THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) UNDER THE LESOTHO ENVIRONMENT ACT N0 10 OF 2008 - A COMPARATIVE ANALYSIS WITH THE SOUTH AFRICAN EIA REGIME

By

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I certify that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work. It is submitted as the dissertation component (which counts for 50% of the degree) in partial fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law, University of KwaZulu-Natal, 2011.

Preface

The study discusses the law as it was at the beginning of 2010 and does not cover the EIA regulations that became operational in the latter part of the year.

ABSTRACT

Environmental Impact Assessment (EIA) has become common as the world realise that the environment has to be managed well for sustenance of life on the planet. As the EIA has now become a sine qua non in the management of the environment, the issue is how to ensure that it is best employed to achieve the desired results. There are various approaches that countries have used in their EIA processes, but it appears that the most efficient application emanates from having a legal basis for its use.

The two countries which are subjects of this study, Lesotho and South Africa, have been chosen primarily because of their geographic proximity to each other, which factor often exposes them to similar environmental experiences. Their response to such environmental challenges then becomes important. This study concentrates on statutory enactments in terms of the EIA processes by the two countries. Their EIA regimes are compared and contrasted. This is done against the background of what is considered the best international EIA practice. It is revealed that the two countries are not at par in their use of and experience with the EIA process. While Lesotho is encouraged to enrich its new practise from South African experiences with the EIA, South Africa too has some way to go towards the best EIA practice.

DECLARATION

I hereby declare that the whole of this dissertation, save as specifically acknowledged in the text is my own unaided work and has neither been published elsewhere nor submitted to any other university.

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AMANDUS THABANG TAPOLE **DATE**

As a supervisor, I agree to the submission of this dissertation.

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Prof. MICHAEL KIDD **DATE**

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DEDICATION

To God, who made heavens and earth.

ACRONYMS

AGOA- African Growth and Opportunities Act

BAR- Basic Assessment Report

CEA- Cumulative Environmental Assessment

DoE- Department of The Environment (Lesotho)

EA -Environmental Assessment

EIA- Environmental Impact Assessment

ECA-Environmental Conservation Act

EIS- Environmental Impact Study

IEM- Integrated Environmental Management

IA I A-International Association for Impact Assessment

LEA- Lesotho Environmental Authority

LENA- Lesotho News Agency

LCN-Lesotho Council of Non-governmental Organisations

LHDA- Lesotho Highlands Development Authority

LHWP-Lesotho Highlands Water Project

MDTFP- Maluti-Drakensberg Trans-Frontier Conservation Project

NAD- National Assembly Debates (Lesotho)

NES-National Environmental Secretariat

NEAP- National Environmental Action Plan (Lesotho)

NEMA-National Environmental Management Act

PB- Project Brief

RSA-Republic of South Africa

SEA-Strategic Environmental Assessment

SADC- Southern African Development Community

SAIEA- Southern African Institute for Environmental Assessment

SAFLII-Southern African Legal Information Institute

ToR- Terms of reference

UNEP-United Nations Environment Programme

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CHAPTER ONE: OVERVIEW

1.1 INTRODUCTION

Lesotho has recently enacted the Environment Act no 10 of 2008, which inter alia introduces various strategies and concepts in an attempt to ensure protection and management of the environment. These include the concept of the Environmental Impact Assessment (EIA). A decade earlier, the Republic of South Africa provided for EIA in its National Environmental Management Act no 107 of 1998 (NEMA).

These two countries, which are immediate neighbours, with South Africa completely surrounding Lesotho, are, as a result of this geographic proximity to each other, often exposed to similar developmental and environmental challenges. Their response, in terms of the EIA approaches to such challenges, thus becomes important for their mutual benefit. The Republic of South Africa has had a longer period of experimenting with the EIA legislation than Lesotho. It is from this wealth of experience that the present study aims to draw in order to enrich Lesotho's new path into this area.

Until now, Lesotho employed her EIA guidelines of 2002 as the basis for her general EIA requirements. This EIA regime, unlike the South African one, was not mandatory. However, with the law that has just been enacted the situation is expected to change. This raises some interest concerning how Lesotho will implement its mandatory EIA regime for the first time. To what extent will the experiences of its neighbour be of use to her? It has thus become necessary to examine the approaches employed by these countries.

The trend now advocated globally is sustainable development. This approach does not sacrifice environment for economic growth, nor vice versa. What sustainable development promises is economic development that conserves the environment. It is in sustainable development that the EIA finds its beneficial role of balancing the two and ultimately reaching the much-desired goal. Lesotho and South Africa have both embraced this approach. They have demonstrated, at various levels, their interest in the use of EIA.

1.2 STRUCTURE OF THE DISSERTATION

The dissertation is divided into five chapters. The first chapter introduces Lesotho's legal background, its environmental concerns and the need for sustainable development. EIA is

then introduced as a basic element of sustainable development that can address such concerns.

Chapter Two deals with the concept of EIA, its emergence from the United States of America (USA), and the role of the United Nations (UN) and other international bodies in the global acceptance of the concept. What is considered the best international EIA practice is discussed and set as a standard towards which the Lesotho and South African EIA regimes should aim.

Chapter Three analyses EIA legislation in South Africa and critically examines how it has been implemented. This is done by considering some decided cases that have set a trend in the application of EIA legislation and the degree to which it conforms to the international best EIA practices.

Chapter Four examines the EIA provisions under the Environment Act no 10 of 2008 of Lesotho, its apparent strengths and weakness and how the South Africa experience may be of relevance to Lesotho.

Chapter Five summarizes the EIA approaches that have been used by the two countries. Their similarities and differences are laid out. Specific recommendations are made on the basis of what the best international EIA practice provides, as well as what has worked positively in the South Africa and could be transferable to Lesotho.

1.3 BACKGROUND TO THE LEGAL SYSTEM OF LESOTHO

At the southern tip of the African continent, bounded by the Atlantic Ocean to the west and the Indian Ocean to the east, lies the Republic of South Africa. Within South Africa lies the landlocked mountain kingdom of Lesotho. This unique position has been described by Palmer and Poulter,[1] employing the graphic words of Austin Coates, that Lesotho „ "shares with the Republic of San Marino the distinction of being one of the only two countries in the world to be entirely enveloped by another country to have no access to the exterior except through that country, and thus by that country's grace and favour." ' Lesotho is one of the least developed countries in the world. The Kingdom covers an area of 30 355 square kilometres and about two-thirds of the landscape is not arable, as it is very mountainous.[2]

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[1] VV Palmer & SM Poulter *The Legal System of Lesotho.* (1972) 3 .

[2] http://www.africa.co/rsaboutlesotho.html (Accessed on 3 September 2009).

As a result of this geographical positioning, Lesotho has been subjected to various negative and positive influences,[3] historical, political, socio-economic, and even environmental, from its only neighbour. As for the law, South-Africa shares its historical Roman-Dutch common legal system with Lesotho.

Prior to gaining independence in 1966, Lesotho was essentially a British Colony, governed by the High Commissioner at the Cape of Good Hope. Through Proclamation No 2B, which was issued on 29 May 1884, Cape Colonial common law was applied in what was called Basutoland (Lesotho). [4] This is now known as section 2 of the General Law Proclamation and states:

> In all suits, actions or proceedings, civil or criminal, the law to be administered shall as nearly as the circumstances of the Country will permit be the same as the law for the time being in force in the Colony of the Cape of Good Hope: provided, however, that all suits, actions, or proceedings which all of the parties are Africans and all suits, actions, or proceedings whatsoever before any Basuto Court, African law may be administered. [5]

As can be seen from this provision, apart from imposing foreign law, the retention of the customary law, as had been administered by the Basotho Chiefs, was allowed. As Poulter puts it, this „represents the foundation stone of legal dualism in Lesotho.' [6] In other words, Lesotho has, since 1884, been using these two systems of law side by side. The customary law is partially codified in the Lerotholi code.[7]

When the country became independent in 1966, parliamentary statutes began to be enacted. These may override customary and / or common law, where it is deemed necessary and constitutional. This duality of the legal system poses various challenges and contradictions in the legal system of Lesotho. Even after forty years of independence such problems still exist.[8]

It is within this legal background that the judicial system of Lesotho will have to interpret and grapple with various modern environmental concerns.

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3 For a detailed exposition of such influences see J Hanlon *Beggar your neighbours*. (1986) 107.
4 S Poulter *Legal dualism in Lesotho* (1981) 2.
5 Laws of Basutoland (1960) (1) 340 .
6 See note 4 above, 2.
7 Laws of Lerotholi. (1959) revised, Morija.
8 See WCM Maqutu 'The judiciary of Lesotho over the past 40 years'. A paper presented during the 40th national independence celebrations in Maseru, Lesotho 9 November, 2006 (Ministry of Justice).

1.4 LESOTHO'S ENVIRONMENTAL CONCERNS

Though Lesotho's environmental concerns were raised mainly after independence, there is evidence that they originated long before that. An examination of various provisions of the Laws of Lerotholi shows a particular trend with regard to the use of land and certain aspects of flora. For example, the code reveals, under Part II section 11 (1), that „Every Chief and Headman may set aside special areas for *Leboella*'.[9] The code denotes *Leboella* as an „area set aside for the propagation of grass, thatching grass, reed beds, tree planting or rotational grazing'.[10] The breach of this provision would attract a maximum fine of £3 or one month's imprisonment.[11]

The environmental significance of these provisions cannot be ignored. They show that the community was aware of the ecologically degrading practices within its ranks and was taking steps to conserve soil, water and natural vegetation. Soil erosion, evidenced by dongas, was already a concern. The monetary sentences, which may appear to be very light by today's standards, were then some of the most stringent, especially in an agrarian society such as Lesotho.

All measures which were taken prior to independence to address the country's environmental problems seem to have had very little, if any, effect. In fact, it appears that this situation is getting worse since the attainment of independence in 1966; Ambrose[12] aptly highlighted Lesotho's environmental concerns in these words:

> Amongst developing countries, few have environmental problems as acute as Lesotho. Human intervention in the natural landscape has had an almost entirely negative effect: the landscape is scarred by gully and sheet erosion; the urban areas have grown without the planning which might have enhanced the quality of life; the cultural heritage is being lost through vandalism and neglect; and the educational system, oriented towards foreign examinations compounds the problems by failing to create the awareness and understanding which might provide appropriate remedies.

This observation is as valid today as it was when initially made. It has been the case notwithstanding some efforts which post-independence governments have undertaken to address the situation. Rightly concerned about this state of the environment, the then Head of

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[9] P Duncan *Sotho Laws and Customs* (1960) 116-140.
[10] Ibid 125.
[11] Ibid 124.
[12] D Ambrose 'Areas of environmental concern: A review of available information' in G Witzsch *Lesotho Environment and Environmental law* (1992) 203.

State, King Moshoeshoe II, had an occasion in 1988 to make a clarion call to the nation about it. This was at the International Conference on Environment and Development, hosted by Lesotho, in Maseru. The King stated:

> We, in Lesotho must use this time of Africa's crisis to understand and confront the dangers of our ever-deepening conditions of poverty and environmental deterioration and convert that time into our opportunity to reverse those dangers, and make a "fresh start" towards greater socio-economic justice, deeper awareness of all the environmental issues, and towards an ecologically sound development policy....(We) shall require a great deal of that common sense, political will, and vision, not only from the north and from the south, but also more importantly from Basotho themselves. All too tragically, what is increasingly becoming apparent in our African crisis is that such common sense, political will, and vision, seem to be in very short supply.[13]

As a response to the conference, the Lesotho government formulated and adopted a national environmental action plan in 1989. It was meant to provide a co-ordinated focus of efforts for a healthy environment. This action plan lists nine basic principles of Lesotho's environmental policies, the seventh being „to require prior environmental assessments of proposed activities which may significantly affect the environment for use of a natural resource'[14]. The action plan further called for the repeal of existing environmental laws and the creation of a new framework of environmental law.[15]

1.5 BRIEF HISTORY OF LESOTHO'S ENVIRONMENTAL LAW

It would appear that for three decades between independence and the 1990s, Lesotho's environmental concerns were neither addressed consistently nor comprehensively. This is evidenced by a plethora of statutory enactments, both prior to and after the independence era, which paid scant, if any, regard to the environment. The situation has been well summed up by Witzsch:

> Lesotho's environmental law is characterized by its fragmentation into many pieces of legislation, many of which deal with ecological matters only as an ancillary to other areas of laws. A comprehensive, systematic approach towards

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[13] His Majesty Moshoeshoe II speech 'Environment and development' in M Morison. (ed) *Clarion call-struggle for a better Lesotho* (1996) 166.

[14] Lesotho National Environmental Policy.

[15] See G Witzsch. *Lesotho Environment and Environment law* (1992) 6-7.

> environmental protection and enforcement has so far been missing in Lesotho's Legislation.[16]

Before enactment of the Environment Act 15 of 2001, only three statutes contained the words „environment' or „environmental'. These are the Public Order Act 12 of 1970, the Land Act 17 of 1979 and the Lesotho Highlands Development Authority Order 23 of 1986.[17]

These examples show that the level of environmental awareness was inadequate to create a comprehensive approach. The 1966 Constitution did not contain any environmental protection clause that could have provided a national rallying point around environmental issues. So the King's call in 1988, and the subsequent adoption of the National Environmental Action Plan, played a major role in creating a national consensus around the environmental question. The need to overhaul the existing environmental laws and to enact a framework of environmental legislation became more plausible. There were also calls for the entrenchment of a clause in the Constitution for the protection of the environment.[18]

Important political changes happened between 1991 and 1993 (the re-establishment of constitutional order from the military rule since 1986) and the ushering in of the new constitutional order in 1993. Section 36 of this new constitution (The Constitution) states: „Lesotho shall adopt policies designed to protect and enhance the national and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure all citizens a sound and safe environment for their health and well-being'.[19]

On the strength of this constitutional mandate, the government approved the „National Environmental Policy' in 1996. In 1998 it was reviewed and changes adopted.[20] This document, The National Environment Policy 1998, states, at the on-set, that its goal „...is to achieve sustainable livelihoods and development for Lesotho'.[21]

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16 Ibid 7.
17 Ibid 8.
18 Ibid 12.
19 Lesotho Constitution 1993 section 36.
20 National Environment Secretariat. Second State of the Environment Report 2002 (2002) 178.
21 National Environment Secretariat. National Environmental Policy (1998) Article 2.1 Available at http://www.esc.co.sz/env-leg-lesothoenvpolicy.htm.Accessed on 12/06/08.

1.6 THE QUEST FOR SUSTAINABLE DEVELOPMENT IN LESOTHO

According to Kidd:[22]

> The concept of sustainable development was generally considered to have been coined by the World Commission on Environment and Development. The WCED defined it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Two concepts are fundamentally tied to the idea of sustainable development. One is that the basic needs of humanity (food, clothing, shelter and employment) must be met. The other is that the limits to development are not absolute but are imposed by present state of technology and social organisation and by their impacts upon environmental resources and upon the biosphere's ability to absorb the effect of human activities.

Another detailed and authoritative explanation of what the concept entails may be found in the International Court of Justice case concerning the constitution of the Gabcikovo-Nagymaros Project (between Hungary and Slovakia), wherein Justice Weeramanty said:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effect upon the environment. Owing to new scientific insights and to growing awareness of the risks for mankind-for present and future generations of pursuit of such interventions at an unconsidered and unabated pace. New norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities began in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[23]

Lesotho subscribes to the United Nations as well as the International Court of Justice. Therefore its claim to employ the „sustainable development concept' in its environmental policy should derive from the meaning expounded by these bodies.

Since attaining independence in 1966, Lesotho has undertaken various social and economic policies in an endeavour to uplift itself from a state of poverty. What emerges as a clear trend throughout the analysis of its economic policies is that their environmental impact was not taken into account. As the *Second State of the Environment Report* (the Environment Report) states, „The macro–economic framework adopted in Lesotho, as articulated by the economic

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[22] M Kidd *Environmental Law* (2008) 16.
[23] 37 *International Legal Materials* 162 (1998).

policies that are being pursued, constitutes the major driving force for economic activity and its concomitant environmental impacts'.[24]

The report continues:

> In Lesotho, as in many other developing countries, economic development policies have been articulated through five-year development plans. The five-year development plans, however, had little regard for environmental effects of economic activities. This has been the case despite the fact that many of the policies advocated in these five-year development plans were natural environment-intensive, i.e. highly reliant on the natural environment for success. For instance, the five-year development plan of 1970/71-1975/75 laid heavy emphasis on the exploitation of domestic resources through enhancing agricultural productivity. This clearly poses a great risk of environmental degradation but did not call for the deployment of clear mitigation strategies.[25]

Thus much harm has been inflicted on the physical and ecological environment of the country perhaps somewhat unwittingly, but nevertheless tragically. Some of the effects of these policies are obvious for everybody to see. The effects of some are yet to emerge. The Environment Report gives some examples of these:

> Mining, construction, transport and infrastructure have contributed to negative environmental impacts change. This is through habitat destruction, water, noise and air pollution and visual impacts. There are three large-scale diamond mining activities in the country–Kolo, Lighobong, and Letšeng-La-Terai. Over and above this, there are individuals engaged in diamond mining on a small scale. Slurry from diamond mines impacts on water and stone crushing activities creates noise and air pollution. Burrowing pits utilised for road construction and other infrastructural activities are not rehabilitated, thereby creating the negative visual impact on the landscape.[26]

Indeed, all these are painful reminders that Lesotho's economic journey has hitherto not been a balanced one. Temporary economic gains that were made in the process are not worth much, in view of the negative impacts they have had on the country. The lesson that emanates is that, even though Lesotho's economic options are limited, such should be embarked upon sustainably. Lesotho has no alternative but to create and deploy mitigation strategies whenever it undertakes development projects.

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[24] National Environment Secretariat. Second State of Environment Report. (2002) 26
[25] Ibid 26.
[26] Ibid 20.

It is disheartening to observe that, even after adopting the National Environmental Policy in 1996, the environment was still subjected to more degradation in the execution of another prime policy concern: abject-poverty alleviation. This is noted in the Environmental Report as follows:

> The Government of Lesotho adopted its sustainable human development policy in 1996, thus ushering in a new strategy of poverty alleviation. The policy also had significant environmental implications that were, arguably, not foreseen. For example, the heavy reliance on labour intensive methods under the „fato-fato'[27] of the late 1990s laid more emphasis on giving people livelihoods through the food and money earned than on the actual infrastructure projects. The result of this has been catastrophic on the environment with a lot of road and dam projects ending up as catalysts of environmental degradation rather than, as was intended, development.[28]

In analysis, this means, firstly, that the socio-political and economic benefits of the projects were emphasised at the expense of the physical environment. Secondly, it means that the mitigation strategies such as the environmental impact assessment, which were built into the policy, were not employed, or simply not effective, to counter-balance the negative environmental effects, in which case new and other instruments will have to be employed. Thirdly, Lesotho, in retrospect, has to determine whether the above cited example actually sets a trend to be followed in environmental issues or not. Genuine response to these three points shall indicate how a nation measures on the scale set by King Moshoeshoe II's speech in 1988, in which he pleaded for a „"fresh-start" ' , will and vision.

