REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No. 03/16337

Date:31/03/2004

In the matter between

B P SOUTHERN AFRICA (PTY) LIMITED Applicant

And

MEC FOR AGRICULTURE, CONSERVATION, ENVIRONMENT & LAND AFFAIRS Respondent

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JUDGMENT

CLAASSEN J

The applicant sought, firstly, an order reviewing and setting aside a decision of the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs of Gauteng ("the Department"), refusing applicant's application in terms of section 22(1) of the Environment Conservation Act No. 73 of 1989 ("the ECA") for authorisation to develop a filling station on a property in a commercial area in Midrand owned by the applicant. When it considered the application, the Department applied paragraph 2(1) of the "EIA

ADMINISTRATIVE GUIDELINE: GUIDELINE FOR THE CONSTRUCTION AND UPGRADE OF FILLING STATIONS AND ASSOCIATED TANK INSTALLATIONS", dated March 2002[1], which provides *inter alia* that new filling stations would generally not be approved by the Department where they are situated within three kilometres of an existing filling station in urban, built up or residential areas (the so-called "distance stipulation"). Secondly, applicant sought an order to review and set aside the Department's decision to apply this Guideline when it considered applicant's application. Thirdly, it applied for an order remitting to the Department for reconsideration the application for authorisation to develop the filling station[2].

Applicant's case is that the Department rigidly and unlawfully applied the distance stipulation to its application. The distance stipulation was likewise applied when the Department rejected a similar application for a filling station lodged by Sasol in respect of a property in Randpark Ridge. Sasol successfully challenged that decision in this Division. The judgment is recorded in the unreported case of **Sasol Oil (Pty) Limited and Another v Metcalfe,** Case no. 17363/03**,** (the "**Sasol** case"), in which Willis J on 29 March 2004 set aside the Department's refusal of Sasol's application to develop its filling station. Willis J held that the Guidelines referred to above, while not *ultra vires*, were for the most part totally irrelevant and inappropriate because they were clearly based upon a wrong premise, namely, that the Department had the power to regulate the construction and erection of filling stations *per se*. He held that the decision-maker in that matter applied her mind to considerations that properly belonged to the local municipality or some other such authority. Mr. Kennedy SC who appeared with Ms Barnes for the applicant submitted that the judgment and reasoning of Willis J in the **Sasol** case was correct and should be followed in this matter. Mr. Marcus SC who appeared with Mr. Sikhakhane for

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1 See Record page 241/2

2 The aforesaid relief is contained in paragraphs 1.1, 1.5 and 2 of applicant's notice of motion. The relief sought in paragraphs 1.2, 1.3, 1.4 and 3 of the notice of motion was abandoned. See paragraph 64 of the heads of argument submitted by applicant's counsel.

the respondent contended that the judgment of Willis J was distinguishable alternatively clearly wrong and should not be followed.

With those preliminary remarks I now turn to deal with the present application.

BACKGROUND FACTS

The applicant is in the business of developing filling stations and the retail sale of petroleum products. It develops on average 5 to 8 new filling stations in Gauteng each year. It currently holds 19 sites in Gauteng earmarked for developing new filling stations over the next 2 – 3 years. It complains that the Department's adoption of the policies laid down in the Guideline has a major adverse impact on the applicant's business.

The property concerned in the present case is known as "Portion 2 of erf 115, Kyalami Park, Midrand". Applicant bought the property during 1997, specifically for the purpose of developing it as a filling station. It is common cause that the property is situated at a busy intersection i.e. on the northwest corner of the intersection of the R55 Main Road and Kyalami Boulevard, Midrand. The surrounding area is a well-established commercial area. No natural resources are located within close proximity of the site.

When the applicant bought the property it was undeveloped and zoned for the development of a hotel or place of amusement. On 18 February 1997 the Town Council of Midrand granted an application lodged by the applicant for the rezoning of the property to "Use Zone XV 1: Special, for a public garage". It is common cause that in addition to the rezoning of the land use, applicant also required the authorisation of the relevant environmental authority, in this case the Department, prior to it being allowed to develop the property as a filling station. This authorisation is necessary due to the fact that a filling

station is identified as an activity, which may have a substantial detrimental effect on the environment. In this regard sections 21(1) and 22(1) of the ECA are relevant. Section 21(1) provides:

> "(1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental affect on the environment, whether in general or in respect of certain areas."

Section 22(1) of the ECA provides:

> "(1) No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the *Gazette*."

It is common cause that the respondent in this matter is such a competent authority.[3]

The Minister under section 21 of the ECA promulgated government Notice R1182 published in the Government Gazette No. 18261 of 5 September 1997.[4] In terms of Schedule 1 to GN R1182 the following were *inter alia* identified as activities, which may have a substantial detrimental effect on the environment:

> "1. The construction or upgrading of –
>
> (a) ……..
> (b) ……..
> (c) transportation routes and structures, and manufacturing, storage, handling or processing facilities for any substance which is dangerous or hazardous and is controlled by national legislation; ……"

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[3] Schedule 4 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 has determined the environment as a functional area in which national and provincial legislatures have concurrent competence. The respondent is therefore the competent organ of State and custodian of the environment in the Gauteng Province. See also paragraphs 13 and 14 of respondent's answering affidavit.

[4] See Annexure A3 to the founding affidavit, record p 55-57.

It is common cause that petroleum products are dangerous or hazardous substances, which are controlled by national legislation.

Government Notice R1183 published in the same Government Gazette of 5 September 1997 promulgated under sections 26 and 28 of the ECA, provides for regulations relating to applications for the authorisation of activities which have been identified under section 21 of the ECA[5]. The regulations in GN R1183 presuppose the existence of "policies, legislation, guidelines, norms and standards" which are to be complied with when application for the necessary authorization is made. Section 3(1)(a) of these regulations requires an applicant to appoint an independent consultant to comply with the regulations on its behalf. Such a consultant is obliged to have "a good working knowledge of all relevant policies, legislation, guidelines, norms and standards"[6]. The relevant competent authority considering such an application is also obliged to employ officers, agents or consultants to evaluate any reports submitted in terms of the regulations, who have "a good working knowledge of all relevant policies, legislation, guidelines, norms and standards"[7]. Section 3(3)(c) obliges the relevant competent authority considering the applications to provide all applicants with any guidelines that may assist them in fulfilling their obligations in terms of the regulations.

