regime, there is a need to 'green the judiciary'. Additionally, considering the South African Government's approach to ecologically sustainable development and the Government's agenda of socio-economic development, there is an additional need to 'green the decision-makers' in the environmental regime.

One can concur with Kidd's[180] submission that the judiciary needs greening, considering the courts' role in fulfilling the environmental right. However, considering how the South African Government misconstrued section 24 of the Constitution, NEMA principles, and the successful challenging of the government's decisions, it is evident that the decision-makers need greening of their own. This is so because South African courts are not implementers of the legislation but enforcers. Accordingly, courts come in only when there is non-compliance on the part of the government. Accordingly, the government must respect, protect, promote and fulfil the environmental rights in section 24 of the Constitution.[181] Weis maintains that the government's obligation to protect the environment is predominantly entrenched, and it is not to be given effect by direct judicial enforcement[182] but by binding institutions. Consequently, radical greening of the decision-makers is required to alleviate the judiciary's load and ensure compliance with constitutional obligations. Suppose the South African government can play its role consistent with section 24 of the Constitution, the national legislation on environmental regimes, and their

[177] Kidd op cit note 88.
[178] The role that passes the constitutional muster is the one that is ecologically sustainable.
[179] Kidd op cit note 88.
[180] Ibid.
[181] Section 7(2) of the Constitution.
[182] Weis op cit note 145 at 836.

commitment to international human rights instruments. In that case, there will be less focus on the judiciary's effectiveness.

VIX CONCLUSION

The law related to environmental protection and the selected case law evaluated in chapters two and three of this study reveal that the South African Government failed to have regard to its commitment to the international human rights instruments when making decisions that may impact the environment. Consequently, it fails to fulfil the aims of section 24 of the Constitution and NEMA principles. The South African Government treats socio-economic rights as superior to environmental rights. Yet both rights enjoy the same status in the Bill of Rights.

This chapter demonstrated that the drafters of the Constitution and the policymakers enacting national legislation on the environmental regime intended to enable environmental protection. However, failure by the decision-makers to correctly interpret and implement the enacted legislation in line with section 24 of the Constitution, NEMA principles and human rights instruments hinders environmental protection. This failure is evident in how the South African Government interprets and implements legislation on the environmental regime, deals with people's social and economic needs, approaches 'ecologically' sustainable development, and unjustifiably prioritises socio-economic development over environmental protection. Accordingly, the South African Government's role hinders environmental protection. Similarly, the cases on trade-off reveal the extent to which the South African Government's role hinders environmental protection.

This study reveals how the South African government's role in environmental protection leads to the unjustifiable degradation of the environment. This degradation affects the citizens in many ways - their health and well-being. Further, punitive action imposed by the courts on the decision-makers for failing to safeguard the environment is always compensated by citizens whose environmental rights were infringed. This makes the citizens suffer twofold - their health and well-being, and their finances. Not only do the citizens suffer, but the environment, which is meant to be protected in section 24 of the Constitution, is also not spared. This chapter demonstrates that the citizens and the environment cannot be exonerated from the harsh consequences of the South African Government's failure to ensure environmental protection

Chapter 5

CONCLUSIONS AND RECOMMENDATIONS

I RECOMMENDATIONS

(a) Shift from sustainable development to ecologically sustainable development

The inclusion of the prefix 'ecologically' in the concept of sustainable development in section 24(b)(iii) of the Constitution shows that the drafters of the Constitution were conscious of the evolution of the sustainable concept. However, this study revealed that this evolution is only witnessed textually. Consequently, this study advocates for the decision-makers to embrace this shift and evolution of the sustainable development concept. The adoption of sustainable development that is ecologically oriented is encouraged. The desired ecological sustainable development encompasses all three pillars of sustainable development: economic, social, and environmental development.[183] However, pursuance of any of the three pillars should be ecologically sustainable.

(b) Greening the decision-makers

In the past fifteen years, ' greening the judiciary'[184] became a buzzword. This is attributable to the judiciary's role in enforcing the rights in the Bill of Rights. However, this study revealed that not only does the judiciary require greening in the environmental regime, but also the decision-makers. The South African Government unjustifiably prefers socio-economic development, so it needs greening.

II CONTRIBUTIONS OF THE STUDY

This study aimed to explore how South Africans play their role in protecting the environment. The study was based on a critical analysis of selected case law on environmental protection and legal writings in this area of law. This study examined how courts and legal scholars have interpreted how the South African Government plays their role in protecting the environment. Therefore, this study submits that the South African Government must cease treating socio-economic rights as

[183]Tladi op cit note 26 at 80.
[184]Kidd op cit note 88.

superior to environmental ones. The study aims to conscientise decision-makers on the importance of ecological sustainability in their decisions that may significantly affect the environment.

III CONCLUSION

The findings in this study reveal that the promulgation of environmental legislation is the right step towards the right direction for protecting the environment. However, how the South African Government prioritises socio-economic development and their interpretation and implementation of the national legislation on the environmental regime hinders environmental protection. Accordingly, the South African agenda of unjustifiably pursuing socio-economic development at the expense of the environment is inconsistent with the principle of integration and is not sustainable. This study's findings, conclusions, and recommendations may be utilised to assist the South African government with interpreting and implementing environmental legislation.

Chapter one provided the background for this study. Chapter two deals with the law related to environmental protection and provides the general position and the expectation as provided for in section 24 of the Constitution and other national environmental legislation. The law provided standards upon which decision-makers should base their decisions in the form of laws related to environmental protection. Chapter three deals with case law related to environmental protection and reveals that the standards set out in the law related to environmental protection are not adhered to when decisions that may impact the environment are made. Chapter 4 provided a critical analysis of the findings of this study.

The study aimed to explore how the South African Government plays its role in the protection of the environmental. This desktop study evaluated literature related to environmental protection, the provisions of section 24 of the Constitution, international human rights instruments, national legislation, and the case law on the environmental regime. The research question that framed this study is:

> **‘**Whether the manner in which South African Government plays its role in the protection of the environment enables or hinders environmental protection’?

This study states that section 24 of the Constitution ideally empowers the South African government to enable environmental protection. In keeping with this role, the South African government promulgated many national legislations on environmental protection. The scholars

agree that this is a step in the right direction, as it was intended to enable environmental protection. However, in reality, the misinterpretation and lack of implementation of the environmental laws witnessed in how the South African Government deals with people's social and economic needs, 'ecologically' sustainable development, unjustifiably prioritises socio-economic development over environmental protection, hinders environmental protection.

The literature reviewed in this study reveals that over-prioritising socio-economic development over environmental development is a global problem.[185] Furthermore, the South African Government's pursuit of unjustifiable economic development hinders environmental protection.

[185] Bosselmann op cit note 76.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Percival Mandlakhe Makhanya (210554216)
School Of Law
Pietermaritzburg

Dear Mr Percival Mandlakhe Makhanya,

Original application number: 00021838
Project title: Enabling or hindering environmental protection in South Africa: The role of government.

Exemption from Ethics Review

In response to your application received on 5/6/24 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

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.

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

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
Academic Leader Research
School Of Law