It appears that progress towards attaining environmental protection and sustainable development has been retarded by a lack of an integrated approach to development. The latter would require that all measures towards positive economic development be applied or be taken into account. This necessarily includes mitigation measures which will off-set the negative aspect of developmental process. Only in this way can the way forward be clearly mapped out and progress made. It would appear that there are already available strategies in this regard such as the National Environment Policy, which has these mechanisms built in. For example, under Article 3.1, entitled „Social and economic dimensions,[29] it is mentioned:

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[27] This refers to the construction of unsupervised road paths and dams done by simply digging the ground and laying gravel. This is obviously prone to erosion.

[28] National Environment Secretariat. *Second State of the Environmental Report* (2002) 14.

[29] See note 14 above, 3.

> Pre-requisites for sustainable development include a commitment to transitional programmes of sound economic policies and management, effective and predictable public administration, democratic governance, and the integration of environmental consideration within the decision-making processes.

Article 4.6, entitled „Integrating environment and development into decision-making,' provides more specific procedures and tools in this regard.[30] The objective is clearly stated as „(t)o ensure that environmental considerations are incorporated at every level of decision-making during formulation, design implementation and management of development programmes and projects'.[31] The first strategy towards achievement of this objective is to „develop and implement an Environmental Impact Assessment (EIA) Policy.' [32] Article 4.22, „Environmental impact assessment, audits and monitoring' has as its objective: „To develop a system and guidelines for Environmental Impact Assessment (EIA), audits monitoring and evaluation so that adverse environmental impacts can be eliminated or mitigated and environmental benefits enhanced'. [33]

Besides this, EIA finds expression of approval in one of the most important documents containing national aspirations. This is the Lesotho Vision 2020 document. Article 2.3.6, „A well-managed environment', states: „Every development in the country will be subjected to an intensive Environment Impact Assessment (EIA) to gauge its environmental friendliness.' [34] This highlights the critical role EIA is meant to play in the attainment of the sustainable development goal. There seems to be a national consensus on the importance of this management tool in this process. However, it should be borne in mind that EIA is simply a tool that can be used to yield particular results, but not an end in itself. In other words, even if all national strategies may refer to it, it will still not yield the expected results as long as it is not used correctly or set up on an appropriate system; for example, if the EIA system is set within an oppressive socio-political/legal regime, it hardly yields the maximum results expected of it since public participation processes, inter alia would usually not be prioritized under such circumstances. This may be attributable to its (EIA) nature, which demands transparency.

It is pertinent at this juncture to examine in some detail what exactly EIA is.

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[30] Ibid 6.
[31] Ibid 6.
[32] Ibid 6.
[33] Ibid 13.
[34] *Lesotho Vision* 2020. Available at www.gov.ls.

CHAPTER TWO: DEVELOPMENT OF EIA

2.1 EIA AND ITS DEVELOPMENT

Almost (40) years ago, one of the development-pace-setter nations of the world, the United States of America (USA), came to realize that something was wrong with its developmental processes; something that was threatening to undermine its spectacular industrial and commercial strikes so far made. The required a remedy based on national commitment and the arm of the Law to deal with it. This challenge was the environmental neglect that was manifesting in all sorts of ecological disasters. Various authors have documented these events, but what is most important of all is that it was at this time that the idea of the Environmental Impact Assessment (EIA) was conceived and enacted into Law in America.[35]

Wood, a world-renowned authority on the EIA, defines it as „the evaluation of the effects likely to arise from a major project (or other action) significantly *affecting the natural and manmade environment'*.[36]

This is not the only acceptable definition of this term, but it appears to be the one general enough to capture the core essence of the concept, without over-emphasising any particular aspect. Other authorities, while retaining this core essence, emphasis other aspects thereof in their definitions. For example, Sands describes it as:

> A process which produces a written statement to be used to guide decision- making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and in some cases, programmes and policies and their alternative. Secondly, it requires decisions to be influenced by that information. And thirdly, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.[37]

As the concept gained global adoption and prominence it also appears to have gathered various definitional inconsistencies. In fact, other jurisdictions still use the generic term Environmental Assessment (EA). However, as Glazewski, a South African Environmental Law Authority shows, „Environmental Impact Assessment (EIA) is probably the most

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[35] W Sheate *Environmental Impact Assessment: Law and policy making an Impact* (1996) 16-17.
[36] C Wood *Environmental Impact Assessment: A Comparative Review* (1995) 1.
[37] P Sands *Principles of International Environmental Law* 2ed (2003) 800.

common term used in practice but its meaning varies according to jurisdiction and circumstance.'[38]

In simple terms one may understand the EIA as consisting of a systematic process undertaken with a view to producing particular data that will be employed to influence a developmental decision that has an impact on the environment.

Various countries in the world, including Lesotho and South Africa, have adopted this concept with the same objective; that is to realise its value as it influences their developmental decisions which have a bearing on their environment. The main influence for adoption of this concept came from the United Nations Organisation (UNO) and its agencies.

2.2 THE ROLE OF THE UNITED NATIONS

The United Nations Organisation, through its agencies and many conferences, played a pivotal role in the development of the E.I.A, as individual nations were grappling with the concept of balancing environmental issues with economic development. The UN (as a group of nations) was also attempting to find solutions to this challenge. Three UN conferences that played this major role are worth a brief mention. These are the Stockholm Conference in 1972, the Rio Declaration in 1992 and the Johannesburg Declaration in 2002. In 1972 the UN held a conference on the Human Environment and Development in Stockholm.[39] As a result of the environmental and developmental concerns raised there the UN appointed the World Commission on Environment and Development (WCED) in 1983, to find ways of reconciling environmental protection concerns with economic development.[40]

The Commission, which was chaired by Gro Harlem Brundtland, published its report, „Our Common Future', in April 1987 and provided a momentum for the 1992 Earth Summit and Rio Declaration.[41]The latter reaffirmed the concerns raised in the Stockholm Conference in 1972. Under the principle 4, The Rio Declaration in Environment and Development stated that „... environmental protection shall constitute an integral part of the development process

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[38] J Glazewski *Environmental Law in South Africa* 2ed (2005) 230.
[39] SA Atapattu *Emerging principles of International Environmental Law* (2006) 82.
[40] Ibid.
[41] Ibid.

and cannot be considered in isolation from it.'[42] This was a clear indication of the interdependence of the environmental and developmental concerns at the international level.

The Declaration provided for the EIA under principle 17.[43] „Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.'

The third conference, The Johannesburg Declaration on Sustainable Development, reaffirmed Agenda 21 and The Rio Declaration as the new agenda for sustainable development. „It sought to strengthen the interdependence of the "mutually reinforcing pillars of sustainable development; economic development, social development and environmental protection" at local, national, regional and global levels'.[44]

The significance of this conference on the development of the EIA was its ability to emphasise the interdependence of the three pillars of sustainable development.[45] This is exactly where EIA comes into the picture. The EIA has the capacity to yield information that can be used to balance the economic, social and environmental pillars of development, so as to attain sustainability in development. The centrality of EIA in the attainment of sustainable development has been evidently displayed by the United Nations Environment Programme (UNEP)'s definition of EIA. In its 1987 Principles of EIA, it defined EIA as „an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.' [46]

The concept of sustainable development, which had been the theme running throughout the Rio Declaration, was, however, not defined by these three conferences. It is the WCED that defined it a „development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'.[47]

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[42] Rio Declaration on Environment and Development. N0 16. Principle 4. *Selected Texts of Legal Instruments in International Environment law.* UNEP.2005:86.

[43] Ibid 87.

[44] Ibid, 101. Johannesburg Declaration on Sustainable Development. N019 .Para 5 and 8.

[45] Ibid, Para 5.

[46] Atapattu (note 39 above) 325.

[47] World Commission on Environment and Development: *Our Common Future* (1987) 43. See also Gabcikovo-Naqymaros Case. 37 International Legal Materials (1998) 162. In the context of South African case law, *BP Southern African (PTY) LTD v MEC for Agriculture, Conservation and Land Affairs,* (2002) (1) SA 478, where it was stated that by elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road which will lead to the goal of attaining a protected environment by an

Throughout these stages of international EIA development and awakening, both Lesotho and South Africa were not left behind. Lesotho played its initial role by hosting an International Conference on Environment and Development in 1988, in Maseru, while South Africa hosted the 2002 conference on Sustainable Development, in Johannesburg. The EIA regimes that will be discussed later are but a culmination of legislative measures, the foundations of which were laid by these conferences.

Apart from the initial efforts at internationalising EIA awareness, UNEP took some practical steps in the concretization of EIA by issuing the principles of EIA for adoption by states at national, regional and international levels.[48] These guidelines have indeed been influential. This has been noted by Atapattu, who acknowledges that the non-binding nature of the UNEP guidelines have not precluded their significance in shaping the EIA law. He cites the Convention on Environmental Impact Assessment in a Transboundary Context 1991 (ESPOO) as a typical example.[49]

Again this is a reflection of a definite developmental stage being reached in the EIA evolution. Though this Convention was the first to adopt provisions on EIA in 1991, there are now several others that embody such provisions.[50]

Other international institutions, such as the World Bank played a role in introducing the concept of the EIA into developing countries such as Lesotho and South Africa. This was mainly through the Bank's Operational Directive adopted in 1989, wherein the Bank would require compliance with EIA processes as a pre-condition for funding projects and thus would impose its own EIA processes.[51]

The World Bank EIA process is of interest in this study, for it has a bearing on some projects affecting both Lesotho and South Africa. Its adequacy or otherwise shall be examined in the chapter on the Lesotho EIA.

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integrated approach, which takes into account consideration, inter alia, socio-economic concerns and principles.

[48] Atapattu (note 39 above) 235.

[49] Ibid, 327.

[50] Ibid, 309.

[51] Center for International Environmental Law. *A Comparison of six Environmental Impacts Regimes* (1995) http;//www.Ciel.org/publications.Accessed on 10 December 2008 .

2.3 CONTEMPORARY INTERNATIONAL EIA STANDARDS

As the EIA practise became more common around the world, so did its variations as it was adapted in different countries with different approaches. In spite of this, there are still some core elements that have remained as the backbone to its good practice. According to Wood, „These relate to legal basis; coverage, consideration of alternatives; screening; scoping; EIA report preparation; EIA report review; decision-making, impact monitoring, mitigation; consultation and participation; system monitoring, costs benefits; and strategic Environmental Assessment'. [52] These fourteen points of concern should act as the evaluation criteria for determining strengths and weaknesses of the EIA processes. [53]

Apart from these criteria, the International Association for Impact Assessment (IAIA) in co-operation with the Environmental Assessment (UK) has issued the principles of Environmental Impact Assessment Best Practice.[54] (See table 1 and 2)

These standards shall constitute the background against which the Lesotho and South African EIA regime shall be compared and contrasted. It is with the South African regime that we shall firstly deal in the following chapter.

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[52] Christopher Wood *Environmental Impact Assessment in Developing Countries: An Overview*. 24-25 Nov 2003. http:-//www.sed.man.ac.uk/research/icrc/ediars/PDF. Accessed on 11/10/2010.

[53] Ibid.

[54] International Association for Impact Assessment. Principles of Environmental Impact Assessment Best Practice. USA. AIAI. Http:-//www.unep.ch/etu/Publications/eia.../EIA..Etop1hd.PDF-Accessed on 10/11/2010.

2.3.1 TABLE 1

Basic Principles

Environmental Impact Assessment should be:

Purposive – the process should inform decision-making and result in appropriate levels of environmental protection and community well-being

Rigorous –the process should apply „„„best practicable ''' science, employing methodologies and techniques appropriate to address the problems being investigated.

Practical – the process should result in information and outputs which assist with problem solving and are acceptable to, and able to be implemented by, proponents.

Relevant – the process should provide sufficient, reliable and usable information for development planning and decision-making.

Cost-effective – the process should achieve the objectives of EIA within the limits of available information, time, resources and methodology.

Efficient – the process should impose the minimum cost burdens in terms of time and finance on proponents and participants, consistent with meeting accepted requirements and objectives of EIA.

Focused – the process should concentrate on significant environmental effects and key issues; i.e., the matters that need to be taken into account in making decisions.

Adaptive – the process should be adjusted to the realities, issues and circumstances of the proposals under review, without compromising the integrity of the process, and be iterative, incorporating lessons learned throughout the proposal's life-cycle.

Participative – the process should provide appropriate opportunities to inform and involve the interested and affected parties and their inputs and concerns should be addressed explicitly in the documentation and decision-making.

Interdisciplinary – the process should ensure that the appropriate techniques and experts in the relevant bio-physical and socio-economic disciplines are employed, including use of

traditional knowledge.

Credible – the process should be carried out with professionalism, rigour, fairness, objectivity, impartiality and balance and be subject to independent checks and verification.

Integrated – the process should address the interrelationships of social, economic and biophysical aspects.

Transparent – the process should have clear, easily understood requirements for EIA content; public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties.

Systematic – the process should result in full consideration of all relevant information on the affected environment, of proposed alternatives and their impacts and of the measures necessary to monitor and investigate residual effects.

2.3.2 TABLE 2

2.3 Operating Principles

The EIA Process should be applied:

- As early as possible in decision making and throughout the life cycle of the proposed activity;
- To all development proposals that may cause potentially significant effects;
- To biophysical impacts and relevant socio-economic factors, including health, culture, gender, lifestyle, age and cumulative effects and consistent with the concept and principles of sustainable development;
- To provide for the environment and input of communities and industries affected by a proposal, as well as the interested public;
- In accordance with internationally agreed measures and activities.

Specifically the EIA process should provide for:

Screening – to determine whether or not a proposal Should be subject to EIA and, if so at what level of detail.

Scoping – to identify the issues and impacts that are likely to be important and to establish terms of reference for EIA.

Examination of alternatives – to establish the preferred or most environmentally sound and benign option for achieving proposal objectives.

Impact analysis-to identify and predict the likely environmental, social and other related effects of the proposal.

Mitigation and impact management-to establish the measures that are necessary to avoid, minimize or offset predicted adverse impacts and, where appropriate to incorporate these into an environmental management plan or system.

Evaluation of significance-to determine the relative importance and acceptability of residual impacts (i.e., impacts that cannot be mitigated).

Preparation of environmental impact statement (EIS) or report- to document clearly and impartially impacts of the proposal, the proposed measures for mitigation, the significance of effects and the concerns of the interested public and the communities affected by the proposal.

Review of the EIS – to determine whether the report meets its terms of reference, provides a satisfactory assessment of the proposal(s) and contains the information required for decision making.

Decision making- to approve or reject the proposal and to establish the terms and conditions for its implementation.

Follow up- to ensure that the terms and conditions of approval are met; to monitor the impacts of development and the effectiveness of mitigation measures; to strengthen future EIA applications and mitigation measures; and where required, to undertake environmental audit and process evaluation to optimize environmental management.*

*it is desirable, whenever possible, if monitoring, evaluation and management plan indicators are designed so they also contribute to local, national and global monitoring of the state of the environment and sustainable development.

CHAPTER THREE

EIA LEGISLATION IN SOUTH AFRICA

3.1 INTRODUCTION AND ENVIRONMENTAL CONCERNS

Apart from surrounding Lesotho, South Africa shares common boundaries with five more Southern African states. These are Botswana, Swaziland, Zimbabwe, Mozambique and Namibia. It is a vast country, with a surface area of 1 219 00 square km and a population of 46.9 million. [55] While South Africa is endowed with its fair share of natural resources, it is not exempt from the increasing deterioration in environmental quality in the Southern African region. [56] This is evidenced by factors such as persistent drought, shortage of land, soil erosion and degradation, various forms of pollution and poverty. [57] The apartheid policy left the country with a legacy of extreme inequalities and lack of access to land by the majority of the people. These are some of the challenges that South Africa has to address. [58]

South Africa is now a member of the Southern African Development Community (SADC) and of the New Partnership for African Development (NEPAD). Through these bodies it has embraced the concept of sustainable development as a „vehicle' to achieving its own development, as well as those for the region. It was in the development of this undertaking that South Africa hosted the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002. A steering device for this process appears to be the EIA, for it has the inbuilt mechanisms to keep the process balanced

3.2. EIA LEGISLATION AND PRACTICE

It would appear that the idea of an environmental assessment did not wholly come to Africa from the American National Environmental Policy Act (NEPA.) There is evidence that some African countries were already practising aspects of EIA during the 1970s. This holds true for South Africa as well. As Glazewski shows:

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[55] *State of the Environment Report* (S A) (2006) xix.

[56] J Glazewski *Environmental Law in South Africa 2ed* (2005) 5.

[57] P Nqobese & J Cock, 'Development and the environment' in Patrick Fitzegerald et al (eds) *Managing Sustainable Development in South Africa* (2ed) (1997) 257-258.

[58] B Cousins 'Contextualising the controversies : dilemmas of communal tenure reform in post-apartheid South Africa' in A Claasens & B Cousins (eds) *Land, Power and Custom* (2008).

> Environmental assessment has been practised extensively in South Africa, particularly for large projects, since the 1970s. The impetus for this practice originally came about not from legislation but rather from the development of the Integrated Environment Management (IEM) procedure by the Council for the Environment and the Department of Environmental Affairs and Tourism.[59]

This shows that environmental assessments were always at the centre of some environmental management integration processes. There is an indication that the EIA process can still be undertaken even without a formal legislative framework. Evidence exists in several hundred voluntary EIAs that were conducted during that time.[60] The advent of the EIA in the form of legislation thus served to strengthen these processes. In South Africa most of the EIA projects were undertaken under the now repealed Environmental Conservation Act no 73 of 1989 (hereafter referred to as ECA). Even when the National Environmental Management Act no 107 of 1998 (NEMA) came into force in 1998, its EIA regime in terms of the regulations was not ready. It was only in 2006 when the EIA regulations became operational that EIA under ECA ceased to operate. In the next section, the exposition of South African EIA law will start with an overview of the provisions under the repealed Act. Then the provisions under NEMA will be considered.

3.3. EIA PROVISIONS WITHIN THE ENVIRONMENT CONSERVATION ACT 73 OF 1989 (ECA)

This Act provided for the Minister of Environmental Affairs and Tourism to identify those activities which in his/her opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas. [61]

An identified activity in terms of section 21 (1) could include, but was not limited to, the eleven categories mentioned in the subsection. These include land use and transformation; water use and disposal; agricultural processes; industrial processes and recreation.[62] Undertaking of any identified activity, or one falling under any category, was prohibited except by virtue of a Minister's or competent authorities or local authority's written

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[59] Glazewski (note 56 above).

[60] Southern African Institute For Environmental Assessment (SAIEA) *Handbook on Environmental Assessment Legislation in SADC Region* – Country Report South Africa :- (2003) :- 212.

[61] ECA-Section 21 (1).

[62] Section 21 (2).

authorisation.[63] The competent authority was the Member of the Executive Council (hereafter called MEC) in the province concerned. The Minister's involvement occurred if the activity in question was of national importance or its effects were going to be felt across provincial borders.