As stated above these regulations are issued in terms of section 26 of the ECA. Section 26 provides *inter alia* as follows:

> "The Minister or a competent authority, as the case may be, may make regulations with regard to any activity identified in terms of section 21(1) or prohibited in terms of section 23(2), concerning –
>
> (a) The scope and content of environmental impact reports, which may include, but are not limited to –

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5 See section 2(1) of the schedule to GN R1183, Annexure A4 to the founding affidavit.
6 See section 3(1)(d)(vi).
7 See section 3(3)(a)(iv).

(i) A description of the activity in question and of alternative activities;

(ii) The identification of the physical environment which may be affected by the activity in question and by the alternative activities;

(iii) An estimation of the nature and extent of the effect of the activity in question and of the alternative activities on the land, air, water, biota and other elements or features of the natural and man-made environments;

(iv) The identification of the **economic and social interests** which may be affected by the activity in question and by the alternative activities;

(v) An estimation of the nature and extent of the effect of the activity in question and the alternative activities on the **social and economic interests**…" (Emphasis added).

Pursuant to this section, the regulations in Government Notice R1183 stipulate further what is to be contained in an application for authorization (section 4); the requirement to submit a plan of study for scoping (section 5); the contents of the scoping report and the manner in which the relevant authority may accept such report and come to a decision thereon (section 6); the submission of a plan of study for environmental impact assessment (section 7); the submission of such environmental impact report (section 8); the consideration of the application (section 9); a record of the Department's decision (section 10); and the manner in which an appeal may be lodged (section 11).

APPLICANT'S APPLICATION FOR AUTHORISATION

Pursuant to the aforesaid legislative requirements, applicant applied on 11 June 2001 for authorisation to develop the filling station on the property.[8] On 22 June 2001 applicant submitted its "Plan of Study for Scoping" to the Department.[9] It was recorded therein that among the specific issues to be dealt with was "the location of other existing filling stations within 5

[8] See Annexure A5 to the founding affidavit.
[9] See Annexure A6 to the founding affidavit.

kilometres of the site".[10] On 19 September 2001 the Department approved this study plan. The Department directed, *inter alia*, that the scoping report must include a locality map "with a clear indication of the location of the site in relation with/and the distance of the tank/s from existing filling stations in proximity."[11] Applicant's consultants Mills and Otten prepared its scoping report.[12] It was submitted to the Department on 19 October 2001. In so far as the impact on the environment is concerned, it covered the geology and soils, hydrology, topography, climatic conditions, fauna and flora, cultural, social and historical features and land use.[13] Paragraph 8.2 of the scoping report recorded the existence of two existing service stations, one to the north approximately 1,8 kilometres away and the other to the south approximately 1,4 kilometres away. It is further recorded that from an economical point of view, no impact between the existing sites and the new site is envisaged, the reason being that each of the three sites have their own niche target market irrespective of the main arterial route through the area. The paragraph concludes with the following:

> "It is therefore concluded that the development will not have an impact on the existing facilities in the area."

Attached to the scoping report, as Appendix 1, is a geotechnical report. Paragraph 3.4 of this report dealt with ground water and soil chemistry and stated as follows:

> "Minor to moderate perched water seepages were encountered from below a depth of 0,8m and proper damp-proofing precautions should be taken underneath structures. Cognizance should be taken of the perched water table in the design of subsurface containers and behind retaining walls."

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10 See paragraph 3(vi) of Annexure A6.
11 See paragraph 1 of the letter dated 19 September 2001, Annexure A7 to the founding affidavit.
12 See Annexure A8 to the founding affidavit.
13 See paragraph 3 of the scoping report, Annexure A8.

REASONS FOR REFUSING THE APPLICATION

On 9 October 2002 the Department made its decision refusing to grant the required authorisation. Head of Department, Dr. P Hanekom, communicated the refusal to the applicant in his letter of even date wherein he stated:

> "Enclosed, please find the Record of Decision and the reasons for declining the authorisation of this proposed development. Attached for your information is a copy of the evaluation checklist and report."[14]

The Record of Decision follows the prerequisites set in section 10 of the schedule to Government Notice R1183. The relevant part contains the following:

> **"DECISION: Application not approved**
>
> In reaching the decision not to authorise the proposed development, the Department has reviewed and considered all information provided as part of the application for authorisation in terms of GN R.1182 and 1183 of Sections 21, 22 and 26 of the Environment Conservation Act, No. 73 of 1989. Please note below the main reasons for declining authorisation:
>
> **Reasons for declining authorisation fall into four categories:**
>
> 1. Incompatibility of the proposed development with the Department's "Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations, September 2001":
>
>   - There exist two filling stations within three kilometres of the proposed site.
>
> 2. Incompatibility of the proposed development in terms of the National Environmental Management Act, No. 107 of 1998 (See attached Evaluation Checklist)
>
>   - The requirements necessary for achieving Integrated Environmental Management, as listed in the said Act, have not been complied with.
>
>   - No comparative assessment of feasible alternatives was done.

[14] See Annexure A9.

- Assessment of impacts not done according to the stipulated assessment criteria.

- Development must be socially, environmentally and economically sustainable [section 2(3)].

  - There exist two filling stations within three kilometres of the proposed site.

- That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions [section 2(4)(vii)].

  - With reference to the geological report a significant perched water table is located on the site (water seepage was encountered at approximately 0,8m from the surface).

3. Incompatibility of the proposed development in terms of the Development Facilitation Act, No. 67 of 1995:

   - The promotion of optimum use of existing resources relating to transportation is compromised in terms of Section 3(c)(iv) of the Development Facilitation Act (Act No. 67 of 1995) as there are two filling stations within three kilometres of the proposed site.

Please refer to the attached Evaluation Checklist for more details regarding the above.

Additional comments:
The Department has the responsibility to adopt a risk-averse approach and places emphasis on point source pollution, cumulative impacts and social impacts."

Attached to the Record of Decision is the "Report Evaluation Checklist". Tina Rossouw prepared this report on 20 August 2002 for submission to the Head of Department. It is a 23-page document, divided into the following sections:

"A DESCRIPTION OF PROPOSED DEVELOPMENT
B ALTERNATIVES
C PUBLIC PARTICIPATION PROCESS
D ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED
E CUMULATIVE IMPACTS
F ENVIRONMENTAL MANAGEMENT PLAN AND MITIGATORY MEASURES

G GENERAL
H DEPARTMENTAL RECOMMENDATION"

In paragraph 1 of section A, under a brief description of the locality of the activity, the following comments by the Department appear:

> "The proposed site is located on portion 2 of Erf 115, Kyalami Park, Midrand on the intersection of the R55 (Main Road) and Kylami Boulevard. It should be noted, at the outset that there exist two filling stations within three kilometres of the proposed site.
> Therefore given the proliferation of filling stations within close proximity of each other it is clear that this Department cannot support the proposed development at this time."