The authorisation in question would only be issued after consideration of reports concerning the impact of the proposed activity and its alternatives.[64] The Minister was empowered to make regulations with regard to any activity identified, including the scope and content of the environmental impacts reports, their evaluation, drafting and the procedure to be followed.[65] Such regulations were only made in 1997. The Minister promulgated a list of identified activities and EIA regulations to accompany them.[66] The list of identified activities has been amended several times, in an attempt to cover all possible areas where detrimental effect on the environment may be experienced. The list includes activities such as the establishment and operation of waste management sites,[67] release of any organism outside its natural area of distribution for purposes of using it as a pest control measure, scheduled processes in terms of the Atmospheric Pollution Prevention Act[68] and importation of any plant or animal that has been declared a weed or invasive alien species.

There are also general EIA regulations which prescribed the processes which the applicant or developer was to follow.[69] These may be summarized as follows:

1) The requirement for an independent consultant. The regulations clearly state that a person carrying out the assessment must be independent.[70] The notion of this independence is contained in the subsequent subsections which state inter alia that such a consultant has to have no financial or other interests in the undertaking, except an interest in complying with these regulations, expertise in the area of environmental concern and a good working knowledge of all relevant policies, legislation, guidelines, norms and standards.[71] This requirement was very important in ensuring that required standards in conducting an EIA would not be compromised. However, what remains questionable is the degree of

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63 Section 22.
64 Section 22 (2).
65 Section 26.
66 See GN R1182 *in GG 18261 of 5 September 1997*.
67 Under section 20 of ECA.
68 Act 45 of 1965.
69 GN R1183 in *GG 18261 of 5 September 1997*.
70 Reg 3 (1) a.
71 Reg 3 (1) c, 3(1)d (1), 3 (1) d (11).

independence that is expected of the consultant who is employed and paid by the applicant or project proposer. Does this mean that the consultant's lack of any other interest in the undertaking genuinely means exclusion of the client interest from whom he/she received the mandate?

2) Authorisation to undertake a listed activity. The regulations provide for a form to be submitted to the relevant authority, which is normally the provincial department concerned.[72] Where the circumstances are that the activity concerned has implications for national environmental policy, or international environmental commitments, or is likely to have cross-provincial implications, then it must be submitted to the Minister of Environmental Affairs.[73] There is, however, another sub-regulation, which provides that the Minister and the Provincial Authority concerned may jointly decide that such an application may be considered by the Provincial Authority.[74]

3) Screening. The regulations require that the determination of the level of EIA assessment should be undertaken to determine whether a full EIA process will be required or whether a preliminary survey suffices for the issuing of a licence.

4) Scoping. This process often overlaps with screening. Scoping follows immediately after screening in order to focus the EIA process on the most important aspects that need the EIA.

5) EIA process. This follows after scoping, unless the relevant authority decides that it is adequate for a decision to be made on the proposal in question.[75] In a case where an EIA process is needed, the applicant must submit a further "plan of study," with prescribed details for EIA.[76]

6) Record of decision and appeal. After the EIA process has been carried out and submitted, the relevant authority must consider the application either to approve or disapprove, or to attach some conditions with respect to the application.[77]

These were some of the main EIA sections in ECA. There are EIA provisions in the National Environment Management Act[78] (NEMA). When NEMA came into being in 1998, the EIA

[72] Reg 4 (2).
[73] Reg 4 (3) (a) – (e).
[74] Reg 4 (3) (a) inserted by R 1645.
[75] Reg 6 (3) (a).
[76] Reg 7 (1).
[77] Reg 9 (1).
[78] Act 107 of 1998.

regulations (1997) in ECA had only been in use for one year. Then NEMA replaced the bulk of the ECA provisions, except those pertaining to EIA (parts V, VI and VII). These were in force until the EIA regulations envisioned under NEMA (section 24) were promulgated and the Minister was satisfied that the regulations and notices under sections 21 and 22 of ECA had „become redundant'.[79] The decided cases that will be discussed in this study were concluded during the time of the ECA-EIA first set of regulations (2006). This was before the promulgation of the NEMA Amendment Act 62 of 2008.

3.4. EIA PROVISIONS UNDER NEMA

Chapter Five of NEMA, entitled „Integrated Environmental Management', states that a general objective of the chapter is the promotion of the application of appropriate environmental management tools. [80]

It is perhaps necessary at the outset to clearly distinguish EIA from the concept of „Integrated Environmental Management' (IEM). As Retief and Kotzé warn, there is a misconception in South Africa „that IEM is synonymous with EIA'. [81] They attribute this misconception to the fact that Chapter Five „incorrectly uses the term IEM to postulate the EIA mandate'.[82]

It will be realized that NEMA does not define IEM but it can be gathered from the stated management principles, under section 2 (4) (b), where the word „integrated' is used, that reference is being made to a holistic and co-ordinated style of managing all aspects of the environment. In full, the provision reads as follows:

> Environmental management must be integrated, acknowledging that elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.[83]

The import of this provision is different from the definition of EIA given in Chapter Two of the present study. In referring to EIA in this study, note should be taken that it is not referring to IEM. This confusion of terminology is not apparent under the Lesotho EIA regime. This is probably because the chapter that deals with the EIA and its processes does not also seek to

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[79] NEMA section 50.
[80] NEMA section 23 (1).
[81] F Retief & L.Kotzé 'The lion, the ape and the donkey; cursory observations on the misinterpretation and misrepresentation of environmental impact assessment (EIA) in the chronicles of Fuel Retailers'(2008) 15 *SAJELP* 139 , 143.
[82] Ibid.
[83] NEMA section 2 (4) (b).

promote other objectives related to the EIA. [84] In fact the word „integrate' does not appear in the Act. [85]

At most, EIA is just one of the varied environmental management tools which may be used towards the achievement of IEM. Whatever the case may be, the position at present is that most of the attributes of EIA are reflected in this chapter and include identification, prediction and evaluation of the impact on the environment, socio-economic conditions, cultural heritage, the risk and consequences of undertaking a particular activity.[86]

The main provisions of the EIA are found in section 24 „Environmental Authorizations'. This section, while seeking to give effect to the general objectives of the IEM, is specifically devoted to the implementation of the EIA. It starts by emphasising„…that the potential impact on the environment of listed activities, must be considered investigated, assessed, and reported to the competent authority charged by this Act with granting the relevant environmental authorization …'[87]

„Competent authority' has been defined to be „... the organ of state, charged by this Act with evaluating the environmental impact of that activity and, where appropriate, granting or refusing authorisation'.[88] The Amendment Act also provides the procedure for identifying the competent authority in terms of section 24 (2). In particular, it provides that the Minister of Minerals and Energy must be identified as the competent authority where the activity involves prospecting, mining, exploration, production, or when a related activity occurs within such an area.[89] Otherwise, reference to the Minister in relation to all environmental matters means the Minister of Environmental Affairs and Tourism.[90]

The word „activities' has been defined in a broad manner to include policies, programmes, processes, plans and projects.[91] This broad definition includes strategic environmental assessment (SEA). This is another tool which is used in environmental management.

As a second step towards authorisation:

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[84] Environment Act no 10 of 2008 sect 19. Though mention is made of SEA, it remains abundantly clear that all processes made thereunder pertain to EIA only.
[85] Ibid.
[86] NEMA sect 23 (2) (b).
[87] NEMA section 24 (1)
[88] Section 1 as inserted by sect 1 (c) of Act no 8 of 2004.
[89] Section 24 c (2A) of the NEMA Amendment Act 62 of 2008.
[90] Section 1 (k) of the NEMA Amendment Act 62 of 2008.
[91] Section 1 of the NEMA Amendment Act 62 of 2008.

> The Minister and every MEC, with the concurrence of the Minister, may identify-
>
> a) activities which may not commence without environmental authorization from the competent authority;
>
> b) geographical areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may not commence without environmental authorization from the competent authority;
>
> c) geographical areas based on environmental attributes, and specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may be excluded from authorisation by the competent authority;
>
> d) individual or generic existing activities which may have a detrimental effect on the environment and in respect of which an application for an environmental authorisation must be made to the competent authority…[92]

In terms of section 24 D, the Minister or MEC must publish a notice in the Government Gazette listing activities and areas identified under section 24 (2) and listing competent authorities identified in terms of section 24, as well as the date on which the list is to come into force.

This was duly effected through the Government Gazette of 21 April 2006 [93], which published regulations on the processes to be followed,[94] a list of activities and competent authorities for which a basic assessment as opposed to the full EIA shall be required, [95] as well as the list of activities and competent authorities for activities requiring both scoping and EIA.[96] The date on which these notices came into force was 3 July 2006. Activities related to mining would require a separate notice of taking effect, even though they were included in these notices.[97]

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[92] Section 24 (2) (a); (b); (c); (d), as substituted by the NEMA Amendment Act 62 of 2008.
[93] *GG 28753 of 21 April 2006*.
[94] GN R 385.
[95] GN R 386.
[96] GN R 387.
[97] This is per GN R 613 in *GG 28938 of 23 June 2006*.

The listed activities may also be delisted if circumstances so require, but the Minister or MEC must comply with the requirements of section 24 (A) in delisting. This entails publication in a Government Gazette, specifying through description, map or any other appropriate manner, the activity that is to be delisted and inviting interested parties to submit written comments on proposed delisting within a specified period.[98]

The Act also sets some minimum requirements that must be met with respect to every application for an environmental authorisation. These requirements relate to procedures for the investigation, assessment and communication of the potential activities.[99] Applications for EIA authorisation must ensure, as a minimum, that there has been:

- investigation of the potential impact of the activity and its alternatives;
- integration of mitigation measures and consideration of the „no action' option;
- must ensure public participation and access to information;
- reporting on gaps in knowledge and adequacy of predictive methods and underlying assumptions.
- co-ordination and co-operation in assessments where the activity falls under the jurisdiction of more than one organ of state.
- that findings and recommendations borne out of the activities, including objectives of the integrated environmental management, as well as the principles of environmental management under section 2 of NEMA, are taken into account by an organ of state.[100]

The Minister or MEC, with the Minister's consent, may make regulations consistent with section 4, *inter alia*, setting out the procedures to be followed when applying for environmental authorisation, administration and processing of environmental authorisation; conflict management in the consideration and processing of these applications; exemptions from provisions of any regulations and appeals, to mention but a few. It is the Minister alone who is empowered to make regulations where activities will traverse international borders, or impact on international customary law or international conventions.[101] Environmental authorisation, as a minimum, must ensure adequacy in the provision for the on-going

[98] NEMA section 24 A (a) and (b).
[99] NEMA section 24 (4).
[100] NEMA section 24 (4) (a) (b) (c) (d) (e) (f) (g) (h).
[101] NEMA section 24 (5) read with (9).

management and monitoring; that the site of the activities is clearly specified, and that there exists adequate provision for transfer of rights in case of change of ownership.[102]

It is an offence to commence an activity listed under section 24 (2) (a), (b) and (d) without authorisation, or to continue with the existing one where its application has been refused. A stringent punishment of a fine of five million rands, or a ten-year imprisonment term, or both, are provided for.[103]

The Act provides for what is called „rectification of unlawful commencement or continuation of an activity.'[104] This provision follows a breach of the preceding section and creates an understanding that some of the initially unauthorised activities may subsequently be approved. The person who applies for „rectification' is required to compile a report, the contents of which are outlined in the subsection.[105] This appears to be a special or mini-EIA report which the Minister or MEC will consider only upon payment of an administration fine not exceeding one million rands.[106] Thereafter the Minister or MEC may direct the applicant to cease the activity, either in part or wholly, and to rehabilitate the environment affected; alternatively such a person may be granted an environmental authorisation, but with some conditions attached.[107]

The new EIA approach uses lists. The disadvantage of this method is that whatever may not have been on the list at a particular period of listing runs the risk of being left out of the „activity' pertaining to EIA processes. That itself would necessitate an ongoing upgrading or amendment of the list, which may take a long time to be effected.

The emphasis in section 24 (h) of the NEMA Amendment Act, for the consideration of section 2 principles, which include socio-economic and cultural factors, is important for it strengthens the earlier court's decision in *BP Southern Africa (pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*[108] and ensures that the concept of sustainable development is realizable.

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[102] Section 24 E (a) (b) (c) NEMA Amendment Act no8 of 2004.
[103] NEMA section 24 F (4).
[104] NEMA section 24 (g).
[105] NEMA section 24 (g) (1) (a), (i) ,(ii), (iii), (iv), (b).
[106] NEMA section 24 (g) (2).
[107] NEMA section 24 (g) (2) (a) and (b).
[108] 2004 (5) SA 124 (W) 1461-147A.

One of the main innovations brought by the NEMA Amendment Act 62 of 2008 has been the designation of the Minister of Minerals and Energy as the „competent authority' in respect of authorization of mining and mining related activities. This appears to have been designed to address the issue of capacity or skills shortage in the Department of Environmental Affairs and Tourism (DEAT) in-so-far as dealing with issues of mining and minerals is concerned. The challenge that now arises is whether or not the Department of Minerals and Energy (DME) itself has the requisite capacity to perform the task. Indeed, given the presently widespread illegal mining happening in the country, it remains questionable whether the DME is equal to the task. [109]

The second concern posed by this scenario is with regard to the role that the DME will play in authorizing/refusing the applications, essentially for its own cause (in essence being both a referee and a player). This might rob the process of public confidence, an asset essential in EIA authorizations. The safeguard, in the form of appeals from the DME being decided by a different Minister such as the Minister of Environmental Affairs, may not restore the requisite integrity of the initial process, given the usually private cabinet and collective ministerial responsibilities.

There is also a potential threat posed by possible numerous appeals that could come from both DME and DEAT, which would create a bottleneck for an appeals authority. This, then, would result in delays for the implementation of projects. While the amendments are generally welcomed, there is therefore a need to address these new challenges.

The above is a brief exposition of EIA in South Africa as the law stands. While it has introduced many important approaches into the EIA practice, it is still far from being perfect.[110] A general criticism that EIA laws have received is that of lack of linkage to planning law.[111] There is an observation that, since 1994, much planning legislation issued refers to environmental assessments or Strategic Environmental Assessment (SEA) philosophy in the plans and programmes, but the present practice does not link it to EIA.

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[109] Mail & Guardian on line. (June 3 2009) at http://www.mg-co-za/article/2009-06-o3-illegal-mining-we-need-to-target-the-syndicates/ Accessed on 10 June 2009

[110] Department of Environmental Affairs and Tourism. *Review of the effectiveness and the efficiency of the Environmental Impact Assessment (EIA) System in South Africa.* Draft Report (2008) :- 17.

[111] J Glazewski *Environmental Law in South Africa* 2ed (2005) 250.

3.5. THE ROLE OF THE JUDICIARY IN SHAPING EIA

The fact that EIA processes aim at balancing various interests in the developmental process makes it inherently contentious. This is so, given the fact that various factors come into play at different times and under different circumstances. To satisfy all concerned parties at all the times may be virtually impossible. One of the best mechanisms built into the EIA to address this challenge is to involve all the stakeholders during the planning stages of the EIA. The advantage of this method lies in the fact that it is pro-active and able to address many concerns before they create serious problems. However, there are other conflicts which may still by-pass it.

Other conflict resolution methods, such as review and appeal built into the process, may also be used. The Public Protector office or Ombudsman intervention may be sought. When some or all of these strategies fail, the last resort is always to the courts of law.

The approach which courts use is often based on the constitutional framework in a given country, the policy framework and the particular environmental legislation being enforced as well as international best practices and commitments. The present study will show that these three factors largely determine the extent to which courts of law may shape the EIA process in a given country. The courts in Lesotho and South Africa are no exception in this regard.

3.6. SOUTH AFRICAN CONSTITUTIONAL MANDATE

The courts in South Africa find the prime basis for decisions in the Constitution.[112] Chapter 2 thereof is the Bill of Rights and in terms of section 24:

Everyone has the right to a) 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 the use of natural resources while promoting justifiable economic and social development.

[112] Constitution of the Republic of South Africa of 1996 (South African Constitution)

The above provision has been quoted in full to display its similarities and differences from that of Lesotho (see section 4.8 of this dissertation). Since Lesotho's approach to environmental issues is the subject of the next chapter, it suffices to note here that it is materially different from the South African provision.

South Africa has entrenched the right to a healthy environment in its Constitution and enacted other laws to ensure that such a right is procedurally and substantively realised. NEMA is one such Act with provisions to assist in the justiciability of the right to environmental issues. In their duty to uphold environmental rights, courts are bound to adjudicate on the EIA itself or aspects thereof. This happens because EIA is usually a central point of reference in modern environmental conflicts. South African courts have, likewise, been called upon to settle disputes concerning EIA. The understanding of how they execute such a mandate within their legal framework may enrich other judicial systems in this regard. It is noteworthy that both Lesotho and South-Africa share the Common Law system. Thus the decisions of the courts in South Africa play a highly persuasive role in Lesotho. The understanding of these decisions would also be valuable to the Lesotho law-making arm, since it is still in the early stages of enacting environmental legislation and EIA regulations.

The case of *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*[113] highlights the importance of stating with precision, in law or regulations, the identification of activities that would call for EIA. This is the role usually played by the law-maker.

The respondent company (Sybrand) was the lessee of a property in the Cape Peninsula protected natural environment. It established a vineyard and a dam on the property, without performing an EIA. The applicant, a coalition of non-governmental organisations, had made several requests to the respondent to conduct an EIA. On the strength of the legal advice which it secured from senior council, the respondent company managed to convince the designated EIA authority that the regulations emanating from ECA exempted it from conducting an EIA.

However, the said EIA authority, acting on the strength of a new legal opinion, reneged and requested an EIA. After much argument on the import of the provision, the court held that prior authorisation was needed for the activities in question. The regulations did not make it

[113] 2002 (1) SA 478 (C).

reasonably clear in the first place as to what the law was. The court had to adopt a complex analysis of the whole legislative framework in order to arrive at its decision.

In the same case, the court further held that is was inappropriate for an EIA to be carried out after the event had commenced without it. This pronouncement by the court tends to regard EIA as a forecasting tool only, yet it can still have a role during the implementation process. The mitigation of impacts, which EIA addresses even at that late stage of the project implementation, should not be ignored.

In *Eagles Landing Body Corporate v Molewa NO and Others,*[114] which was decided afterwards, the court seemed to realise the impact-mitigation role which the EIA plays. It held that an EIA could be requested after commencement of the project, as long as it is before its completion. As the law proved to be somewhat uncertain, the legislature enacted an amendment to discourage non-compliance with environmental authorisation.[115] Under the present EIA regime it is one of the most serious offences to commence a listed activity without environmental authorisation.[116]

The issue of compliance with the initial requirements for EIA authorization is of paramount importance, for it is here that the gate to subsequent non-compliance is either opened or shut. In the presence of clear requirements as to when EIA authorization is required, the chances of compliance are increased. On the other hand, where the law provides ambiguous exceptions compliance is hindered.

Another case worth considering is *All the Best Trading CC t/a Parkville Motors and Others v SN Nayagar Property Development and Construction CC and Others*.[117] This case has been criticized as depicting an example of the „EIA regime that has moved towards an environmental paradigm rather than sustainability in development[118] The applicants were established filling station owners in the area of the road in which the respondents (new filling station owners) were trying to construct another petrol filling station. The applicants resisted this move on the ground that they would suffer a financial prejudice as a result of having an

[114] 2003 (1) SA 412 (T).
[115] Section 24 F of Act 8 of 2004.
[116] Section 24 F (4) stipulates punishment as a fine not exceeding R5 million or imprisonment period not exceeding ten years or both.
[117] 2005 (3) SA 396 (T).
[118] T –L Field. 'Sustainable development versus environmentalism; Competing Paradigms for the South-African EIA Regime' (2006) 123 *SALJ* 409.

additional station within their vicinity. In other words, trade competition would be heightened by the new filling station.