In section B, the following comments appear:

> No location alternatives were identified by the scoping report. The report only consists of a motivation as to why the proposed site should be utilised for a filling station. The scoping report therefore considers that the applicability of the site for a proposed filling station is a given.
>
> The absence of any evaluation of possible alternatives (due to the above assumption) has resulted in the scoping report not identifying and evaluating the proposed site and other sites against the necessary criteria.
>
> It should further be noted that:
>
> - It is necessary to view the sustainability of all new developments within the context of existing economic pressures currently facing filling stations.
>
> There exist two filling stations within 3 kilometres of the site. Given the proliferation of filling stations within the area there exists a serious concern as to the economic viability of the new filling station and the potential economic effects that the filling station will have on already existing service stations."

Under the heading, "Land Use Alternatives", the following comments appear:

> "No land use alternatives have been considered by the scoping report given it is next to a commercial area. Therefore the exploration of alternatives was not considered viable.
> It should be noted that no more information is required as it is clear that this Department cannot support this development proposal at this time."

The evaluation checklist which is a standard form recording the Department's detailed assessment of the application evaluated the application in numerous respects. It is not necessary to repeat all the aspects covered in the checklist save to state that the official who prepared the checklist stated in 31 instances that no more information was required "as it is clear that this Department cannot support this development proposal at this time".

Item 7 under section D, dealt with, "Hazards and hazardous materials". The question is asked whether the proposed development will "create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment." In response to this question the following comments appear:

> "This department has identified filling stations as being point sources of pollution. Consequently the proliferation of filling stations is considered by this Department to place undue stress and risk on the surrounding environment.
>
> - The potential exists for the proposed filling station to result in land contamination, through the seepage of spilled fuels into the soil, overfilling of USTs and leaking USTs and pipes.
>
> **Such contamination is considered by this Department to be completely undesirable.**
>
> **It should be noted that this Department does not support the proliferation of filling stations nor does it support the development of filling stations within a 3 km radius of an existing filling station. There are two filling stations within a two-kilometre radius of the proposed site.**
>
> **No more information is required as it is clear that this Department cannot support this development proposal at this time."**

In Item 8 under the same section, dealing with hydrology and water quality, the question is posed whether the proposed development will cause "a potentially detrimental effect to the surrounding ground water quality". In response to this question the following comments appear:

> "No detailed hydrological study was included in the scoping report.
>
> It should be noted that the geological report identified a perched water table and that water seepages were encountered in most of the test pits.
>
> Ground water pollution can occur as a result of inadequate corrosion protection on tanks, spills and overfills, installation mistakes and pipe work failure. The extent and impact of potential ground water contamination from any one installation is largely dependent on the nature of the underlying geology and ground water conditions.
>
> In terms of the precautionary principle this Department does not consider it feasible to place the underground water resources at (risk) of possible pollution. Therefore the Department feels that the development poses a risk to water pollution."

Applicant took the Department's refusal on appeal to the respondent.[15] The appeal to the respondent was unsuccessful, hence this review application.

APPROACH TO THIS APPLICATION

Before dealing with the opposing contentions and disputes, I need to set out the approach, which a court of review is called upon to adopt in the present matter.

This being an application on notice of motion, I am obliged to adopt the approach set out in **Plascon-Evans Paints Ltd. V Van Riebecck Paints (Pty) Ltd.** 1984 3 SA 623 (AD) at 634 H – I, where Corbett JA said

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

The broad effect of this rule is that an application for final relief is generally decided on the respondent's version[16].

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[15] See paragraph 24 of the founding affidavit, Annexure A10 attached thereto and paragraph 50 of the respondent's answering affidavit.

[16] See Associated **South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere** 1982 3 SA 893 (AD) at 923H; **Ngqumba en 'n Ander v Staatspresident en Andere** 1988 4 SA 224 (AD) at 261B and 263D; and **Rawlins and Another v Caravantruck (Pty) Ltd.** 1993 1 SA

APPLICANT'S CONTENTIONS

The applicant contended that the Record of Decision, as read with the Evaluation Checklist, establish the Department's true reason for refusing the application. It was refused not because the new filling station itself posed a danger to the environment (the Department did not reach such a conclusion). It is rather because there are two other filling stations within three kilometres of applicant's site and most significantly because the Department regarded it as unacceptable to allow proliferation of filling stations where existing filling stations are economically vulnerable to more competition. Applicant contended that the Department applied the distance stipulation rigidly regardless of the merits of the application. Under the guise of "environmental concerns" the Department was instead seeking to regulate the economy on the basis of what are essentially economic considerations unrelated to the environment. It was said that the Department's attitude flies in the face of the constitutional principle of legality and the constitutional and statutory limitation of administrative power. It was argued that the decision affected a number of constitutional rights i.e. it constituted unreasonable administrative action, more particularly because the Department (i) failed to call for more information from the applicant in terms of section 6(2) and (3)(a) of the schedule to GN R1183; (ii) did not apply its mind to the facts; (iii) it seriously impacted on the exercise by applicant of its constitutional guaranteed property rights; and (iv) it impacted upon the applicant's right to engage in the endeavour of competitive economic activity in the form of conducting filling stations. Simply put, it was argued that the Department's concern was not truly environmental but rather one of regulating the economy to protect the commercial interests of existing filling stations. To do so, it was said, was beyond the limits of the Department's lawful authority.

RESPONDENT'S CONTENTIONS

537 (AD) at 541J to 542B.

The respondent denied the applicant's contentions. In paragraph 19 of her answering affidavit she stated the following:

> "In taking relevant decisions, I endeavour, to the best of my ability to take into account all the relevant considerations and to render decisions which conform with the statutory and constitutional requirements. The relevant statutory framework will be dealt with in argument. I wish merely to stress that in applications of this nature a wide range of sometimes competing consideration have to be taken into account. There are many relevant considerations which all have to be carefully weighed. The guidelines discussed below, are in no way definitive. They reflect the prevailing policy but are not cast in stone. Every application is considered on its merits. Where appropriate, the guidelines are departed from."