The Court rejected this argument. It held that the applicants had not shown their interest to be of an environmental nature, but purely commercial. As such, „a commercial entity or consortium that attempts to frustrate a rival's lawful endeavour to conduct business ought not to be able to promote its trade on the back of environmental considerations.'[119] The case revolved around whether or not economic interest is one that should also be considered in an EIA application. The Court responded in the negative. Obviously this approach does not support the three pillars of sustainable development. The universal approach, which South Africa also embraces, advocates for the balancing of socio-economic and environmental considerations in development endeavours. The Supreme Court of Appeal restored certainty and validity of the sustainable development principle under South African law in *MEC for Agriculture, Conservation Environment and Land Affairs v Sasol Oil (PTY) LTD*.[120]

The second respondent's authorisation for construction of a filling station EIA had to be considered within the process of ascertaining the nature of the business in question. The Court reiterated the requirements of the principle of sustainable development and upheld their continual application.

One other point of importance which is central to any EIA is the involvement and participation of the public in the process, whether under national or international law. This principle remains vital to the success of EIA processes. South Africa has written this principle into its legislation. NEMA provides, as one of the environmental management principles that: „Environmental Management must place people and their needs at the fore-front of its concern and serve their physical, psychological, developmental, cultural and social interest equitably'.[121]

Subsection 4 (b) is replete with such principles.[122] It becomes important, therefore, in the context of EIA to examine how courts have had a role in maintaining these principles. The following cases may illustrate this role.

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[119] Note 117 above, 399j-400a.
[120] 2006 (5) SA 483 (SCA)
[121] Section 2 (2).
[122] See 4 (b) (f) (g) (h) (i) (k) and o.

In South Durban Community Environmental Alliance v Head of Department: Department of Agricultural and Environmental Affairs,[123] the officials of the Department of Agriculture and Environmental Affairs, KwaZulu-Natal, had granted an oral exemption in favour of Mondi Paper Mill, Merebank. The exemption was in terms of section 28 A of ECA and had to be in writing. It exempted the second respondent from procedural arrangements in conducting an EIA for his project. The applicant community did not know of this exemption. They came to discover it only as they were lodging an appeal to the Minister regarding flaws in the EIA process. They took the matter to court and the exemption was pronounced a nullity for not having been produced in writing. The fact that the community did not know of such a material step in the EIA process simply means they had not been sufficiently involved. It would therefore make sense to argue that such failure to consult the public could, on its own, provide a reason for the court to invalidate the process.

Another example is found in *Earth Life Africa (CapeTown) v Director-General: Department of Environmental Affairs and Tourism and Another.*[124] A record of decision (ROD) was issued by the Department of Environmental Affairs and Tourism (DEAT) for the construction of a demonstration nuclear reactor at Koeberg. This was followed by an extensive public participation process during the EIA. Information was publicised by availing the final report in specific public libraries, as well as on the Internet. The applicant made extensive comments on the draft report, but was denied a hearing during the decision-making. He applied for a review of the decision which was authorizing the process. The basis for the review was that his right to procedural fair administrative action had been infringed, contrary to section 33(1) of the South African Constitution (1996), read with section 6 (2) (c) of The Promotion of Administrative Justice Act 3 of 2000 (PAJA). The court found that public participation had been fair until the stage when the applicant was denied a chance to make his contribution to the final report. The need to review the report was made even more material by the fact that the final report contained information that was not available in the draft report. The court also found that ECA or NEMA regulations did not exclude public participation even at that stage of the process. The applicant and other interested parties had to be given the chance to make their comments.

Lastly, it should be pointed out that underlying all these processes to ensure EIA success is the principle of sustainable development. This concept itself is based on the integration of

[123] 2003 (6) SA 631 (D).
[124] 2005 (3) SA 156 (C).

environmental protection, economic and social development. Any attempt to remove or narrow down any one of these three aspects will surely undermine the whole system. It is indeed much like the African three-legged pot, which cannot stand on two or just one leg. This explains why the attempt to remove socio-economic considerations from EIA processes is a serious assault on the EIA regime. Equally unpalatable is an approach by any arm or organ of state to over-emphasise one aspect of this triangle at the expense of the others.[125] The latter approach seems to be the one which the Constitutional Court adopted in *Fuel Retailers Association of South Africa (pty) Ltd v Director General, Environmental Management, Mpumalanga and Others.* [126]

In this case the applicant of the (Fuel Retailers) had lodged an application for review of the decision to authorize the development of a petrol station by the Department. The applicant alleged that the Department had not considered the socio-economic impact of the additional filling station in the area of White River, Mpumalanga. In terms of section 22 of the Environment Conservation Act 73 of 1989, the Department of Agriculture, Conservation and Environment (the Department) was required to consider the socio-economic impacts of the proposed development. In this incident the Department argued that it was not necessary for it to do so, because this aspect of the need and desirability had been considered by the local authority, which approved the rezoning of the property in question. The Constitutional Court held that it was wrong for the Department to rely on the local authority's consideration of the need and desirability to satisfy the consideration of socio-economic impact required of it. In other words, the Constitutional Court drew a distinction between the requirements under the „need and desirability' against those for socio-economic impacts of a project.

This approach has been criticised as leading to the over-emphasis of the environmental pillars of sustainable development at the expense of the other two[127] and thus the impression of being overly concerned with environmental aspects, to the detriment of socio-economic aspects of these developments. The correct approach, it is submitted, is the one that recognises that the cardinal principle which every organ of the state must apply is found in section 2(1) of NEMA. In other words, even when a local authority considers a rezoning

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[125] See M Kidd '*Removing the green-tinted spectacles: The three pillars of sustainable development*.' (2008) *SAJELP* 82 – 102.

[126] 2007 (6) 4 (CC)

[127] Field (note 118 above).

application, once it realises that it „may significantly affect the environment' it must observe section 2 (4) I in its procedures. The environmental authority is similarly bound.

Having said this much about this case (Fuel Retailers) it is important to note that the case generated a plethora of academic debate on what its implications really are.[128] Much of the criticism of the case has been on whether or not the concept of EIA has been properly interpreted and applied by the courts that dealt with the case from the High Court to the Constitutional Court.

As Retief and Kotzé argue, the holding by the majority at the Constitutional Court „disregards and muddles the fundamental differences' between EIA as a project level tool and SEA as the strategic level tool.[129] The concern is that the judgement, in considering whether or not socio-economic conditions had been addressed, should in the first place have a concern regarding what level of decision-making that would be. As Retief and Kotzé put it „...assessing socio-economic impact at the project level differs significantly from assessment at higher or more strategic tier'. [130] It is trite that, when the case was brought to court, the activity was at the project implementation stage (EIA). At that level decisions that belong to a higher „tier', that is „strategic', should not be made part of the EIA. To do so would be to place obligations and expectations on the EIA that go' beyond its methodological design'.[131]

In the context of the Fuel Retailers case, for the Court (majority judgement by Ngcobo J) to have agreed with the applicant that the cumulative impact of the new filling station on existing ones, had to be considered under socio-economic impacts was actually bringing into the scope of the EIA, a consideration that does not belong there. Of course, the socio-economic impacts have to be considered, but considering their *cumulative* impact at that EIA level is to stretch EIA's elasticity too far. EIA has its own limits. This has clearly been acknowledged and reiterated at the 2008 conference of the International Association for

[128] See, for example, (2008) 15 *SAJELP* and L Feris *Constitutional Court Review* (2008) 1-235.

[129] F Retief & L Kotzé 'The lion, the ape and the donkey; cursory observations on the misinterpretation and misrepresentation of environmental impact assessment (EIA) in the chronicles of Fuel Retailers. (2008) 15 *SAJELP 139,146.*

[130] Ibid.

[131] Ibid 147.

Impact Assessment (IAIA) that Cumulative Impact assessment (CEA) is best dealt with at a strategic level (SEA).[132]

Yet the blame for this situation cannot be squarely on the Court„s pronouncement of the use of the EIA in this manner. NEMA itself requires that cumulative impacts of proposed developments be assessed, but falls short of providing CEA processes or methods.[133] This can be understood to mean that EIA processes should be used to yield CEA impacts and, as argued, there are inherent methodological problems to this approach. Retief and Kotzé lucidly explain what happens when this approach is adopted; „EIA continually ends up with so-called "cannot know" results; with many of these indirect and cumulative impacts considered as "trans-scientific", in that science is unable to answer the questions to which they relate'.[134] Surely to persist along this road, despite this warning, will lead to a cul-de-sac in such assessments.

The South African Legislature is not alone in providing for cumulative impacts under these circumstances. Similar provision emerges in the Lesotho EIA regime, requiring that the contents of the environmental impact study (EIS) must, inter alia, include „...the direct, indirect, cumulative, short-term or long-term effects on the environment of the project'. [135] Like NEMA, the Lesotho Environment Act does not specifically provide for CEA or its accompanying processes. The impression created is that the EIA processes duly provided for in the Act will also function for CEA. Is that really the case or rather *should* that be the case? The courts in Lesotho are yet to authoritatively interpret this provision, but this approach may also lead to a cul-de-sac, hence being discouraged internationally.

It is of course noted that these cases were based on statutes that are South African, without necessarily having similar statutes in Lesotho. However, their value lies in the fact that they demonstrate what role courts of law can play in building a culture of an effective EIA. Secondly, most of the principles which are illustrated by these cases are the basis of any reasonable standard EIA. The international best EIA practice as reflected in Chapter Two, also show these principles. The South African legislature has merely gone a step further, to

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[132] International Association for Impact Assessment (IAIA) Conference in Calgary, Canada Proceedings. „Assessing and managing Cumulative environmental Effects, Interventions.' 4- 6 November 2008. Available at http; IAIA Accessed on 20 October 2010 [132]

[133] NEMA regulation 23 (h)

[134] Retief & Kotze (note 129 above) 146.

[135] Environment Act no 10 of 2008 sect 21 (5) (e)

entrench most of these principles in the legislation. All these moves have significantly contributed to making environmental justice become more realizable.

3.7. SOME PRACTICAL CHALLENGES IN THE USE OF EIA IN SOUTH AFRICA

The EIA regime in South Africa is generally comprehensive and satisfactory, but it is still lacking in some respects of its practice. These weaknesses are particularly apparent in the following areas: lengthy delays in processing applications, appeal processes, post-authorisation and monitoring. These will be dealt with below:

The first weakness is that of lengthy delays that are experienced in the processing of EIA applications, the prime cause of which has been found to be the incapacity of the EIA staff to handle the voluminous applications timeously and expeditiously.[136] Shortage of staff and skills capacity which are attributed to this problem can surely be eliminated by the necessary and practical commitment on the part of the government to allocate the necessary resources for this endeavour. The introduction of time-frames through regulations, as an attempt to remedy this problem, must be coupled with an increase in the number of the EIA officials who handle the applications.[137] Their continuous training cannot be overemphasized. Otherwise, the decisions that they will make under pressure to meet the regulatory datelines will hardly be the ones that will enhance the EIA regime and its objectives.[138]

The second weakness concerns the appeal process. There are two aspects to this. The first pertains to the credibility of the appeal process itself, for it is decided by the head of the very department whose officials took the initial decision being appealed against. Surely in this scenario the decision of the MEC or Minister is highly likely to be clouded by the relationship between him and his fellow officials. Even when the appeal is handled by the appeal panel, with its independent members, [139] the Minister still has the last word in the matter.[140] The solution may be the use of the independent tribunals to deal with these appeals.

Secondly, an appeal process in law usually halts any related processes, but this is not the case here. The NEMA Amendment Act 8 of 2004 [141] specifically does not allow for such

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[136] M Kidd *Environmental Law* (2008) 204.
[137] Ibid.
[138] Ibid.
[139] As introduced by regulation 67 (2) of 2006.
[140] See section 43(6) of NEMA.
[141] Section 43 (7).

suspension, unless the Minister or MEC directs otherwise. This undermines the credibility of the appeal process, for it means that the dismissal of the appeal is almost a foregone conclusion. This might discourage any prospective appellant with good grounds from filing an appeal and consequently allow some ill-conceived decisions to find their way into existence.

Post-authorisation and monitoring is also a difficulty in the South African EIA regime. The fact that most EIA applications are authorized with certain conditions to ensure mitigation of environmental damage, as may have been identified, necessitates a compliance follow-up. However, due to understaffing and underfunding of provincial and local authorities,[142] such follow-ups are often not possible. Post-authorisation monitoring, which has now been strengthened by making it an offence to fail to comply with a condition of the authorisation, also means the need for more officers.[143] Once more, the credibility of the EIA process as a whole would be negatively affected by the lack of enforcement of these provisions. These challenges reveal how far the government has to go in its commitment to making the process effective. The success of this process, as Kidd puts, it is „predicated on political will'.[144]

The 2006 EIA regulations under NEMA go some way to solving these long-term concerns. One example is with the regulations that now divide applications into two main groups. These are applications that are subject to basic assessment only and those that will be subjected to scoping and EIA. The criteria for determining what type of assessment would be required in each case are provided for in the regulations.[145] The significance of this division lies in the realisation that some applications are not as complicated or detailed as others, and as such the classification assists in fast tracking those that deserve to be treated quickly so that minimal time may be spend on the rest. Generally these improvements seem to usher in speedy and effective EIA machinery than has hitherto been the case; however, actual improvements generated by these regulations are yet to be seen.

From the discussion held in this chapter it has emerged that South Africa has laid a strong legal basis for its EIA practice. The country's Constitution and the environmental framework of legislation clearly support the EIA procedures. This has been achieved by

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[142] See C Wood 'Pastiche or Postiche? Environmental Impact Assessment in South Africa' (1999) 81 *South African Geographical Journal,* 52 - 56 .

[143] Regulations 79 (2) read with 81 (1) (c).

[144] M Kidd *Environmental Law* (2008) 206.

[145] See chapter(3) part(1) section(21) of the 2006 regulations.

using judicially enforceable EIA regulations. Though there are still some practical weaknesses in the system, it can be argued that the system is impacting much more than it did when it was merely voluntary. These seem to be the basic factors that underlie the differences between South African EIA and that of Lesotho, which will be the subject of Chapter Four.

CHAPTER FOUR

EIA LEGISLATION IN LESOTHO

4.1 INTRODUCTION

The promulgation of the Environment Act no 10 of 2008 in Lesotho resuscitated the hope that Lesotho would finally have a legally mandatory EIA process as part of its environmental laws. This Act repealed its predecessor, the Environmental Act no 15 of 2001, which, though entrenching the EIA provisions was not operational until it was wholly repealed in 2008.

There may be many other reasons why the Environmental Act of 2001 was repealed, but the main one appears to be the financial and the autonomous implications of running the Lesotho Environmental Authority constituted under the Act.

The 2001 Act was meant to be the first framework environmental law in Lesotho. It made provision for compulsory EIA, section 27 (1). It also sought to establish, under section nine, what would be called the Lesotho Environment Authority (LEA). This Authority was to be a body corporate entrusted with the execution of the Act and all environmental policies of Lesotho.

There were no less than 25 functions which were entrusted to the Authority under Section 10 of the Act. These included EIA authorisation and monitoring. Understandably, LEA would have to marshal a great number of personnel, equipment and other administrative infrastructure to be able to execute this mandate. After commissioning a study into the transformation of the National Environmental Secretariat (NES) which had hitherto been responsible, inter alia for EIA Authorisation, into the LEA, the government seems to have run short of the political will to establish this Authority. According to the report for the transformation from NES to LEA, the staff complement of LEA for the first five years would be between 37 and 50.[146]

The Minister of the Environment, when asked to explain the reason for the Act not being in force, said it was due to the high cost of establishing the LEA. As she put it, "Most of the money would go to address peripheral issues like salaries and other

[146] National Environment Secretariat. 'Transformation of NES into LEA (Draft Report)' (2003) 20.

expenditure rather than actual environmental problems.[147] This response was given in parliament during the discussion of the Environmental Bill 2007, which was finally enacted as the 2008 Environment Act.

Before this repeal, the EIA practice in Lesotho was ad hoc and voluntary.[148] Even during the British colonial administration of Lesotho, the interventions that were introduced in the physical environment merely have some relevance to the contemporary EIA.[149]

Since the 2001 Act, which was the first legislation to introduce the concept of EIA into the environmental jurisprudence of Lesotho, was not successful, the Environment Act 2008 was therefore the second attempt to make the EIA practice mandatory in Lesotho. This time around, all indications are that this Act will soon be functional, for its commencement notice has already been issued.[150] It must be pointed out however, that more than a year after the said notice of commencement, the necessary regulations for its enforcement are yet to come into being.[151] In the meantime the EIA regime in Lesotho relies on the 2010 EIA Guidelines.

These are essentially the old EIA guidelines under which the voluntary EIA practice had been based in Lesotho. They have been reworked to accord with the new 2008 Environment Act and appear to derive authority from sect 21(4) of the new Act. No such provision for guidelines existed under the repealed Act. Until the Minister, under section 113 (1) exercises his power to make the EIA regulations, the new EIA compulsory practice shall rely on the EIA provisions of the Act, that is sections 19 to 27 of the Act and the 2010 EIA guidelines.

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147 NA Debates (Lesotho) 15 October 2007-17 (trans mine).

148 See L Mokhehle, and R Diab 'Evolution of Environmental Impact Assessment in a small developing Country: A preview of Lesotho case studies from 1980 to 1999' (1 March 2001) 19 *Impact Assessment and Project Appraisal* volume 9-18
Also accessed at http://www.ingetaconnect .com/content/beech/iapa/2001/000000919/00000001/art 0003/ Accessed on 10/5/2010.
See also John O. Kakonge ' "EIA in Lesotho Prospects and Challenges'' ' (1997-17) Environment Impact Assessment Review 109-121.

148 K Showers and G Malahlela . *"Historical Environmental Impact Assessment: A tool for analysis of Past intervention in landscapes.'' (1993)*

149 Ibid.

150 This is the Legal Notice no 47 of 2009, which appointed 16 June 2009 as the day on which the Act comes into operation.

151 The director in the Ministry of Tourism, Environment and Culture, Mr. Stanley Damane, in an interview with the researcher on 5-10-2010, revealed a copy of an advertisement for consultancy service for the implementation of this Act, including the drafting of the Regulations.

4.2 EIA UNDER THE ENVIRONMENT ACT NO 10 OF 2008

One of the objectives of the 2008 Act is to introduce the concepts of EIA into the environmental jurisprudence of the environmental law of the country.[152] This act defines an EIA to mean „a systematic examination of a project or activity conducted to determine whether or not that project or activity may have adverse impact on the environment'. This is obviously a straight-forward definition of the concept which does not purport to cover, in detail, every foreseeable assessment that might be necessary.

What matters is that it has the basic connotation of what the concept entails. In contra-distinction to NEMA, the latter does not define this concept as a whole, but rather individual aspects thereof.

The Act requires the undertaking of EIA under sections 19(1) for projects and activities specified in Part A of the first schedule. This schedule categorises types of projects and activities under 17 headings. In their order they are as follows:

1) „General'
Under this category falls three types any activity out of character with its surroundings, any structure of a scale not in keeping with its surroundings and major changes in land use. One notices that this category acts as a cover-up for any loop-holes that may have been left in other categories. This is due to its lack of specificity and deliberately general nature. The potential problem that may arise in relation to this group is the interpretation of what the group actually covers and what it leaves out. It is not very clear and may be abused. This is in contra-distinction to other headings, under which various examples of activities and projects are listed. For the purposes of this study, however, only the headings will be mentioned:

2 „Urban and Rural Development'
3 „Transportation'
4 „Dams, rivers and water resources'
5 „Aerial spraying'
6 „Mining, mineral extraction including quarrying and open-cast extraction' of various stones and metals
7 „Forestry related activities'

[152] See Government Notice no 237 of 2008

8 „Agriculture'

9 „Processing and manufacturing industries'

10 „Energy and electric infrastructure'

11 „Waste handling, storage, transport, treatment and disposal'

12 „National conservation areas'

13 „Camp-sites and hiking and ski trails development for tourists'

14 „Permanent racing and test tracks for cars and motorcycles'

15 „Communication facilities, including telephone, television and radio transmission masts'

16 „Projects or activities that could affect areas of various sensitivities.'

17 „Projects or activities that could affect any of following areas or features which have been demarcated as such by central or local authority': Examples given include (h), battle sites and (u) sites of geological significance.

There are two comments that may be made about these lists. While they are not as elaborate as those of South Africa, they are essentially about the same activities or projects for which the EIA authorisation is needed.

Secondly, the approach used by the Lesotho regime is straight-forward, in-as-much as it does not attempt to draw a distinction between activities requiring basic or full EIA as its first step. This is because it does not yet provide for thresholds. The Minister has first to enact regulations to specify the sizes of projects for activities in the first schedule.[153] It will be NES officials who will determine whether a project has to be subjected to an EIS or whether a brief suffices. (See the graphic illustration of Lesotho EIA attached). The South African approach particularly under the 2010 regulations, provides thresholds and lists on the basis of which the project proponent himself or herself, or the applicant for EIA, has to make an initial determination as to whether a basic assessment report (BAR) or scoping and EIA will be required.

Section 19 (2) introduces a SEA, which shall be undertaken for matters specified in part of the first schedule. The Act defines strategic environmental assessment as „an assessment of the positive and adverse effects that the implementation of a Bill, regulation or of a public policy programme or plan is likely to have on the environment'. This definition supports that

[153] Section 113 (1) (g).

SEA is undertaken at the conceptual stage/formulation stage of the idea, well ahead of its implementation.

More than a year after the Act came to force no regulations have been enacted to give effect some of its provisions. This is despite authorisation granted to the minister to make such regulation.[154] The said regulations would, inter alia specify sizes of projects and activities listed in the first schedule; provide for environmental management plans and the conduct and certification of environmental practice.[155] In the absence of the said regulations, the practice still is for officers to dictate what appears reasonable in the circumstances. Arbitrariness can surely not be overruled in these circumstances. It is not clear why the Minister has not made these regulations. Perhaps there is no pressure from those who are using the Act, or perhaps is just a question of not giving it a high priority. After all, EIA has been conducted previously in the absence of regulations. This undermines compliance with the Act and seriously undermines its authority.

In terms of sect 113(4) of the Act, regulations may partially or wholly, or with modification, adopt other regulations, guidelines or administrative procedures prescribed in any law already in force. Even this provision which really goes a long way to assist with the provision of the regulations has not been taken advantage of.

Under sub (3) the Minister is empowered to prescribe, by regulations:

(a) the category of projects or activities for which only a project brief is required by reason of their nature, scope, scale and location.
(b) the category of project or activities for which an EIA strictly is required by reason of their nature, scope, scale and location.

These two provisions are significant, as they seek to ensure that there is flexibility in the terms of the EIA schedule.

Provision (a) seems to address a situation in which the item in the EIA schedule would not have a significant impact on the environment. In order to avoid the unnecessary undertaking of an EIA, the Minister is empowered to require only a project brief. This has the advantage

[154] Section 113(1) and (2) in particular g and j.
[155] Section 113 (1) (h) and (j).

of fast-tracking the making of decisions regarding less serious activities, so that more time can be spent on deserving activities.

Provision (b) serves as a back-up to the activities on the schedule which may be found lacking or may fall behind as time passes.

Subsection 4 enjoins the Minister, by notice published in the Gazette, to amend the first schedule. In view of sub 3(a) and (b) just discussed, it would appear that (a) and (b) serve as temporary/interim measures, that would culminate in the amendment envisaged by sub (4).

It is perhaps still too early for the act to have been thoroughly implemented and for the need for amendment of the first schedule to have been apparent hence no such amendment has been made.

Even the regulations that are supposed to show which projects qualify for only a Project brief or which need a full EIA have still not been formulated. The Director in the Ministry explained that this delay was due to lack of the funds necessary to implement the Act. His assurance was that since this challenge had been over-come, plans were going ahead to implement the Act before the end of the year.[156]

What is happening at present is that the old practice under the repealed 2001 Environment Act has still not disappeared. The provisions of the new Act have not taken root, despite the fact that the commencement notice for the new Act stipulated the 16 June 2009 as the date on which the Act comes into force.[157]

One may begin to question the wisdom of having passed the commencement notice for the Act while fully aware that the very basics for its implementation were not yet in place. Perhaps it was to allay fears that, just like its predecessor, the 2008 Act might never come into operation.

Now with that background briefly explained, the actual steps of going about the EIA licensing particularised in the Act from section 20 to 27 will be examined.

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[156] This is from an interview with the Director on 5 October 2010, whose Office had just issued an advertisement requesting consultancy services for the implementation of the Act and enactment of the Regulations.

[157] Legal notice no 47 of 2009.

Section 20 requires that, prior to commencing or conducting a project or activity specified in Part A of the first schedule, a developer shall submit a project brief to the Director and the relevant Line Ministry.

The Director and the line Ministries are the authorities that will to examine, review and finally approve/disapprove the EIA under this Act.

The „Director' in this Act refers to the Director of the Department of the Environment.[158] He is a central figure in the administration of this Act and his full functions are listed in section 10 (1) of the Act. He may delegate any of his functions to a Line Ministry, Technical advisory committee or any public officer.[159]

A „Line Ministry' under this Act means „a ministry, department, parastatal or agency in which any law vests functions for the protection, conservation or management of any segment of the environment or whose activities may have an impact on the environment as defined in this Act'.[160] The Line Ministries` full roles are stipulated in section fifteen.

Submitting a project brief to the Director and the relevant Line Ministry would mean that if the proposal is on mining, for example, the relevant Line Ministry would be the Ministry of Natural Resources. The clear impression that is created by this provision is that only the relevant Line Ministry is given the brief. This clarity is, however, obscured by what the EIA guidelines 2010 also provide on this point.[161]

These guidelines provide, under step 3, that 15 fifteen copies of the Project brief shall be submitted to the Department of the Environment, so that *all* Line Ministries would receive a copy for comments. This was the practice even before the coming of the 2008 Act. Now it would appear that the phraseology of section 20(1) creates a different practice or there is a possibility of it being misunderstood, concerning the 15 copies. It is desirable that from the onset, the law should be clear to the proposer. If all Line Ministries should always be given a copy of the brief the Act should clearly state so. On the other hand, if the intention is to only provide the relevant or possibly most relevant line ministries (where more than one is relevant to the proposal) with a project brief, then the regulations should first of all make it

[158] Section 2.
[159] Section 10 (2).
[160] Section 2.
[161] These guidelines have apparently been prepared in terms of section 21 (4) of the Act, though no such claim of connections with the 2008 Act is clearly made.

reasonably clear what role the other line ministry would play in reviewing the project brief, before requiring more copies for other ministries.

Throughout the procedure for the EIA in the Act, reference is consistently being made to the Director and the *relevant* line ministry as the reviewing authorities. The guidelines must be clear on the significance/role played by other ministries at any particular point in time; otherwise the EIA guidelines in question, which claim to be consistent with this Act, are clearly falling short of consistency on this point.[162]

One reason why it would make more sense to issue all line ministries with a copy of a project brief for comments is to build capacity in reviewing EIA. Lesotho is still in its infancy in developing capacity to deal with EIAs. Under sections 15(1) each line ministry is enjoined to establish an environmental unit which will inter alia handle these project briefs. At present, and even under this Act, it is the Director who does the reviewing task. In actual fact, he delegates this task to the EIA Office of the Ministry. This office is currently manned by only two officers. This means that the task of reviewing the project briefs coming from all the other the 10 administrative district of Lesotho is already overwhelming. If all line ministries help in reviewing project briefs, in the long run a wide and strong pool of public officers that can do the job will be created. If this situation comes about, care should be taken that decisions are not delayed because of many Line Ministries that have to make comments especially where the proposal concerned has nothing much to do with a particular ministry. Introduction of time-frames within which each line ministry should have decided may help to remedy this challenge.

As for the contents of the project brief, the Act lists minimum contents. The Director may require more from the developer.[163] These include the nature of the project or activities that shall be undertaken; possible products and by-products anticipated and their environmental consequences; the likely number of people to be employed; which environmental medium may be affected; and other matters that may be prescribed by the Director.

The Director may approve the project, after consideration, if he is of the view that it will not have significant impact on the environment. The director has been left with the discretion to determine what constitutes significant impact on the environment. The Act does not define it.

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[162] The EIA guidelines 2010 (Lesotho) foreword.
[163] Section 20 (1) a, b, c, d, e, f and g.

One can only hope that such discretion will be exercised with due diligence, always in consultation with the line ministries, as the Act requires.[164]

Where the Director believes that the project or activity is likely to have a significant impact on the environment, he may invite written or oral comments from the public. He may also consult with the community of the affected area, even about the project brief.[165]

In terms of Section 20(5) the Director may overrule the decision he made under sect 19 (3) (a), which categorised a particular project as requiring only a project brief. When he learns that such a project is likely to have a significant impact on the environment, can request that and Environmental Impact Study be made. This he does in consultation with the Line Ministry.[166]

An Environmental Impact Study may be undertaken in accordance with section 20 (5). It shall yield an Environmental Impact Statement (EIS) at the end of the exercise.[167] The E.I.S will be submitted by the developer within 30 days of completion of the study.[168]

Section 21 (5) lists a minimum of 13 concerns that the EIS shall contain. These include:

(a) A detailed description of the proposed project or activity and activities it is likely to generate;
(b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effect of the proposed project or activity;
(c) A description of the technology, method and process that shall be used in the implementation of the project and the main alternatives and reasons for deciding to use these alternatives;
(d) Reasons for selecting the proposed site and rejecting alternative site;
(e) Environmental impact of the proposed activity or project, including the direct or indirect, cumulative, short-term or long-term effects on the environment of the project;

[164] Section 20 (3).
[165] Section 20 (4).
[166] Section 20 (5).
[167] Section 21 (1).
[168] Section 21 (2).

(f) An indication of whether or not the environment of any other state area beyond the limits of national jurisdiction is likely to be affected and the mitigating means to be undertaken;

(g) The social economic and cultural effect the project is likely to have on people and society;

(h) A comprehensive mitigation plan.

These are only some of the minimum contents expected. The Minister is enjoined to prescribe other matters he may deem necessary.[169] The guidelines also stipulate these minimum E I S requirements.

In general, these requirements seem to conform to International Best Practice.

Concerning the contents of the project brief, the guidelines require as a minimum of 16 items which must be included in the brief. These are finer details concerning what is found in section 20 (1). However, one needs to comment on four of these details as they can have deeper implications for the whole EIA process and do not readily appear to be related to the generalities mentioned in section 20 (1).

A) Alternatives to the project. It is of vital importance that, from the outset, the practicable project alternatives are considered, as they can have implications on the nature and design of the project. It would be advisable to consider such options early in the process, to avoid wasting resources on an option that later might have to be altered.
As the guidelines show, there are various categories of alternatives that should be considered. These are demand alternatives, local alternatives, process alternatives, temporal and the no-action alternative.[170]

B) Key elements of an environmental management and mitigation plan.
The significance of this item, even at this stage, is to indicate the level of preparedness in mitigations of which the developer is aware.

C) Recommendations as to whether or not full EIA is required. The tendency is often to recommend that the project brief will be adequate. This puts the professionalism and

[169] Section 21 (5) (m)
[170] Guidelines – Step 2 checklist for preparing Project Brief

objectivity of the consultant in the spotlight. The Director and the relevant ministry will make the final assessment.

D) A draft notice for publication in national and local news papers describing the project and disclosing where and when the project brief is available for public review.[171]

The main point here is that such a publication should have a circulation throughout the country. The project brief is usually available for public review at NES offices but, in practice the consultants have also used their offices for some reviews.

Fifteen copies of the Project review shall then be submitted to Department of the Environment. [172]

4.3 PUBLIC INVOLVEMENT IN THE LESOTHO EIA

This is one aspect of the EIA that can either make or break the project.

In terms of sections 20 (4) 21 (3) and sections 22 (a) (b) and (d), where the Director is of a view that the project or activity will have significant environmental impact, he or she may invite written or verbal comments from the public concerning the project brief of the environment impact statement. These provisions are supported by Step 4 of the Guidelines. The Department of Environment shall assist the developer to ensure that all interested and affected persons participate.[173]

The guidelines do not prescribe any particular method of informing the public or seeking their input, but suggest that local councils or non-governmental organisations be consulted on how to identify the interested and affected parties. Further directions for involving the public have been left for possible inclusion in the regulations.

It is encouraging to note that the Department of Environment seems to have given this question, Public Participation within the EIA, the serious attention it deserves. The Department, even before it sought consultation for the drafting of other regulations, has started seeking consulting services for the professional drafting of guidelines for public participation the Lesotho EIA.[174]

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[171] Guidelines – Step 2 Item 16 of the checklist

[172] Step 3 of the Guidelines. This has already been disclosed

[173] Step 4 of the Guidelines.

[174] From an interview with the Director of Environment, Mr Stanley Damane, on 5 October 2010.

One would expect, in accordance with best international practice, publication of such draft regulations for public comment before their adoption as final regulations. The need for meaningful and legally entrenched public participation provisions in the Lesotho EIA cannot be over-emphasised. The presence of this principle in Lesotho EIA will ensure that incidents of non Public involvement and participation in projects which affect their lives, such as happened in Phase 1 of the Lesotho Highlands Water Project, never again happen in Lesotho.[175] The regulations should as far as it is possible, ensure that public participation process remains genuine and it is not just a hurdle that developers have to rush through without due quality of citizens participation.[176]

The said regulations should also set proper guidelines or roles, if any, to be played by the Lesotho national security agents who routinely attend some of the public participation meetings, so that their presence does not inhibit meaningful participation but enhances it.[177]

It should be noted, that all these good moves by the Director's office to ensure public participation serve only one aspect of the EIA regime. This is because no public participation is provided for at the project brief stage.[178] The Director has the sole responsibility to invite public comments when he finds that the project may have significant environmental impacts.[179] This is one of the weakest aspects of the Lesotho EIA regime. In fact it is a backward step from what was provided for under the repealed Environment Act 15 of 2001. This is different from the South African approach where participation is provided throughout the EIA process. This approach by Lesotho does not also accord with the best EIA practice internationally encouraged. It falls short particularly of the principle of transparency and participation as reflected in table 2.

One of the surest methods of facilitating meaningful public participation in EIA undertakings as reflected in various international best practices is ensuring access to information. As the

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[175] ML Thamae & L Pottinger *On the wrong side of development-lessons learned from the Lesotho Highlands Water Project* (2006) 16.

[176] See Sherry R Arnstein. 'A ladder of citizen participation'(1969) 35 *Journal of American Institute of Planners* 216-224. Available at http://lithgow-schmidt.dk/sherry-arnstein/ladder-of-citizen-participation.html. Accessed on 30 November 2010.

[177] Note 175 above, 112, where it is reported that in 1999 the Lesotho National Security service agents confiscated materials about World Commission on Dams from a man affected by LHWP when he returned from a regional hearing on Dams.

[178] Environment Act no 10 of 2008 Section 20(3).

[179] Ibid section 20 (4).

next chapter shall reveal South Africa has taken commendable Legislative and administrative steps in this regard.[180] Lesotho again lags behind on this question.

The assurance for public inspection of Environmental Impact Statements and project briefs does not translate to sufficient and meaningful access to information, when such records are available only in English which some Basotho do not understand. The Environment Act 2008 itself still has no Sesotho version, two years after it was enacted.

Unlike South Africa, that has eleven official languages, Lesotho has only two.[181] It should not be impossible to produce translated versions where this is driven by issues of public participation. The issue of increasing costs of producing these documents sure is quite minimal when compared with the ultimate cost of not involving the public in these activities.

In terms of Section 22 the Director is empowered to follow other routes in reviewing the Environmental Impact Statements. Where, for example, he is satisfied that the project shall not result in significant damage to the environment he may approve the project or that activity.[182]

He may also require the developer to redesign the project in accordance with the comments received[183] or, alternatively, reject if it he is of the opinion that it may cause significant and irreversible damage to the environment.[184]

Should the Director approve the project, he will issue an EIA licence. The licence may contain terms and conditions aimed at mitigating negative impacts of the activity on the environment.[185]

4.4 ENVIRONMENTAL MONITORING AND AUDIT

Under section 23 (1) the Director, in consultation with the line ministry, shall monitor all environmental elements, projects or activities with a view to determining their mandate and

[180] This refer to access to Promotion of Access to information Act 2 of 2000 and Promotion of Administrative Justice Act 3 of 2000 both of which are applicable to EIAs, but Lesotho does not have any equivalent Acts to support its EIA regime.
[181] Constitution of the Republic of SA 1996 chapter 1 sect (1) and of Lesotho 1993 chapter 1 sect 3 (1).
[182] Section 22 (e).
[183] Section 22 (f).
[184] Section 22 (g).
[185] Step 10 of the Guidelines.

long-term effects on the environment. This includes monitoring the operation of all projects even those that were already in existence at the commencement of this Act.[186]

This means that the Director has a mammoth task, for there are too many projects in Lesotho which impact on the environment and have been going on years with minimal, if any, monitoring.

In executing this onerous job, the Director will be using environmental inspectors duly designated for that job.[187] Though the Act is officially in force, in practice it still not. As the Director pointed out, the Department is busy with the modalities of implementing the Act.[188] This means that no environmental inspector has been appointed and the monitoring, as envisaged by this section is yet to happen.

As for Auditing, it is the Director and the relevant Line Ministry that shall be responsible for carrying out periodic environmental audits of projects or activities that are likely to have adverse effects on the environment.[189]

The Director is also empowered to require periodic reports on the operation of a project or an activity from an EIA licence holder, operator or developer of a project for which an Environmental Impact Statement has been made, or from an owner of the premises or one with a Legal right to the land on which an activity for EIS has been made.[190]

The Provision Section 23(1) (C) of the Act is of interest, as it imposes monitoring of the „operation of all projects in existence at the commencement of this Act'. Prior to the commencement of this Act, the previous EIA regime was voluntary, with hardly any monitoring. This provision gives the Act some retrospective application. There are at least two challenges that may be posed by this provision.