In paragraphs 20 to 30 of the answering affidavit, the departmental guidelines are discussed. In summary respondent alleges that the guidelines were established for purposes of evaluating applications of this nature and that they are what they purport to be, i.e. "general guidelines" only. Respondent stressed the fact that the formulation of the distance stipulation commences with an introductory sentence that filling stations will "generally" not be approved for the reasons stated thereafter. This indicates that the distance stipulation in the guidelines is not regarded as rigid or inflexible. The distance stipulation is preceded by the introduction to the "EIA ADMINISTRATIVE GUIDELINES", which contains the following remarks:

> "The purpose of this guideline is to provide an overview of the department's approach to the management of applications in respect of the construction and upgrading of filling stations with a view to ensuring that the department's responsibility in respect of the protection of the environment are carried out in an efficient and considered manner…
> In developing the guideline, the department has taken, *inter alia*, international approaches, the views of stakeholders, the department's legislative obligations and its experience in the processing of environmental impact assessments into account."[17]

[17] See Record pages 241 or 530.

The respondent also referred to the "Key Issues" in paragraph 3 of a document entitled, "BACKGROUND TO THE EIA ADMINISTRATIVE GUIDELINE FOR THE CONSTRUCTION AND UPGRADE OF FILLING STATIONS AND ASSOCIATED INSTALLATIONS" (the "Background Document")[18] where the following is stated[19]:

> "Whilst recognizing the need for access to filling stations for the purposes of transport and the potential employment opportunities that filling stations provide, the department's legislative mandate also requires that the negative potential impacts are considered and assessed. In this regard, it is noted that filling stations may be a cause of major sources of pollution and unless appropriate measures are in place, severe environmental impacts could eventuate."

The document then considers the following key issues as relevant in the determination and adjudication of applications for filling stations, namely impacts on water, impacts on air quality, social impacts, waste and soil impacts, fire and explosion, transportation, impacts on sensitive areas, cumulative affects, feasibility/sustainability, desirability, limited end-use and change in consumer behaviour.[20]

In paragraphs 26 to 29 of the answering affidavit the respondent stated the following:

> "26. All applications including the one that is the subject of the present application are adjudicated after a careful consideration of a wide range of impacts. In this regard the background document explains in some detail the above issues. In the discussion on "**cumulative affects**" the document lists a number of "**significant cumulative impacts**" which could result "**due to the proliferation of filling stations in proximity to each other**". These cumulative impacts are ground water and soil contamination, visual intrusion and lighting, sense of place and character of the area, an increase in the significance of social impacts and virtual sterilisation of land use.

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[18] See Annexure A16 to the founding affidavit, record pp 214 or 230 or Annexure R4 to the answering affidavit, Record p 544.

[19] See record pp 216, 232 or 546.

[20] See paragraphs 24 and 25 of the answering affidavit.

> 27. The document further states that the "**feasibility of new development should be viewed in the context of the extreme economic pressure experienced by existing filling stations**".
>
> 28. The document goes further to discuss the issue of desirability of new developments. It states in very clear terms that "**current indications based on objections from the public are that the people of Gauteng do not support, and therefore do not need, the development of new filling stations in close proximity to each other, particularly in existing urban/built residential areas**."
>
> 29. Contrary to the applicant's contention the distance stipulation is not used rigidly and/or as the only measurement, rather it is but one of the factors considered during the adjudication process. Where appropriate, the distance stipulation is departed from. Supportive documentation in this regard will be made available to this honourable court if so required." [21]

Applicant did not dispute these allegations in its replying affidavit.

The "virtual sterilisation of land use" referred to in paragraph 26 above, concerns the so-called "footprints" or "graveyard sites" left behind after the closure of filling stations. In this regard one of the key issues in the Background Document under the heading, "Limited End-use", states the following:

> "Property zoned for filling stations has limited end-use after closure. According to Gautrans' view, the property cannot have direct access to roads at the filling station access points should it be used for another purpose. Given the vast number of applications that the department received to date, it means that Gauteng would in future be sitting with "graveyard" sites due to the legacy of the petroleum industry. The department thus has to be guided by all types of developments presently to ensure that Gauteng's environment does not exceed a level beyond which its non-renewable resources are jeopardised. Furthermore remediation costs are high. The re-use of existing sites must therefore be considered."[22]

The respondent reiterated this argument in paragraph 83.2 of the answering affidavit wherein she stated that the economic viability of filling stations is relevant both to "the footprints left behind from closures of filling stations" and

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[21] These contentions are repeated in paragraph 43 of the answering affidavit. Neither paragraph 29 nor paragraph 43 was disputed in applicant's replying affidavit.

[22] See record pp 218, 234 or 548.

the Department's obligation "to ensure sustainable development in the Province".

A letter dated the 15th of June 2001 from the South African Fuel Dealers' Association supports the respondent's allegation in paragraph 27 above regarding the "extreme economic pressure experienced by existing filling stations"[23]. Therein mention is made of the fact "that more than fifty percent of our dealer network is operating at a net loss."

In view of applicant's failure to dispute the allegations in paragraph 29 above, it must be accepted that the Department did not apply the distance rule rigidly and has in fact in the past departed from it by granting applications, which fell foul of the distance stipulation. This flexible approach is further confirmed by the terms of the March 2002 Guideline.[24] This document explicitly states:

> "It should be noted that this document is a guideline and that the department accordingly reserves the right to deviate from the guideline where appropriate."

This flexible approach is further explained by the respondent in her reply to the applicant's allegations in paragraph 52.4 of the founding affidavit where it is alleged that the guidelines adopted by the Department introduced a new consideration based primarily on economic and social factors rather than environmental considerations. To this respondent replied in paragraph 97.1 of the answering affidavit as follows:

> "I deny the allegations contained in this paragraph.... In exercising the mandates assigned by the EIA Regulations, the Head of the Department and I have to also consider compliance with the requirements stemming from the NEMA and the constitution and other legislation as set out above. Although decisions related to these mandates are at the discretion of either the Head of Department or myself, it is never an unqualified discretion as it has to be exercised within the context of the legislation and both the HOD and I have to provide, on request, the reasons that informed the decision. Furthermore such

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[23] See Annexure R7 to the answering affidavit at page 571 of the record.

[24] See record page 241 or 530. It is common cause that the application was decided in terms of this Guideline.

> decisions can be made subject to a review process through either the appeal process provided for in the regulations or by application to the High Court. It is therefore in the interests of the Department to make informed and defensible decisions."

The respondent also expressly alleged that the March 2001, September 2001 and March 2002 guidelines resulted from the participation of members in the fuel and petroleum industry. It is as a result of such public participation that the distance stipulation was amended from five kilometres to three kilometres in the March 2002 Guideline.[25]

All of the above allegations by the respondent stand uncontroverted.

As to the status of the checklist, respondent alleged in paragraph 121 of the answering affidavit that it -

> "…serves only for the responsible official to confirm whether or not all impacts according to the assessment criteria have been addressed and not to express an opinion on the merits of how these impacts have been addressed. Furthermore the evaluation checklist is a tool to assist the responsible official in the evaluation of the application and is not binding on the decision-maker, the Head of the Department."