The first and readily discernible one monitoring is being increased. In order to execute monitoring meaningfully, there is a need to increase the number of environmental inspectors.

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[186] Section 23 (1) a, b and (2) and (3).
[187] Section 23 (3) read with section 89 and section 90 of the Act.
[188] In an interview on 05/10/2010.
[189] Section 24 (1).
[190] Section 24 2 (a) (b) (c).

It is doubtful if the Department of Environment would readily appoint a staff complement large enough to perform these extra tasks.

The second challenge relates to the acceptability of the retrospective application of the Act to the public and in law. This section has not been framed in clear terms to denote retrospective application, but it may possibly be used in this fashion. There have been a number of projects going on in Lesotho, about which the public has been complaining, concerning their non-compliance with the environmental ethos. These include the Moradi Stone Crushers at Morija and Ha Ntsi Semphuroaneng. If their operations are to be subjected to the provisions of this Act, as section 23 (1) (C) provides, this would mean that some retrospective application of the Act is envisaged. Sub-section (2) to leaves the Director with some discretion in this issue, without providing how this discretion would be exercised with respect to already existing projects. This should be clarified. The sub-section merely states that „The Director may, where he determines that the project does not comply with the provision of this Act require that the developer of a project or of activity take remedial measures in a manner and within such time as the Director may determine'.[191]

The South African experience with a somewhat similar provision may be useful here. Section 28 of NEMA 107 of 1998 provided that anyone who causes or has caused significant pollution or degradation of the environment must take measures to prevent this form re-occurring. When a dispute arose with regard to whether or not this provision as applicable retrospectively the court in *Bareki NO and another v Gencor Ltd and others*[192] held that it does not operate retrospectively. This was held so despite the clear reference to the past made in the phraseology of the Act.[193]

The 2010 EIA Guidelines do not provide any counsel concerning whether a distinction should be made in monitoring the pre-Act projects and those that came after its commencement. It would be advisable for the Director to use his discretion hereunder very advisably to avoid the complexities that might accompany retrospective application.

Another alternative would be to explain, in the forth-coming regulations, the extent to which monitoring of the pre-Act projects would be covered by the provisions of this Act.

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[191] Section 23 (2).
[192] 2006 (1) 432 T.
[193] Scholarly opinions were that it operated retrospectively. F Soltau 'The National Environmental Management Act and Liability For Environmental Damage' (1999) 6 *SAJELP* 33 48 , 49. See also Jan Glazewski. *Environmental Law in South Africa*. 2ed (2005) 150.

4.5 EIA LICENCE AND RECORD OF DECISION STEP 10

Section 25 (1) prohibits the undertaking of any project or activity specified in the first schedule without an EIA.[194] To strengthen this provision, sub-section (4) provides that only the EIA issued under this Act shall be recognised for any purpose for which an EIA is required.[195]

The effect of this is to subject all other EIA requirements or processes to this Act. This has been clarified by providing that the provisions of this Act shall prevail in the event of any inconsistency with any Act or operation of any law.[196]

This clarification is important, because there already are some recent pieces of legislation that require the EIA process in Lesotho. These include the Tourism Act of 2002[197] and the Mines and Minerals Act of 2005.[198] The former, under section 29 (6) (a) compels the Lesotho Tourism Development Corporation to undertake an EIA before proceeding with its operations. Failure to do so, however, is not treated as an offence. As for the Mines and Minerals Act, part VIII includes and is titled: Environmental obligations. Section 58 (3) provides that „an applicant for a mining lease or renewal of a mining lease shall in accordance with good international mining industry standards prepare and submit a Comprehensive Environmental Impact Assessment as part of the Project Feasibility Study Report'.

The Act further provides that the Minister may approve and issue a mining lease only if satisfied that the applicant has obtained an EIA Licence.[199] All these processes would be subjected to the EIA in terms of the 2008 Act.

Contravention of this section that is undertaking the first scheduled activities without an EIA is punished with a fine not less than M10 000[200], or imprisonment for a minimum period of three years or to both.[201]

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[194] Section 25 (1) read with section 19 (1)
[195] Sub-section (4)
[196] Section 114 (1)
[197] Act No 4 of 2002
[198] Act No 4 of 2005
[199] Ibid section 33 (1) (9).
[200] The currency of Lesotho is called Maloti (M). It has the same value as the South African rand (ZAR)
[201] Environment Act 2008, Section 25 (7) The first highest is M20,000 or minimum of 10 years in Jail (section 90 sub (5)

This is the second highest threshold penalty in the whole Act. The sentencing threshold at this minimum appears to be too low neither to have any deterrent effect nor to actually indicate to the courts that a more stringent sentence was envisaged by the law-maker. Given the fact that environmental damage involves a huge loss of means of livelihood extending even to the future generations and often, irreversible, it can only be hoped that courts of law would be aware of these principles in their sentencing. [202] This differs drastically from the South African penalty that is imposed for commencing or continuing an unauthorised activity which is R5 million fine or ten years imprisonment or both. [203] This penalty is augmented by an ‚administrative fine' which should not exceed RI million imposed by the department officials. The Lesotho EIA regime does not use this administrative fine method.

4.5.1 CANCELLATION OF EIA LICENCE

The EIA licence granted may subsequently be cancelled where there is a substantial change in the original project or the project poses environmental threats which could not be foreseen during the initial study. [204] The licence holder is then called upon to submit a fresh environmental impact statement. Failure to do so would be deemed criminal and licence the cancelled. [205]

4.5.2 STAGES OF APPEAL PROCESS-STEP 11

The first stage in terms of section 25 (2) (3) (e) is that the Director, in issuing or refusing to issue a licence, shall produce a record of decision (ROD), which shall contain information with regard to the right of any person to seek reconsideration and how such may be sought. From the wording of the sub-section it is clear that this right for reconsideration is availed to any interested and affected person, not only the developer. This request has to be exercised within 30 days of receiving the Director's decision.[206]

Since this request is made to the same person, authority or office that issued the initial decision, a great onus for changing the initial decision is cast on the aggrieved applicant. The

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[202] Other neighbouring countries such as Swaziland and Botswana provide for high penalties, either as imprisonment period or fines. Swaziland Environment Authority Act No 15 of 1992 provides for E50, 000.00 or 10 years imprisonment or both while Botswana Environment Act no 6 of 2005 under section 16 (1) provides for P100.000.00 or 2 years imprisonment or both.

[203] NEMA Act 107 OF 1998 , sect 24F augmented by sect 24G.

[204] Section 26 (1) (a) and (b).

[205] Section 26 (2) (a) and (b).

[206] Section 25 (5)

chances of revising such a decision are slim and this can discourage aggrieved persons from trying to seek reconsideration.

The only advantage of the appeal process lies in the fact that it can be swift, for the Director will already be familiar with the facts and circumstances on which it is based. His period of response could therefore be shortened. In these circumstances, the period of 30 days allowed for the Director to respond seems to be lengthy. [207]

The second stage of the appeal lies with the environmental tribunal. [208] This is a three-member body which excludes the Director. Any member of the tribunal who is directly interested in the subject of the proceedings in question is barred from participating. [209] Unlike the appeal to the Director, this body inspires some confidence, in that it approaches the appeal with an open mind. The one pitfall that is found at this stage is the lack of time-frame within which its decision should be made. There is no reasonable length of time beyond which the aggrieved person may complain of an unreasonable delay in completing the case.

When finally the decision is made, the aggrieved, if still not satisfied, may appeal to the High Court within thirty 30 days. [210]

It is commendable though, that this Act stipulates some time-frames in this process of appeal. However, these time-frames appear to be one-sided at stage two (tribunal) where it is only the aggrieved who is pushed to initiate an action, while those within the system are not equally compelled to respond within a reasonable period. There is a chance that a developer who is made to wait for the tribunal decision for an unspecified period may ultimately lose interest in the project and abandon the development. In Lesotho, a least developed country, where poverty is the order of the day, the EIA process should not stall developmental processes but fast-track them. So the need to avoid unreasonable delay in the Environmental Assessment process cannot be over-emphasised. [211]

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[207] Section 25 (6)

[208] This is established under section 98 of the Act.

[209] Section 98 (9)

[210] Section 100 (3)

[211] See L J. Kotzé and A J.Van de Walt 'Just Administrative Action and the issue of unreasonable delay in the Environmental Impact Assessment Process: A South African Perspective'*: (*2003) 10 *SAJELP* where they highlight the need to have time frames throughout the EIA process so as to fast-track the approval process.

Lesotho's EIA Regime, new as it is, should take a lesson from the South African process where time-frames are set for the entire EIA decision-making process and are given particular attention and reference.[212] The ultimate aim is to ensure that there is no unreasonable delay in the process.

It should be borne in mind that time-frames are not set for own sake. They should be set in full appreciation of what is required, in practice, to meet them. The Lesotho EIA regime has to set such time-frames in full appreciation of the skills, experience and numbers required for the EIA staff to deliver services within such limits. Indeed, the South African EIA Regime has been criticized inter alia for imposing deadlines on under-staffed and under-skilled decision-making departments.[213]

The Lesotho EIA appeal process has one advantage over the South African one, namely it has an independent tribunal that considers appeals against the Director's decisions. While in South Africa, the appeal is subjected to the Minister or MEC under whose authority the initial decision was made. The degree of independence by the Lesotho tribunal is not unquestionable since it is the Ministry of Environment which appoints the members thereof, but its existence depicts a better jurisprudential philosophy than that of South Africa.[214]

Lastly, the Lesotho EIA regime, much like the repealed ECA[215] in South Africa, is silent on the question regarding suspension or otherwise of the EIA authorization while the appeal is being heard. Even the Lesotho EIA 2010 guidelines do not address this, but, it would appear that, since the tribunal has been allowed to regulate its procedure, it may include deciding on the issue, of when and why it may suspend authorization. This may not be the best way of addressing this issue, for it does not provide certainty in law. Just as South Africa has dealt with it under the NEMA, it would be best to address it in the regulations that are being drafted.[216]

It would be desirable if the regulations stated clearly what powers the tribunal has in this regard. Perhaps the silence on this question is strategic at this stage, and practice will

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[212] RSA 2006 EIA Regulations

[213] See M Kidd and F Retief 'Environmental Assessment' in H.A. Strydom and ND King (eds) *Environmental Management in South Africa.* 2 ed (2009) 1028

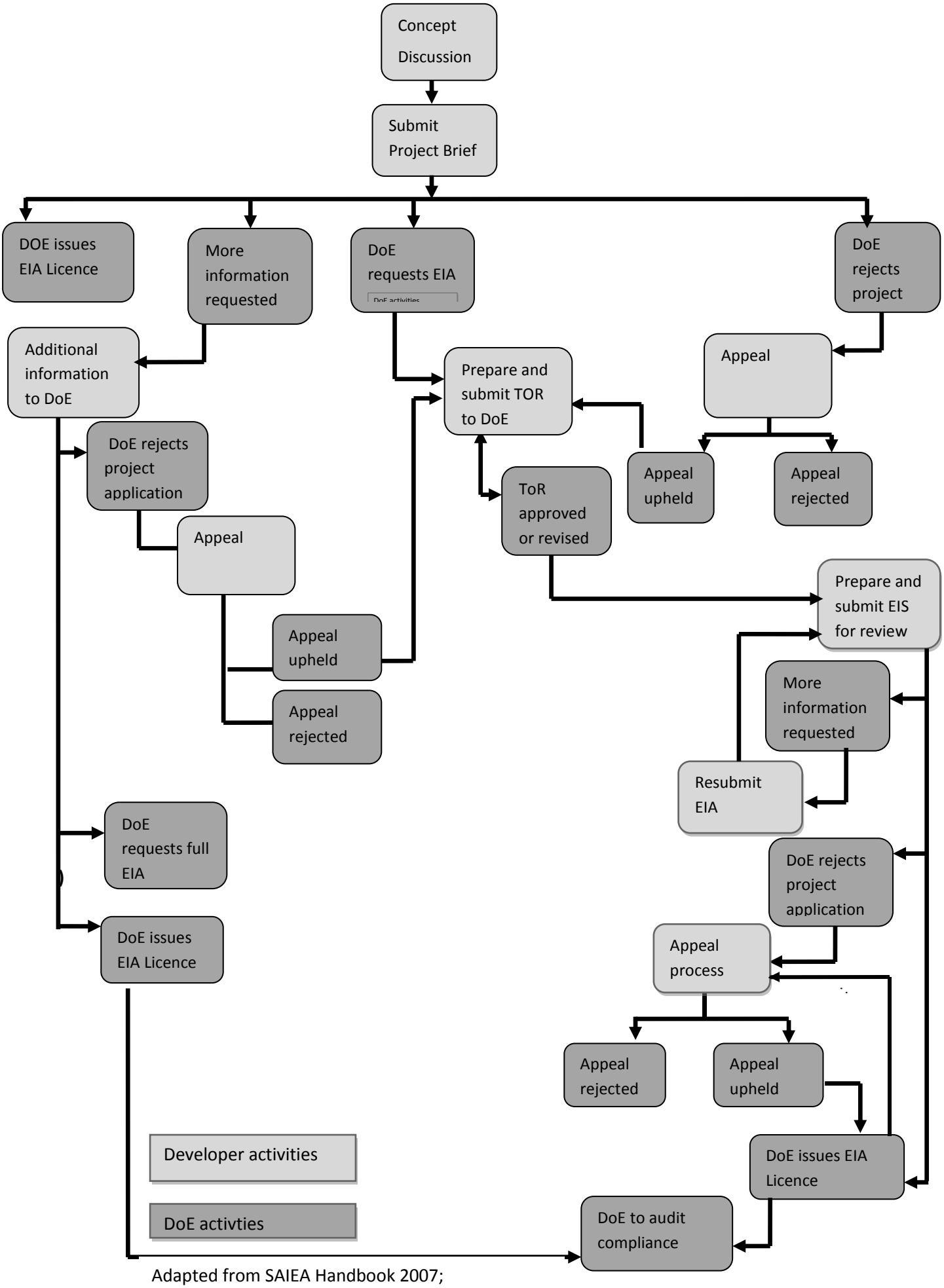
[214] See sections 98 (1) (2) (a) (b) and (c) (establishment of the Environmental Tribunal and its Composition)

[215] Environment Conservation Act 73 of 1989

[216] Section 43 (7) of Act 8 of 2004, which provides that 'An appeal under this section does not suspend an environmental authorization or exemption, or any provision or conditions attached thereto or any directive, unless the Minister or MEC directs otherwise'.

determine how this issue should best be treated. Considerations, which include the fact that Lesotho desperately needs investors and developmental projects, coupled with the just administration of the appeal process, should underlie any decision to be made in this regarding the suspension or otherwise of the EIA authorisation while the appeal is being made.

FIGURE 3. **LESOTHO EIA PROCESS**



Adapted from SAIEA Handbook 2007;

4.6. IS THE COMING OF THE MANDATORY EIA IN LESOTHO TOO LATE?

There are many developmental projects that were undertaken in Lesotho before the introduction of the mandatory EIA regime as ushered in by the Environment Act no 10 of 2008. Some of these projects are detrimental to the environment and good health of today's public. In the absence of any legally enforceable EIA law, there was nothing much done by way of responding to such environmental challenges, which often sparked public outcries. A typical example is found in the ever-resurfacing scuffle between the Morija Community and the Moradi (pty) ltd Stone Crushing Company operating in Morija within the Maseru district. To express their anger and frustration, the community held a demonstration and handed a letter of complaint to the management of the company.[217]

The community complaint, which was not the first, concerned serious emissions of dust and stench from the chemicals and noise pollution from the operations of this company. The community also complained of their communal land which they said used to serve pastoral and ecological needs. The company has now occupied this land. They allege further that trees, grass and traditional herbs which they used medicinally, have been affected.[218] In response, the Moradi Company, which started its operation during the late 1980s, claims that dust emissions have been reduced to the required standard. The company added that, as part of its ongoing improvement scheme, it is continuing to develop and implement other strategies aimed at the reduction of dust levels. The company maintains, however, that „zero dust emission' is not achievable within its operations. The company further attaches a seismic report showing a vibration and air blast record of 29 July 2003. From this report, the company concludes that vibrations and air blasts from its operation could not have damaged the community's structures. With regard to damaged trees, the company's argument has been that it has photographs to prove that, prior to the inception of its operations; there were no trees in the demarcated area.

This scenario clearly shows that an EIA process was not undertaken at the outset of this project, the reason being that, at the inception of the operations in 1986, Lesotho had no EIA policy for such an undertaking. NES and other line ministries, to whom such complaints were lodged, tried to intervene by requiring the audit reports and encouraging the company to

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[217] LENA 'Residents challenge company' (5-11 September 2008) *Public eye news paper*. 4. See also Sechaba Matatiele 'Moradi must go' (5-11 September 2008) 1. (trans mine) Mosotho in *Public eye news paper.*

[218] The copies of this correspondence between the Community and the Company's response are also in possession of the researcher.

practise safe environmental activities. Such administrative efforts, which were not backed up by threats of legal sanctions, did not change much. In this case it was not easy to convince either side about the emission standards that were acceptable without referring to a law setting such standards.

The Environment Act of 2008 does have adequate provisions to address these concerns. Environmental quality standards are provided for under Part V of the Act.[219] What remains are the practical efforts on the ground to apply these standards. The actual implementation of the Act seems to proceed very slowly.

In some instances it appears that some of the environmental challenges now facing the country were created

by various government agencies. What is certain is that it was not without their knowledge and tacit approval. The dumping site at Ha Ts`osane within Maseru city, for example, was never intended to be a land-fill or dump–site as it is now being used. It was originally a quarry site that was left unrehabilitated, like numerous quarry holes that are found around the country. The Maseru City Council turned it into a dump-site for the city's refuse (see Annexure A, pictures 1 and 2 for a view of such holes).

In addition, the site is within a residential area. The fence around it has long since been vandalized and the site has become accessible even to children. Spontaneous combustion continues unabated and the smoke from dangerous chemicals that burned contaminated the atmosphere of the surrounding community, (see Annexure B, pictures 1 and 2).

The site is not owned or maintained by a private company. It is owned and maintained by the Maseru City Council, an agency of the Ministry of Local Government, which, in terms of the Local Government Act has a cardinal role to ensure healthy environment in the country.[220] It cannot be argued that the health risks that were created by this site were not known by the authorities. The main hazard is the possible seepage of leachate from the unlined pit, downstream into the Maqalika dam. This dam supplies Maseru with drinking water (see Annexure C, picture 2). It may be too late for an EIA to play a remedying role now, but this example underlines the importance of having the EIA to avoid similar situations in the future.

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[219] Sections 28 to 36 of the Act.

[220] Local Government Act of 1996, section 42 (2) (b).

Due to abject poverty and lack of education concerning the health hazards of living in this kind of environment, some members of the community adopted an attitude that can be described as the best-in-my-back-yard attitude (BIMBY). This entails a total focus on the economic benefits of scavenging on the site, whilst opposing or resisting any measures towards closure of the site or its removal.[221] This is a painful reminder of the ease with which poverty-stricken people will accept any condition that seems to address their plight, even though in the long term it may be self-destructive. All this is a painful reminder of the hitherto absence of an enforceable EIA regime in Lesotho to protect these people.