In the replying affidavit applicant merely responded to these allegations with a bald denial. In any event, in paragraph 142.2 respondent alleged that it is clear from the departmental checklist that other factors *inter alia* location alternatives, land use alternatives, no-go options, hydrology and geology are among some of the factors that were considered when the Department's decision was made.

The respondent stated unequivocally that the Department's mandate is to ensure that negative environmental impacts are avoided or mitigated and that its mandate was derived *inter alia* from the constitution, the ECA, the ECA regulations, NEMA and the DFA.[26] The applicant contended that the

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[25] See paragraph 69.2 of the answering affidavit and paragraphs 44 and 45 of the founding affidavit.

[26] See answering affidavit paragraph 9 and paragraphs 18-19.

Department's mandate is derived from sections 21, 26 and 28 of the ECA and its regulations. However, the applicant did concede, in paragraph 10 of its replying affidavit that the Department was obliged to be guided by the principles set out in section 2 of NEMA but disputed the competence of the Department to have regard to economic and social considerations which were unrelated to or had no significant relationship to the environment. It was further conceded in paragraph 7.3 of the replying affidavit that the Department's task in the present case was to determine whether the proposed development would have an actual or potential detrimental impact on the environment. This latter issue is dependant upon the correct definition of "environment" and the scope of the Department's mandate, which in turn will depend upon what legislative imperatives prescribe such definition and mandate.

THE DEPARTMENT'S MANDATE

It is quite evident from the respondent's answering affidavit that the decision to refuse applicant's application was heavily influenced by the Department's understanding of its mandate to control and protect the environment in the Province. The question whether or not the respondent and the Department acted administratively fair in refusing such application will be determined by the correctness or otherwise of the parties' opposing views in regard to the scope of this mandate. As indicated earlier, applicant contended for a narrow legislative mandate emanating from the ECA and its regulations only whereas the respondent contended that it has a much wider mandate rooted in the constitution, the ECA and its regulations as well as the relevant provisions in NEMA and the DFA. It is therefore necessary to examine these legislative instruments.

The Constitution.

The Constitution reigns supreme. Foundational to our democracy is the advancement of human rights and freedoms and adherence to the constitutional imperatives. Section 1 of the Constitution articulates these values as follows:

> "1. The Republic of South Africa is one, sovereign, democratic State founded on the following values:
>
> (a) Human dignity, the achievement of equality and the **advancement of human rights and freedoms**.
>
> (b) …..
>
> (c) **Supremacy of the Constitution and the rule of law**.
>
> (d) ……" (Emphasis added)

The supremacy clause in the Constitution is contained in section 2 which provides:

> "This Constitution is the supreme law of the Republic; law or **conduct inconsistent with it is invalid** and the obligations imposed by it must be fulfilled." (Emphasis added)

The centrality of the Bill of Rights and its foundational values is expressed in section 7 of the Constitution, which provides:

> 7(1) This Bill of Rights is the corner stone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> (2) **The state must respect, protect, promote and fulfil the rights in the Bill of Rights**.
>
> (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in Section 36 or elsewhere in the Bill."
> (Emphasis added)

In terms of section 7(2) the Government has a particular responsibility to sustain and promote the values of the Constitution.[27] The provisions of the

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[27] See **S v Williams and Others** 1995 3 SA 632 (CC) at 648 H.

Bill of Rights bind the State as well as natural and juristic persons. This is expressed in section 8 which provides:

> "8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

The Constitutional Court has repeatedly emphasised that constitutional rights must be generously interpreted.[28] The Constitution also lays down certain principles of interpretation. These are embodied in section 39 of the Constitution, which provides:

> "39(1) When interpreting the Bill of Rights, a court, tribunal or forum –
>
> a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law;
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill."

The meaning and import of the injunction contained in section 39(2) has been stated by the Constitutional Court as follows:

> "This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution."[29]

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[28] See **S v Zuma and Others** 1995 2 SA 642 (CC) at 650 H to 651 I.

[29] See **Investigating Directorate**: **Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd And Others: in re Hyundai Motor Distributors (Pty) Ltd And Others v Smit NO and Others** 2001 1 SA 545 (CC) at 558 E to F.

Both the respondent and the Department are also subject to the express provisions in the Bill of Rights regarding the environment. This is articulated in section 24 which provides:

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

By virtue of Section 24, environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the Constitution. In line with this elevation to prominence, it was stated in **Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others** 1999 2 SA 709 (SCA) at 719 C-D that:

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the **administrative processes** in our country. Together with the change in the ideological climate must also come a change in our **legal and administrative approach to environmental concerns**." (Emphasis added)

The respondent and the Department are at the centre of these "administrative processes" as far as the promotion and protection of the constitutional right to the environment in Gauteng is concerned. They cannot avoid this constitutional duty. They are required to carry it out by means of adequate legislation and other programmes. Section 24(b) expressly obliges the State to take reasonable legislative **and** other measures to protect the environment. In **Government of**

the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC) at 69 B-D, Yacoob J said that:

> "[42] The State is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance**. Mere legislation is not enough**. The State is obliged to act to achieve the intended result and the legislative measures will invariably have to be **supported by appropriate, well-directed policies and programs implemented by the Executive**. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations." (Emphasis added)

In paragraph [43] Yacoob J went on to say that programmes instituted by the State "must be balanced and flexible". In paragraph [41] at page 68 Yacoob J was also at pains to emphasise the necessity for these measures to establish a coherent public programme directed towards the progressive realisation of the protected right. Measures adopted by the State must be capable of facilitating the realisation of the right. However, the precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. It is the court's duty to subject the reasonableness of these measures to evaluation while constantly keeping in mind that courts are generally "ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community".[30]

I am in respectful agreement with Prof. Shadrack B.O. Gutto[31] that the constitutional right to environment is on a par with the rights to freedom of trade, occupation, profession and property entrenched in sections 22 and 25 of the Constitution. In any dealings with the physical expressions of property, land and freedom to trade, the environmental rights requirements should be part and parcel of the factors to be considered without any *a priori* grading of the

[30] See **Minister of Health and Others v Treatment Action Campaign and Others (No. 2)** 2002 5 SA 721 (CC) at 740 F, paragraph [38].
[31] See Chaskalson *et al,* "Constitutional Law in South Africa", paragraph 32.3(c), page 32 – 7.