In further highlighting this concern about government ignoring environmental standards, Tracy Irvine noted:

> Many of the contraventions of the environment guidelines are directly initiated by
>
> the Government itself. Lesotho Council of Non-Governmental Organizations
>
> has evidence that building works have started on a number of high-profile government projects without adhering to Environmental Impact Assessment guidelines, or having EIA licences issued that allow developers to start work on building or infrastructure projects. The new tourism infrastructure development at Sehlaba-Thebe National Park and the new Parliament itself have both begun to clear sites and begun building-work without the mandatory EIA Licence....[222]

It would appear that this concern was a general public perception, for even in the drafting of the 2008 Environmental Act, the Parliament, in a rather unusual move, had to include a provision in the Act that states that „This Act shall bind the state'.[223]

If the above provision is read with section 23 (1) (c), which provides that „The director shall, in consultation with the relevant line ministry, monitor the operation of *all projects in existence at and after the commencement* of this Act, with a view of determining whether

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[221] This is from the interview I held in November 2008 with several members of the community living within this site. One was a widow aged 60 years, who claimed to have educated all her four children by collecting from the site. She proudly displayed various items of clothing like tracksuits and blankets which she had sewn out of the textile cloths dumped at the site. By selling these items she was able to earn an income which she would otherwise not get. She was opposed to the idea that the site is unhealthy and has to be shut down. She claimed that she and all her children, including some who are already married, are still healthy and that closing down the site could actually kill her as she has no other means of surviving. Annexure C picture 1 show two of the countless blankets which she has sewn and sold.

[222] T. Irvine. 'Environmental Enforcement in Lesotho will fail if New Environment Bill 2006 is passed by Parliament' available at http://www.Lecongo.org./s/about/default.PhP.Accessed;12 June 2008

[223] Section 1 (3) of the Environment Act No 10 of 2008

they comply with the provision of this Act,'[224] then the implication is that even those government projects that did not undergo the EIA process must be subjected to monitoring under this Act. Whether the Director, an employee of government and a civil servant, will have the requisite authority to subject various ministries of government to this process remains to be seen.[225] What is important is the recognition and acknowledgement that the government has to be subjected to the provisions of this Act, including compulsory EIA processes.

This will mean that even the EIA considerations that were provided for as government-funded projects under the Ministry of Planning, have to follow only the main EIA course, as provided for under the Act.[226]

4.6.1 INDUSTRIAL POLLUTION

The reluctance of the government to foster environmental enforcement has been noticed in the textile industry which has been a leading employment creator in the country; especially during the African preferential trade by the United States of America under the African Growth and Opportunities Act of 2000 (AGOA) period.[227]

A concern that in particular relates to the Thetsane Industrial Centre in Maseru has come in the form of atmospheric and water pollution of the nearby streams, with untreated industrial effluent and obnoxious smells.

What is now notoriously known as the „blue river' phenomenon („Mabolou' in Sesotho) due to the blue-coloured effluent from the textile industries has been flowing into the river system for more than 15 years due to the absence of a legal mandate to stop it (see Annexure D, picture 1). Some of the effects of this „"dyed"' industrial effluent on animals have been reported by NGOs.[228]

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[224] Emphasis added

[225] It is my opinion that Lesotho Environmental Authority under Environment Act No 15 of 2001 was better placed to do such enforcement tasks than is the Director here.

[226] Section 25 (4) of Act No 10 of 2008

[227] An Issue paper at the African Ministers of Trade in Kigali, Rwanda: 'A decade of African-US-Trade under the African Growth and Opportunities Act (AGOA) ; challenges, opportunities and framework for the post- AGOA engagement'; 30 November 2010. The paper reveals that in the first two years of AGOA Certification, Lesotho experienced a 36 per cent increase in employment from, 29 000 to 45 000, due to the establishment of new companies, mostly textile ones. Available at http;//www.africa-union.org/root/au/Conference/2010. Accessed on 01 December 2010.

[228] The Lesotho Council of Non-Governmental Organisation News Letter (2006) Vol 7 (13) 3. Available at http://www.Lecongo.org.ls. Accessed on 06 December 2008. Note well that when this observation was made

This is a serious concern that strikes at the heart of sustainable development. While Basotho are in need of job opportunities and must endeavour to develop their economy, it would appear that there is now an imbalance between industrialism and environmentalism. The former appears to have taken advantage of the absence of environmental protection tools such as the EIA in Lesotho. The manufacturing industries are not regulated adequately in terms of ensuring protection of the environment. These „blue-river' streams from Thetsane Industry generally join the Mohokare–Caledon River, which forms the international boundary with South Africa. In terms of various international commitments, Lesotho has no business polluting water for other down-stream users.[229]

The national concerns about this situation finally reached international level in 2009 and pressured the government into committing itself to addressing this situation.[230]

Administrative pressures were put on the industries to halt the practice by constructing effluent treatment plants. While the situation has significantly improved, there is a need to monitor these operations fully by employing the provisions of the new Act. Unfortunately this is yet to happen because the necessary institutions are not yet functional.

At present, there are various developmental projects that the country is undertaking through the Millennium Challenge Corporation Programme (MCC). This includes the building of the Metolong Dam. The EIA processes that were used were the donors, but it is desirable that the indigenous processes availed under this Act, especially monitoring, be employed.

4.7 BILATERAL PROJECTS BETWEEN LESOTHO AND SOUTH AFRICA

There are many bilateral projects undertaken between Lesotho and South Africa but for the purposes of this study it is perhaps important to refer to the following two as the main ones. These are the Lesotho Highlands Water Project (LHWP) and the Maloti-Drakensberg Trans-Frontier Conservation Project (MDTCP)

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the understanding was that the compulsory EIA regime as envisaged under the Environment Act 2001, would soon be operationalized but the Government neither created nor enforced such a regime with a result that it became essentially voluntary.

[229] These include the 1995 SADC Protocol on shared water courses. UNEP '*Selected Texts of legal instruments in International Environmental law*' (2005) 578

[230] See (2 August 2009) *The Sunday Time*s, and also http://www.timesonline.co.uk/tol/news/weather. Accessed on 10 August 2009.

4.7.1 LESOTHO HIGHLANDS WATER PROJECT (LHWP)

This is a multi-billion dollar project that is being funded by the World Bank and its development partners. The project aims at damming a number of Lesotho rivers in order to transfer water to South African industries in Gauteng. Lesotho would benefit by receiving royalties from South Africa for the water delivered and by generating hydro-electric power at „Muela. The five-phase project is ongoing until 2020 and so far the first two phases, phase 1 A and phase 1 B have been completed. On the South African side, it is the Trans-Caledon Tunnel Authority (T-CTA) that is charged with the implementation of the 1986 water treaty, while Lesotho has the Lesotho Highlands Development Authority (LHDA).

In terms of Section 44 (2) of the LHDA order No 23 of 1986, the authority shall „(E)nsure that, as far as reasonably possible, the standards of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons.'

This is a minimalist standard, which does not guarantee any developmental growth, yet the project's overall aim is supposed to develop the country and not to include stagnant economic growth. Phase 1 A was undertaken within this legal backdrop. The country at that time did not have any EIA laws, regulations or guidelines to direct its environmental concerns. Lesotho relied solely on the EIA requirements of the World Bank. These requirements, as utilised within the project failed to meet the standards of the EIA which the World Bank was claiming to use.[231] As a result, the project resulted in the most unsatisfactory resettlement processes. The project thus failed to improve the lives of the people it affected most, the rural communities.[232]

For Phase 1 B, both EIA and an environmental action plan were conducted, but none of these studies addressed outstanding problems from the first phase. The current concern is the extent to which the provisions of the new law (Environment Act No 10 of 2008) can be brought to bear to address these outstanding concerns. It is hoped that all the essential logistics can be in place soon, so that the next phases of the project can be approached with the right EIA aspects to complement that of the World Banks.

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[231] P McAuslan 'The Lesotho Highlands Water Project and Environmental Law; A case study in the light of "our Common future".' (1987) 3 *Lesotho Law Journal* 41

[232] M L Thamae & L Pottinger '*On the wrong side of development- Lessons learned from the Lesotho Highlands Water Project'* (2006) 16

4.7.2 THE MALOTI- DRAKENSBERG TRANS-FRONTIER PROJECT (MDTFP)

This is another joint venture between Lesotho and South Africa. A common protected area has been created by joining Ukhahlamba Drakensberg Park World Heritage Site (South Africa) with the Sehlaba-Thebe National Park (Lesotho). The Memorandum of Understanding was signed between the two countries on 11 June 2001.

The purpose of the MDTFP includes preservation and conservation of the ecological and cultural integrity of the area. [233] The project is significant in various ways, one of which relates to water production for the entire Southern African region. The mountain range dominating this area constitutes the principal water production area in Southern Africa and so the project ensures that this mountain catchment area is environmentally protected. [234] The joint management policies and guidelines, as articulated in the plan, include vision, mission and management objectives, research, infrastructure and environmental interpretation and education. Apart from various international treaties, conventions and declarations that find expression in this venture, the respective national policies and legislation of these countries still provide direction.

It follows, therefore, that in this kind of set-up, the use of the EIA process is inevitable. In fact one would submit that a common EIA regime be developed for this project and all other common cross -border projects. The availability and adoption of such a tool could surely facilitate the rate of development of cross-border endeavours. In the long term it could translate to other national projects which could have beneficial extra-territorial impacts. Such a tool is not very evident at present, but there are indications of it emerging. This was seen during the survey concerning the tarring of the Sani Pass route, which connects Mokhotlong and Underberg. The study, commissioned by the Wildlife and Environmental Society of South Africa (WESSA) revealed inter alia that most tourists would not like the route tarred. However, WESSA has emphasised that the EIA assessors should conduct further studies into the need and desirability cost-to-benefit and wider social implications *on both sides of the border*.[235]

Circumstances surrounding the tarring of Sani Pass would not really allow for the conduct of a one-sided EIA, apart from the fact that the Lesotho EIA regime and the South African one

[233] National Environment Secretariat. MDTFP Joint Management Plan-2008-2012. (2008) Lesotho Government Document.
[234] Ibid
[235] (25 August 2008) *Public Eye Newspaper* (Lesotho)

equally mandate cross-border EIA where the project has extra-territorial impact internationally; four more factors would equally demand it.

1) The Pass now falls within the MDTFD conservation area, so the likely impacts on flora and fauna have to be determined before proceeding with the tarring. For example, the effects of the vehicular traffic and noise to the wildlife that will be crossing to either side of the border have to be determined.

2) The very nature of the route and the use of the road would demand it. It is mostly used by businessmen and public from Mokhotlong as the shortest route to Durban harbour and other commercial ports. Tourists on both sides use it, so any development (tarring) might affect the nature of public perceptions about it. For example, while from a tourist point of view the Pass might lose its natural aura of adventure, to businessmen tarring might shorten their journey.

3) The Pass is physically situated in a highly sensitive area, along very steep slopes and prone to erosion on disturbance. A „no-action alternative' would still leave it prone to further erosion.

4) The uniqueness of Sani Pass under International Law would demand that concerned states are informed and consulted as they could be affected. The route is actually between the borders of two states (Lesotho and South Africa) the so-called „No-man's land.

For these reasons, even if the two countries' laws did not call for cross-border consultations, it is submitted that circumstances presented by the Sani Pass project would provide for the opportunity of working together, using the same EIA instrument, which could be further developed into a common process for all future purposes. This would, in turn, serve as a building block that other SADC countries could adopt. A combination of such practices could eventually lead to a region such as SADC having a common EIA practice. It would then be easy to practise EIA in the sub-region. No country in the SADC block could then become a haven for ill-conceived environmental practices, or what Gibbs and Gibbs call „foot-lose investments.'[236]

[236] A Gibbs & T Gibbs *A Water supply and pollution crisis in Lesotho's textile factories: The problems of footloose investment*. (2003)

4.8 LESOTHO's CONSTITUTIONAL MANDATE IN ENVIRONMENTAL ISSUES AND THE JUSTICIABILITY OF THE EIA PROCESS

Unlike the South African Constitution, Lesotho's Constitution does not hold protection of the environment as a right. Under the Lesotho Constitution, environmental protection is categorised as one of the principles of state policy. It reads; „Lesotho shall adopt policies designed to protect and enhance the national and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.'[237] This provision is different from that of South Africa, which advocates for its citizens the right to a healthy environment.

The significance of this provision relates to the way the judiciary will be expected to interpret various pieces of environmental legislation, including EIA disputes that may arise.

The Lesotho Constitution further clarifies what the role of the courts would be in dealing with the above ... and all other principles of state policy, as provided under Chapter III. It states that „These principles shall not be enforceable by any court, but, subject to the limits of the economic capacity and development of Lesotho, *shall guide the authorities in the performance of their functions* with a view to achieving progressively, by legislation or otherwise the full realization of these principles.'[238]

What becomes abundantly clear from the reading of these two sections is that the role of the courts in enforcing section 36 (hereinafter called the environmental clause) is constrained by section 25. This would mean that policies and other endeavours that may be taken to ensure a safe and healthy environment shall be subjected to the import of this provision.

What this means, in practice and under the Lesotho EIA regime, is yet to be decided by the courts, but it is clear from the aspirational language used in the environmental clause that the statement is more of a „wish' than a guaranteed right.

What is also evident from these provisions is the fact that the achievement of these aspirations shall be determined by the economic muscle of the state and its programmes to achieve them. Perhaps some indication of how the courts in Lesotho are going to interpret this provision may be gathered from the case of *Baitsokoli and another V Maseru City*

[237] Lesotho Constitution 1993 Section 36 of chapter III `Principles of state Policy
[238] Ibid Section 25

Council and others.[239] This case, by the highest court in the land, the Appeal Court, did not primarily concern itself with the justiciability of principles of state policy in Lesotho, but only touched on this issue as an alternative argument to the main argument presented to the court. First of all, the court recognised clearly that Lesotho has dealt with socio-economic rights „"green rights"' distinctly different from fundamental rights or „"blue rights"'[240]. Secondly, the court highlighted that the aspirational language used for the socio-economic rights is significant.[241] Then, in a half-hearted attempt to unravel the import of the justiciability of principles of state policy, the court said;

> That is not to say that the provision of Section 29, like those of adjacent provisions regarding matters such as health, education, protection of children, workers' rights, and interests and the environment, may not in appropriate circumstances, and in appropriate ways find implementation and that recourse may be had to the courts in that regard[242].

The court did not deal with the argument any further. What is instructive from this case is that socio-economic rights may find implementation under appropriate circumstances. No other authoritative ruling or direction has been given by the courts to clarify who is responsible for bringing about these appropriate circumstances, but it is obviously the State.

It can be argued that it was in accordance with these two provisions that Lesotho adopted its NEAP and enacted the Environment, Act of 2008. The latter, somewhat curiously (given the preceding two constitutional clauses) provides a right to a clean and healthy environment which is enforceable by the courts of law.[243] The Act achieves this delicate exercise by stating:

> Every person may, where the right referred to in subsection (1) is threatened as a result of an activity or omission which is causing or likely to cause harm to human health or environment, bring an action against the person whose activity or omission is causing or is likely to cause harm to human health or the

[239] C 4/05/ Const/c/1/2004) 2005 LSCA 13 20 APRIL 2005 (SAFLII)
[240] Ibid para 18
[241] Ibid para 19
[242] Ibid
[243] Environment Act No 10 of 2008 Sections 4 (1) a (2) and (3)

environment.[244]

The Act does not define the word „person' and so what this section does appears to exonerate the state from the envisaged legal action. In other words the types of legal actions envisaged under this section are predominantly of a citizen against a citizen (horizontal) and less or none of a citizen against a state (vertical).

This interpretation appears to be the most plausible to be applied to the provisions of the Constitution and this Act to co-exist. Otherwise, a different interpretation, bringing into picture the courts, to enforce section 4(1) (2) (3) of the Act would render the latter provision somewhat un-constitutional, as it would be going against Section 25.

The nature of the intended actions does not *prima facie* or readily call into question, the economic *capacity* of the state. All four types of provided actions appear to be reasonably far removed from raising issues of the economic capacity of the state.[245]

This, in the final analysis, would mean that before one can bring an action involving the state as a party thereto, caution should be borne in mind that such a case does not revolve around the socio-economic capacity of the state. This may be a challenge, with issues involving an EIA where consideration of socio-economic impacts is required as a sine qua non, as is the case in section 21 (5) J of the Lesotho EIA regime.

Besides the interpretive approaches discussed, courts in Lesotho are enjoined, as are their counterparts in South Africa and internationally, to adopt principles of sustainable development, as their guide.[246]

Mention is made of five such principles in the Act:

(a) the polluter pays principle;
(b) the precautionary principle;
(c) the principle of eco-system integrity;
(d) the principle of public participation in the development of policies, plans and processes for the management of the environment; and
(e) the principle of inter-generational and intra-generational equity.[247]

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[244] Ibid 4 (2)
[245] Environment Act No 10 of 2008 Section 4 a, b, c and d.
[246] Ibid 4 (4).
[247] Ibid.

All these principles are fundamental in the implementation of EIA concerns, but what is more interesting is found in 'd' above, that is the requirement that the public be involved in the development of policies and plans for environmental management. This seems to support and strengthen the SEA approach, which the Act introduces.[248] The Act itself defines strategic environmental assessment as meaning „an assessment of the positive and adverse effects that the implementation of a Bill, regulation, or of a public policy, programme or „plan is likely to have on the environment.'[249]

Finally, as a general observation, there is lack of jurisprudence on sustainable development and environmental protection in Lesotho. This is not surprising, for this Act is the first attempt at a comprehensive environmental Act and a principle (EIA) inclusive that is expected to create the culture of sustainable development. Where issues of EIA occasionally appeared on the courts agenda, they were not addressed squarely, nor were these principles of sustainability necessarily the guiding posts.[250] This would mean that all the courts in Lesotho, including the lowest Magistrates Courts, that often feature in this Act, will need some capacitating in this regard, or what Kidd calls „Greening the Judiciary', so as to ensure that they handle environmental issues with adequate appreciation.[251] This brings us to the question of institutional readiness to execute the new EIA mandate in Lesotho

4.9 INSTITUTIONAL ARRANGEMENTS FOR LESOTHO EIA REGIME

As has been pointed out throughout this study, the Lesotho EIA regime under the Environment Act no 10 of 2008 is still in its infancy. In other words, the EIA regime has still not fully functioned as envisaged under the Act. This is because some of the institutions that are provided for by the Act are still in the process of being created. Some of these institutions appear under part three of the Act. The main one is the National Environment Council, which is composed of ten government ministers for all the line ministries and four private individuals, in their representative capacity from civil organizations. This body is supposed to meet biannually, but to date it has not met. It is important that the Council meet, for it is the

[248] SEA is included under section 19 (2) of the Environment Act No 10 2008. The act does not specifically provide for SEA processes in the act but what are traditionally the elements of SEA are found intermingled with EIA requirements. This is the case in section 21 (5) (e) where even cumulative impacts are required but as part of the EIS under EIA process.

[249] Section 2.

[250] For example see *Mahlakeng and others v Southern Sky (Pty) Ltd and others* (Civ/ Apn / 240/03) 2003 LSHC 116 (10 OCT 2003) SAFLII, where even though none compliance with EIA process was one of the complaints, yet nothing much was said about it.

[251] M Kidd ' Greening the Judiciary' (2006) 3 *Potchefstroom Electronic Law Journal* Http://www.Puk.ac.za/fukulteite/regte/per/issueo6v3.html.

one that sets national environmental goals and objectives, as well as being the overseer of the progress of the line ministries.

Secondly, no environmental inspectors have been appointed and the environmental tribunal is still to come. These institutions are essential for the full operation of the EIA regime. At present the EIA office relies on the old operational structure, manned by two EIA officers. This is wholly inadequate. The main task of these officers is to review EIA applications, with the assistance of relevant line ministries.

According to one EIA officer at the Ministry of Environment, there is no backlog of applications, because most of the applications do not require a full EIA, but are approved at the project brief stage.[252] This is probably what has militated against the backlog and also the fact that, all along the EIA system was voluntary. Once the logistics for the full operation of the 2008 Act are in place the picture is expected to change.

As a general observation, regarding the delay in putting these institutions into place, one cannot rule out the challenge of inadequate financial resources. The creation of the new institutions under the Act calls for new or increased office space, increased service infrastructure and more salaries for the government to pay. With the effects of the recent global financial meltdown still affecting the economy, coupled with the serious decline of Lesotho's share in the Southern African Customs Union (SACU) revenue, which constitutes more than half of the government budget, financial constraints are plausible.[253] However, one must hasten to recall that the LEA under the repealed Environmental Act no15 of 2001 never came into existence for almost the same reasons. When it comes to environmental expenditure, the required financial commitment by the government is yet to be seen.

[252] This is from an interview with Mr Phooko on the 05 October 2010. Since there is no reliable data kept on these applications as yet, so it has not been possible to verify this assertion except on anecdotal evidence by EIA practitioners.

[253] See the 2009/2010 fiscal year budget speech to Parliament. Minister of finance and Development Planning. 18 February 2009. http://www.gov.ls. Accessed on 29 November 2010

CHAPTER FIVE

SIMILARITIES AND DIFFERENCES BETWEEN THE LESOTHO AND SOUTH AFRICAN EIA REGIMES

From the discussion in the previous chapters, similarities and differences in these two countries' EIA regimes have become apparent. It is now important to briefly, yet specifically, recap on these distinctive factors.

5.1 SIMILARITIES

Apparently there two reasons behind the similarities. The first concerns their common subscription to similar principles of development, as espoused under various United Nations mandates. A typical example is their common subscription to the concept of sustainable development. This is reflected in various policy documents of each country as a method of approach to be used in their development endeavours.[254] EIA then becomes significant, for it is central to the achievement of sustainable development. These countries have based, or supported, their EIA regimes on principles of sustainable development. For example, „the polluter pays' and „the precautionary principles' are just two of such principles found underlying each EIA regime in these two countries.

Their definition of the concept of sustainable development may not be similar, word for word, nor would that really be necessary. What matters is that they have a common thread of meaning for the concept running through their definitions. This is the fact that development must meet the needs of present and future generations[255].

The second reason that indicates and underlies this similarity is the fact that both countries have specifically provided for compulsory EIA processes under their legal systems. Initially, this was not the case. This move to have a legal basis for EIA practice is commendable, because it is recognized internationally as one of the indicators for best EIA practice.[256]

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[254] For Lesotho see The National Environment Action Policy document.1998
For The Republic of South Africa see the National Strategy for Sustainable Development document

[255] For these definitions see The Environment Act no 10 of 2008;section 2 for Lesotho and for The Republic of South Africa , NEMA Act no 107 of 1998 section 1

[256] C.Wood *Environmental Impact Assessment in Developing countries*; *An overview*.2003

5.2 SIMILARITIES WITHIN THE RESPECTIVE PROVISIONS OF THE EIA ACTS

- Both systems, while clearly providing for EIA and its processes, provide for Strategic Environmental Assessment (SEA) but both do *not* provide for SEA's processes.[257]
- Both systems provide lists of activities or projects for which EIA licencing is required.[258]
- Both systems do recognize that certain activities or projects do not need a full-scale EIA, so there are processes for ‚shorter and longer' EIA processes.[259]
- The minimum/basic requirements for EIA (EIS) are specifically stipulated by both regimes.[260]
- Both systems require under either basic (RSA) or full EIA (Lesotho) assessment of cumulative impacts.[261]
- Both systems recognise the need for a transboundary EIA, where international commitments or relations may be affected.[262]
- Both encourage public participation, though at different levels, in conducting an EIA.[263]
- Both specifically provide for assessment of social, economic and cultural effects of the projects.[264]
- Reviews of Environmental Impact Studies are undertaken by the government agency or department.[265]
- Only appropriately qualified and approved experts are allowed to conduct EIAs.[266]

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[257] For Lesotho, Environment Act n0 10 of 2008 sect 19 (1) and (2),for RSA see NEMA Act n0 .107 of 1998 Regulation 23 (h) and its interpretation in Fuel Retailers case.2007 (6) SA 4 (CC).
[258] For Lesotho, ibid Part A first schedule, for RSA, ibid sect 24 (2).
[259] For Lesotho, ibid ,sect 20 (1) (3),and for RSA, ibid Regulations 22-26 and Regulations 27-36.
[260] For Lesotho, ibid sect 21 (5), and for RSA, ibid sect 24.
[261] For Lesotho ibid sect 21 (5) (e), and for RSA, ibid Regulation 23 (h). This however ,not encouraged under the international best EIA practice.
[262] For Lesotho ibid sect 21(5) (g),and for RSA, ibid sect 24 (c) (2).
[263] For Lesotho, ibid sect 20 (4) 21(3), 22 (a) (b) (c) and (d), and for RSA, ibid Regulation 56, but regulation 54 under the 2010 regulations.
[264] For Lesotho, ibid sect 21 (5) (J) and for RSA, ibid sect (2) Principle 2 (4) (i).
[265] For Lesotho, ibid sect 21 (7), and for RSA, ibid sect 24 (h).
[266] For Lesotho, ibid sect 21 (7), and for RSA, ibid sect 24 (h).

5.3 DIFFERENCES

There are some differences between the two systems. Again there seem to be two main reasons underlying these differences of approach and practice.

Firstly, it will be recalled that the coming into force of the EIA regime under the Environment Act no 10 of 2008 is the first time Lesotho has experimented with the compulsory EIA. The Republic of South Africa has experimented with the same tool for at least a decade. This means that as the Lesotho regime is, for the first time, learning to walk, South Africa is at the stage where it is perfecting its walking skills. In a sense, comparing the two may thus be somewhat unfair. The Lesotho system has not even released its first set of regulations, while the South Africa has recently released its third set of regulations.[267] The Lesotho regime is yet to be tested and tried in practice, so that its weaknesses and strengths can be measured categorically.

Secondly, the fact that Lesotho has a single system of administering environmental laws, as opposed to South Africa, which combines the provincial and national systems of administration, is reflected in the strong need for the integration of systems under the South African EIA than under the Lesotho system, where co-ordination is the prime call.

5.4 DIFFERENCES WITHIN THE EIA REGIMES

- The South African system is mature and at an advanced stage of being perfected with a third set of EIA regulations. The Lesotho system is comparatively young and still awaiting its first set of EIA regulations.
- The South African system is highly justiciable because the national Constitution and other laws are in place to support fully the EIA machinery. In Lesotho the EIA machinery does not get the same support from the Constitution or other national laws.
- As for public participation in the EIA processes, South Africa requires that interested and affected persons are registered for the purpose of participation. Lesotho does not have this requirement.
- Under the Lesotho EIA (project brief stage) the EIA licence may be issued without any public involvement at all (sect 20 (3)), yet this is not possible under the Basic Assessment Stage in South Africa.

[267] EIA regulations 2010

- Under the Lesotho regime EIA reviewing processes are confined to the Government and its agencies (indirect outsourcing), while under the South African regime it may be outsourced if there is lack of expertise within the government machinery (direct outsourcing).

5.5 GENERAL RECOMMENDATIONS

It has been revealed throughout this study that Lesotho and South Africa are making efforts to try to improve their EIA processes. This means that there has been a realisation that the present system has shortcomings in various respects. Obviously, the two systems are at different levels of establishment, but there seems to be some common areas that call for strengthening. These recommendations may be made as follows:

1) There is a need for increased staff and improved EIA enforcement

Both countries may have very good EIA laws on paper, but without adequate enforcement they remain ineffective. In Lesotho, where EIA practice has up to now been largely voluntary and employed basically to meet licensing requirements in most cases, the new pressure for compulsory compliance and subsequent monitoring and auditing is likely to overwhelm the two EIA officers and result in backlogs. The South African practice has suffered inadequacies in the same areas.[268] In both countries the key factor that has to rectify this flaw is adequate staffing and skills training in the respective EIA offices.

2) Incorporating environmental education into schools' syllabi

Environmental awareness is, even by global standards, a new consciousness that still needs to be developed. In Lesotho and in South Africa, this is a truism as the environment movements started around the 1990s. One method that can be used to raise people's consciousness about the need to protect the environment is through formal education. NGOs play a vital role by employing various programmes of environmental education, but their approaches often lack consistency and long - term development, so involvement of the government education department is necessary. Through introducing an environmental awareness syllabus in schools at all levels, the necessary consistency can be assured. In the long term the results

[268] Department of Environment Affairs and Tourism. *Review of the effectiveness and the efficiency of the Environment Impact Assessment (EIA) System in South-Africa.* Draft Report 2008 17. Available on http://www.deat.gov.za /hotissues/2008/eiareview/.html. Accessed on 26 November 2008.

that this method could yield for a country would be far- reaching. The benefits would also be evident where members of the public have to participate in EIA processes. The „enlightened' public would know why they have to participate meaningfully in such processes and this would make it easy for environmental laws and policies of their respective countries to be appreciated. Indeed, the enlightened public could even take other pro-active measures themselves in the protection of their environment.

In the case of „*BIMBY'* (best-in-my-backyard) attitudes, education can help by teaching the public about the negative effects of living in environmentally unhealthy conditions and revealing that the material gains are not worth the risk to one's health. Informal education can address this aspect, but in order to make it more meaningful it would have to be coupled with practical economic upliftment programmes for the poor. Otherwise education that is not backed up by economic measures to improve poor peoples' lives will not change attitudes determined primarily by dire economic necessities.

The Lesotho Environment Act no 10 of 2008 section 10 (1) (i) and 97 empowers the Director in the Department of Environment to take appropriate measures for the integration of environmental education at all levels of education. While the provision is a step in the right direction, it does not go far enough, for it fails to give assurance that such measures would be fundamental. The Lesotho National Environmental Policy 1998 calls for the introduction of environmental education in both formal and non-formal learning sectors.[269] The practical effects of this policy are yet to be seen.

There is an equal educational need in South Africa to put public perception about environmental issues on the same level of understanding. The historically disadvantaged groups generally perceive environmental issues as pertaining to economically advantaged classes of society and not to their own daily struggles, so there is a need for education to address this attitude.

3) Regulation of EIA fees

Closely related to the regulation of the EIA practitioners is the issue of fees charged in the process of conducting EIA. While large-scale developments may not have a problem with such fees, small businesses or poor persons who want to undertake development projects may be prohibited by high and unregulated fees. This has been proven to be an issue of concern in

[269] National Environment Secretariat. *National Environmental Action Policy (*1998) ;15.

South African EIA practice.[270] This is also a worry to Lesotho, with its poorer economic status than South Africa.[271] It can only be hoped that, with the regulation of practitioners, their fees cannot be ignored.

4) Use of SEA and EIA in a complementary manner

Both Lesotho and South African environmental law practices admit that SEA is another valuable instrument for the protection of the environment. However, both systems have not made use of SEA to a considerable degree. It appears that the subjection of a plan, programme or policy to strategic environment assessment reduces or eliminates the chances of such a plan being unsustainable when it reaches the implementation stage (project). As Murombo puts it: „unsustainable projects or activities are unsustainable from the time they are designed or formulated'.[272] This underscores the importance of SEA within EIA. It means that lengthy and detailed EIA processes will not be necessary where a project has been subjected to SEA during its formulation stage. In this way the two processes will complement each other.

5) Creation and use of the same EIA process for cross-border projects

Lesotho and South Africa have undertaken many bilateral cross-border ventures, most of which require the use of EIA. It is therefore desirable to develop a set of EIA process rules that will be applicable for joint border ventures. Such a tool could help to identify and address incidents of environmental degradation taking place along the borders. This move could assist Lesotho to develop its capacity in handling EIAs.

6) A two-year government compliance review on EIA

The government is generally seen as the main violator of EIA law. It is necessary to change this perception if EIA law is to be respected by the general public. Creation of a Joint Review Committee by the NGOs and government to assess how the government has complied with EIA processes will be helpful. The bi-annual report could be made available

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[270] Note 262 above,119

[271] NA Debates (Lesotho) (Senate) 26 February 2008: 38-40

[272] T. Murombo. 'Beyond Public Participation: The disjuncture between South- Africa's Environmental Impact Assessment (EIA) Law and sustainable development' (2008) 3 *Potchefstroom Electronic Law Journal* 14 Available at http://ajol.info/index.php/pelj/article/viewFile/42238/9356. Accessed: 9 November 2009.

even to international organisations such UNEP, with a request for assistance where there is a perennial problem.

5.6 CONCLUSION

The present study has shown that EIA processes tend to succeed where they are embedded in a legal system rather than merely as a voluntary mechanism.

The South African chapter has demonstrated the kind of legal mechanisms that have to be built into the law in order to ensure effectiveness of EIA. These include a positive constitutional clause on the protection of the environment, justiciability of the clause, access to justice provisions, locus standi and the role of the courts of law. These provide a minimal base for the EIA to operate; they do not guarantee its success.

Achieving the full potential of the EIA system needs dedication and political will on the part of the government and its enforcement agencies. This is a critical aspect which often makes the difference between existence of EIA laws and their absence. Good EIA laws do not guarantee effectiveness unless they are enforced. NGOs and other interest groups could play an important role as watch- dogs monitoring government's role in the whole process. In order for all these groups to carry out their over-sight role, the respective country must be under a democratic regime where the rule of law prevails. The general public, in all its different forms, is an integral part of the EIA process. In order for the public to play its part it has to be informed about process as early as possible, almost like engineers to the project; otherwise they often turn into victims of the said process. Once they fall victims of the process, the sustainability of the project becomes questionable.

The study has shown that EIAs are likely to succeed where there is a holistic environmental management programme. This underscores the need for aligning all environmental laws in a country towards achieving a mutual objective. The advantage of this alignment is ease of application and enforcement of all laws including EIA. The processing of an EIA application takes minimal time to complete and the implementation of the projects can be fast-tracked.

The study has highlighted the need for other environment management tools to be employed to complement EIA. In particular, SEA, which is recognised under the laws of Lesotho and South Africa, can complement the initial processes of the EIA and thus expedite the latter

process. South Africa's decade of practice with EIA has revealed that EIA has not reached its full potential to influence developmental decisions and that much still needs to be done by way of adapting this tool. This should provide impetus to countries such as Lesotho, which has just embarked on the mandatory use of EIA, to choose what is best for the country and not to waste time and other resources on what may never work.

ANNNEXURE A

(Pic-1) Notice the two quarry holes in this picture.These are examples of numerous unrehabilitated quarries that have become typical of the land-scape in Lesotho.Some have been turned into dump-site like Ts'osanes'

(Pic-2) Another example of a quarry that has been left un-rehabilitated. Notice the adjoining dongas as it reaches the agricultural land below. Should anybody be held accountable for this type of environmental degradation?

ANNEXURE B

(Pic-1) Spontaneous combustion at Ts`osane dump-site. Is there any law to tell the polluter to pay?

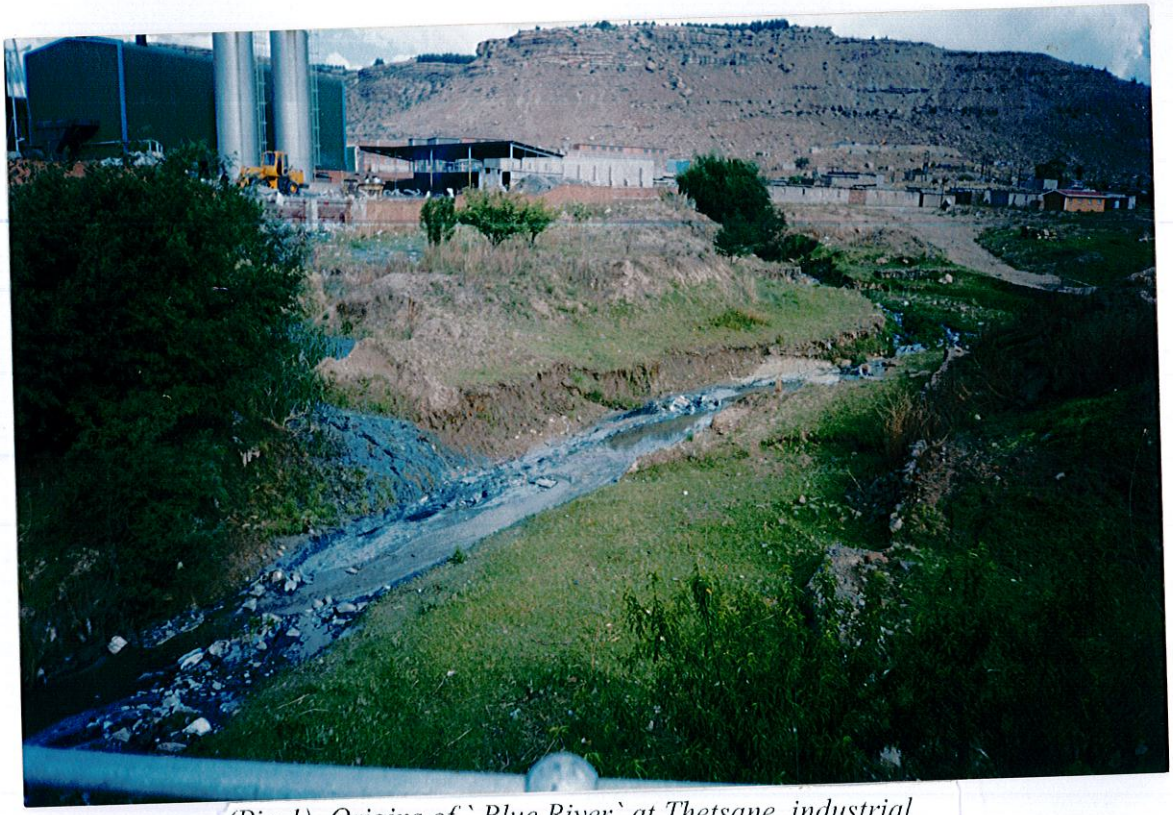
(Pic-2) Un-controlled access at Ts`osane dump-site. Will the new law bring any hope for the future?

ANNEXURE C

(Pic-1) Two of the many blankets sewn from the disused industrial cloths scavenged from Ts`osane dump-site. 'Have I broken any law by sawing together these cloths to earn a living?'

(Pic-2) Leachate at Ts`osane dump-site. Does the law care if it reaches the not so far away Maqalika dam?

ANNEXURE D



(Pic-1) Origins of ` Blue River` at Thetsane industrial area. Should the environment be sacrificed on the altar of economic gain?

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