rights. It will require a balancing of rights where competing interests and norms are concerned. This is in line with the injunction in section 24(b)(iii) that ecologically sustainable development and the use of natural resources are to be promoted jointly with justifiable economic and social development. The balancing of environmental interests with justifiable economic and social development is to be conceptualised well beyond the interests of the present living generation. This must be correct since section 24(b) requires the environment to be protected for the benefit of "**present and future generations**". The above principles of "intergenerational equity", which qualifies the rights to ownership of land, have been recognized as far back as 1971 when in **King v Dykes** 1971 3 SA 540 (RA), MacDonald ACJ said at 545 G-H:

> The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that **he holds his land in trust for future generations**. Legislation dealing with such matters as town and country planning, the conservation of natural resources, and the prevention of pollution, and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimony of the existence of this more civilised and enlightened attitude towards the rights conferred by ownership of land." (Emphasis added)

Sands, *Principles of International Environmental Law* 1995 describes the recurring legal elements of "ecological sustainable development" as follows: (i) the need to preserve natural systems for the benefit of future generations; (ii) the aim of exploiting natural resources in a manner which is "sustainable" or "prudent" or "rational" or "wise" or "appropriate" (the principle of sustainable use); (iii) the equitable use of natural resources (the principle of equitable use); and (iv) the need to ensure that environmental considerations are incorporated into economic and other development plans, programmes, and projects (the principle of integration).[32] It has been held that the goal of

[32] As quoted in Cheadle, Davis and Haysom "South African Constitutional Law: the Bill of Rights" (2002) at p 424.

attaining sustainable development is likely to play a major role in determining important environmental disputes in the future. This is so because sustainable development constitutes an integral part of modern international law and will balance the competing demands of development and environmental protection.[33] The concept of "sustainable development" is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the constitution.

Pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. 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 integrated approach, which takes into consideration *inter alia* socio-economic concerns and principles.

The Environment Conservation Act No 73 of 1989 (ECA)

In pre-1994 South Africa, the environment was controlled by this Act and its regulations. Although the ECA predates the constitutional dispensation, section 39(2) of the Constitution requires a court to interpret its provisions in a way which will "promote the spirit, purport and objects of the Bill of Rights".

The preamble to the ECA records that the Act is intended "to provide for the effective protection and controlled utilization of the **environmen**t and for

[33] Per Justice Weeramantry in International Court of Justice: *Judgment in the case concerning the construction of the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) 37 ILM 162 (1998) at 204.

matters incidental thereto." The "environment" is defined in section 1 as meaning -

> "the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms."

This broad and inclusive definition of the environment is consistent with international law as contained in various international conventions and treaties.[34] It incorporates all the specialist and older categories of "pollution", "conservation", "health" and similar concepts. In line with international law, the environment is a composite right[35], which includes social, economic and cultural considerations in order to ultimately result in a balanced environment.[36] Because the ECA is pre-1994, the aforesaid wide definition of "environment" already existed in our law when the Interim and Final Constitutions were drafted and promulgated.

The aforesaid wide and broad definition of environment is to be distinguished from the more limited definition of the concept "protected natural environment" as referred to in section 16(1) of the ECA. A lively academic debate has existed for a long time concerning the true definition of the environment. On the one hand a more limited approach has defined "environment" as relating only to the natural environment or simply, God's created physical environment. In this sense it would exclude social, cultural, economic and spatial environment, in short, the entire anthropogenic environment. At the other end of the spectrum, it was appreciated that it would be unrealistic to restrict environment to the purely natural environment because most of the erstwhile natural environment is no longer in that state but has to a greater or lesser degree been modified by humans save in protected

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[34] See Chaskalson *et al,* "Constitutional Law of South Africa", paragraph 32.2(a) and (b) at page 32–2/3.

[35] See Shadrack B O Gutto, "*Environmental Rights Litigation, Human Rights and the Role of NGO's and People's Organisations in Africa"* (1994) 2 South African Journal of Environmental Law and Policy page 1.

[36] See R.F. Fuggle and M.A. Rabie, "*Environmental Management in South Africa"* (1992) pp 84 and 85 where the broad definitions of "Environment" in the legislation in the United States of America, Canada and Australia are discussed.

wilderness areas. In promulgating the ECA, South Africa chose to embark upon the extensive approach to environment by giving it a comprehensive definition, which is as all embracing as may be imagined.[37]

The broad definition of "environment" in my view would include all conditions and influences affecting the life and habits of man. This surely would include socio-economic conditions and influences.

The National Environmental Management Act, No 107 of 1998 (NEMA)

Pursuant to section 24 of the Final Constitution, the Legislature responded by promulgating NEMA. Its commencement date was stated to be 29 January 1999. The purpose of this Act is said to be:

> **"to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of State; to provide for the prohibition, restriction or control of activities which are likely to have a detrimental effect on the Government; and to provide for matters connected therewith."**

NEMA contains a preamble which recognizes *inter alia* that everyone has the right to an environment that is not harmful to his or her health or well-being; that the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone; that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations; that everyone has the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable

[37] See R.F. Fuggle and M.A. Rabie *supra* at 86; Cheadle, Davis, Haysom, "*South African Constitutional Law: The Bill of Rights"* page 411 are also of the view that the definition of environment in the ECA should be broadly interpreted in the constitutional context to include "not only our relationship with natural resources but also our cultural heritage as well as the urban environment".

development and use of natural resources while promoting justifiable economic and social development; that all spheres of Government and all organs of State must co-operate with and consult and support one another; that it is desirable that the law develops a framework for integrating good environmental management into all development activities; that the law should promote certainty with regard to decision-making by organs of State on matters effecting the environment; that the law should establish principles guiding the exercise of functions affecting the environment; that the law should ensure that organs of State maintain the principles guiding the exercise of functions affecting the environment; and that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance.

It is manifest from the aforesaid that the intention of the Legislature was to establish a co-operative and integrated policy of protecting the environment which will take into account social, economic and environmental factors in the planning, implementation and evaluation thereof for the benefit of present and future generations. It calls for legislative "and other measures" which would develop a framework for integrated and good environmental management and certainty of decision-making by organs of State, all of which are to be the result of public participation in environmental governance.

Section 1(1) of NEMA defines environment as meaning:

> "The surroundings within which humans exist and that are made up of –
> (i) the land, water and atmosphere of the earth;
> (ii) micro-organisms, plant and animal life;
> (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
> (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being."

Section 1(1) also contains a definition of the concept of "sustainable development" as meaning:

> "The integration of social, and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations."

In Section 1(4) it is expressly provided that neither the absence of any reference in the Act to a duty to consult or give a hearing exempts an official or authority from the duty to act fairly.

The principles upon which NEMA is to be applied, are set out in section 2 which provides:

> "2(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and –
>
> (a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the **social and economic rights** in chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
>
> (b) serve as the general framework within which environmental management and implementation plans must be formulated;
>
> (c) serve as **guidelines** by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment.
>
> (d) …..
>
> (e) guide the interpretation, administration and implementation of this Act, **and any other law concerned with the protection or management of the environment.**
>
> (2) Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and **social** interests equitably.
>
> (3) **Development must be socially, environmentally and economically sustainable**.
>
> (4)(a) **Sustainable development** requires the consideration of all relevant factors including the following:
>
> (i) ….
>
> (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
>
> (iii) – (vi) ……..

(vii) that **a risk-averse** and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

(viii) that negative impacts on the environment and on people's environmental rights be **anticipated** and prevented, and where they cannot be altogether prevented, are minimised and remedied

(b) Environmental management must be **integrated**, acknowledging that all 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 options."

(c) ….

(d) ….

(e) Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists **throughout its life cycle**.

(f)-(h) …..

(i) The **social, economic and environmental** impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

(j)-(k) …..

(l) There must be intergovernmental co-ordination **and harmonization of policies, legislation and actions relating to the environment**.

(m)-(n) …….

(o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the **public interest** and the environment must be protected as the people's common heritage." (Emphasis added)

Chapter 5 of NEMA is intended to provide a legislative framework for the establishment of an Integrated Environmental Management programme. According to section 23(1) this chapter is intended to "promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities." Section 23(2) provides:

"23(2) The general objective of integrated environmental management is to -

(a) promote the **integration of the principles of environmental management set out in section 2 into the making of all decisions, which may have a significant effect on the environment**;

(b) identify, predict and evaluate the **actual and potential impact on the environment, socio-economic**

> **conditions** and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;
>
> (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
>
> (d) **ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment; ……"** (Emphasis added)

Section 24 which is also part of chapter 5 provides:

> "24(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on –
>
> (a) the environment;
> (b) **socio-economic conditions**; and
> (c) the cultural heritage,
>
> **of activities that require authorisation or permission by law** and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing the implementation of an activity." (Emphasis added)

Section 24(2) empowers the Minister with the concurrence of the MEC to prescribe and identify activities, which may not be commenced without prior authorisation from the Minister or MEC. This sub-section is similar to section 21 of the ECA. In terms of section 50(2) of NEMA, sections 21, 22 and 26 of the ECA and the notices and regulations issued pursuant thereto will be repealed on a date to be published by the Minister once the Minister is satisfied that regulations or notices issued under section 24 of NEMA have made the regulations and notices under sections 21 and 22 of the ECA redundant. This has not yet occurred but it is clear that the Legislature's intention is, ultimately, to repeal the ECA and its regulations in their entirety in favour of NEMA.

Section 24(3) provides for regulations to be made laying down the procedures to be followed and the reports to be prepared in respect of the investigation, assessment and communication of the potential impact of activities contemplated in sub-section (1). Section 24(7) prescribes the minimum requirements of the procedures for such investigations, assessments and communication of the potential impact of activities. Of relevance to the present dispute are the following sub-section, which provides:

> 24(7) Procedures for the investigation, assessment and communication of the **potential impact** of activities must, as a minimum, ensure the following:
>
> (a) investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;
>
> (b) investigation of the potential impact, including cumulative affects, of the activity and its alternatives on the environment, **socio-economic conditions** and cultural heritage, and assessment of the significance of that **potential impact**;
>
> (c) investigation of mitigation measures to keep adverse impacts to a minimum, **as well as the option of not implementing**;
>
> (d) **public information and participation,** independent review and conflict resolution in all phases of the investigation and assessment impacts;"
> (Emphasis added)

Because sections 21 and 22 of ECA remain in force where a person seeks authorisation to carry out an activity identified under section 21 of the ECA, the ECA regulations continue to apply, subject to compliance with section 24(7) of NEMA.[38]

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[38] See **Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery and Others** 2002 1 SA 478 (C) at 487 F.

It is with the aforesaid concerns in mind that the Department embarked on a process of public participation in arriving at the Guidelines of March 2002. As indicated earlier that is why the regulations in GN R1182 and R1183 of 5 September 1997 recognised the existence of "guidelines" containing policy considerations and programmes initiated by the Department in conjunction with stakeholders.

The Development Facilitation Act, No 67 of 1995 (DFA)

The Development Facilitation Act imposes a range of obligations on the State. Section 2 of the DFA provides in relevant part:

> 2. The general principles set out in section 3 apply throughout the Republic and –
> (a) ……..
> (b) ……..
> (c) serve as guidelines by reference to which any competent authority. Shall exercise any discretion or take any decision in terms of this Act or any other law dealing with **land development**" (Emphasis added)

"Land development" is defined in section 1 as "any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes….". The relevant portions of section 3 of the DFA which deal with the general principles for land development, provide as follows:

> "3(1) The following general principles apply on the basis set out in section 2, to **all land development:**
> (a) …..
> (b) …..
> (c) Policy administrative practice and law should promote efficient and integrated land development in that they -
> (i) promote the integration of the **social, economic**, institutional and physical aspects of land development;
> (ii)-(iii) ……..
> (iv) optimise the use of existing resources including such resources relating to agricultural, land, minerals, bulk

infra-structure, roads, **transportation** and social facilities;

(viii) **encourage environmentally sustainable land development practices and processes**." (Emphasis added)

EVALUATION

It is clear from the above analysis that the Department is subject to a wide range of constitutional and statutory duties that entitle and obliged it to take into account *inter alia* the following:

1. Because the Constitution reigns supreme, the Department, as the competent organ of state, is obliged to respect, promote, protect and fulfil the rights in the Bill of Rights.[39] A failure to do so would render its conduct invalid.[40]

2. The need to protect the environment for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.[41] In executing this obligation the Department is obliged to develop an integrated environmental management programme, which takes cognisance of a wide spectrum of considerations, including international conventions and approaches as a result of the broad and extensive definition of "environment" in the ECA, which *inter alia* includes the consideration of socio-economic conditions.[42]

[39] See sections 1(c), 2 and 7(2) of the Constitution and section 2(1)(a) of NEMA.
[40] See section 2 of the Constitution.
[41] See section 24 of the Constitution and the preamble to NEMA.
[42] See Section 39(1)(b) of the Constitution, the preamble to NEMA, sections 2(4)(i), 23(2) and 24(1) of NEMA, the definition of "environment" in section 1 of the ECA and section 3(1)(c) of DFA.

3. The need to prescribe regulations with regard to hazardous activities identified in terms of section 21(1) of the ECA, which identify the economic and social interests, which may be affected by any such activity in question or alternatives thereto.[43]

4. The need to consider all relevant policies, legislation, guidelines, norms and standards when exercising decision-making powers in relation to the integrated development of the environment in respect of identified activities.[44]

5. To take measures to promote development that is socially, environmentally and economically sustainable.[45]

6. It must promote sustainable development, which requires consideration of all relevant factors including a minimisation of degradation of the environment if it cannot altogether be avoided, a risk-averse and cautious approach about future consequences of decisions and actions taking account of the limits of current knowledge.[46]

7. It has to implement the general objectives of an integrated environmental management programme, which requires consideration of the potential impact on the environment, socio-economic conditions and cultural heritage of activities that require authorisation or permission by law.[47]

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[43] See section 26(a)(iv) and (v) of the ECA.
[44] See section 3(3)(a)(iv) of the schedule to GN R1183 of 5 September 1997 and sections 2(4)(1) and 24(1) of NEMA
[45] See section 2(3) of NEMA.
[46] See section 2(4)(a)(ii), (vii) and (viii) of NEMA.
[47] See section 24(1) of NEMA.

8. It must have regard to the cumulative potential impacts and effects of proposed activities on the environment, socio-economic conditions and cultural heritage and to assess such potential impact.[48] It is also obliged to promote efficient and integrated land development; to promote the integration of the social economic institution and physical aspects of land development; to optimise the use of existing resources including resources relating to transportation; and to encourage environmentally sustainable land development practices and processes.[49]

9. It must prepare guidelines in consultation with relevant stakeholders.[50] In developing these guidelines, cognisance is to be taken of international perspectives and experiences.

All of these statutory obligations make it abundantly clear that the Department's mandate includes the consideration of socio-economic factors as an integral part of its environmental responsibility. In my view this is an inevitable conclusion arising from the constitutional injunction emanating from section 24 of the Constitution and the existing legislation, which is currently in force regulating the environment and the development of identified activities on land, which may have a detrimental affect on the environment.

Therefore, I reject the contention advanced by Mr. Kennedy that socio-economic considerations fall outside the Department's mandate when considering applications for authorisation under section 22 of the ECA to develop a filling station. The contention that the Department was not permitted to apply the principles set out in NEMA in considering the application is also untenable as it flies in the face of section 2(1)(e) of NEMA which obliges all organs of state concerned with the protection of the environment to apply these

[48] See section 24(7)(b) of NEMA.
[49] See section 3(1)(c)(i),(iv) and (viii) of DFA.
[50] See sections 1(4) and 23(2)(d) of NEMA.

principles when implementing NEMA "and any other law concerned with the protection or management of the environment". Thus, even where the ECA is applied, the NEMA principles have to be applied also.

THE GUIDELINES

For purposes of this application it is necessary to accept the allegations made by the respondent in her answering affidavit regarding the purpose of and process by which the guidelines were drafted and introduced. The Background Document[51] dated March 2002 sets out the Department's approach to the management of applications in respect of the construction and upgrading of filling stations. It seeks to ensure that its responsibility in respect of the protection of the environment is carried out in an efficient and considered manner. It is also intended to assist the applicants in the fulfilling of their obligations when applying for authorisation pursuant to Government Notice R1183. The Guidelines seek to implement the statutory obligations emanating from section 24 of the Constitution, the ECA and its regulations and section 24 of NEMA. It reflects the policy adopted by the Department when implementing its environmental management programme. It identifies several key issues commencing with an acknowledgment that a need exists for the establishment of filling stations for purposes of transport and potential employment opportunities while simultaneously having to comply with the mandate to protect the environment. In my view one cannot quarrel with the various key issues discussed in paragraph 3 of the Background Document.

It furthermore records the comments received from the stakeholders in paragraph 4. It is evident that the Department duly considered the stakeholders' comments on a wide variety of topics including economic considerations, social impacts, noise impacts, visual impact, and then of course, the distance stipulation. In this regard it is recorded that there were objections to the proposed five-kilometre consideration. Two of the objectors indicated that

[51] See Annexure A16 to the founding affidavit

they would support the proposed consideration if it were to be changed to two kilometres in urban areas. The basis of the stakeholders' objection to the distance stipulation is recorded in the following terms:

- "The distance is not motivated and is only based on economic considerations;
- The Department has admitted that these are arbitrary;
- The issue will be addressed by the needs and desirability assessment which is required by the local authority and the recommendations in respect of which should be accepted by the department;
- The categorisation will increase the amount of applications to be considered by the department owing to the challenges that will ensue".[52]

The Department's response to these objections are recorded in the following terms:

> "The department reviewed a number of international approaches which include a distance or limitation criteria in considering the provision. Some of the examples reviewed include the following – in Dublin guidelines have been published which indicate that new petrol stations will not generally be permitted on national roads or adjoining residential areas and will only be considered in rural areas if they are in the immediate environs of rural villages; Singapore's guidelines indicate that existing filling stations located within 1 km of an interchange are inappropriately located; and Germany's guidelines indicate that filling stations should only be erected on rural roads where there is a clear need and there should be 25 km between stations. In Denmark, drivers requiring high-octane petrol will have access to a filling station within 30 km.
>
> In developing the consideration, the views of other government departments and bodies and in particular Gautrans were taken into account.
>
> After reconsidering the comments and international review, the department has amended the final guideline to reflect a 3 km driving distance for urban areas and to a 25 km driving distance for rural areas."

The applicant in the present matter chose not to take issue with the environmental concerns giving rise to these guidelines at all. Accordingly the

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[52] See Record p222

present application falls to be decided against the background of the undisputed potential environmental hazards posed by filling stations.

The Department is vested with the statutory duty to authorise the establishment of new filling stations pursuant to sections 21 and 22 of the ECA. In order to exercise these functions it adopted the aforesaid Guideline regarding the establishment of new filling stations. There are clearly circumstances in which a state organ such as the Department in the present case, would wish to formulate a particular policy to guide the exercise of its discretionary powers, provided it is not implemented in a rigid and inflexible manner. The adoption of a guiding policy is not only legally permissible but in certain circumstances may be both practical and desirable. Thus it was stated in **Britten and Others v Pope** 1916 AD 150 by Innes CJ, dealing with the powers of a liquor licensing court at 158 as follows:

> "There should no doubt be an exercise of discretion in respect of each application; but that need not necessarily exclude all reference to general principles. Indeed some such reference would seem to be necessary to the intelligent exercise of this administrative discretion. The law affords no guide; and if the decisions of the Committee are not to be arrived at by haphazard, the adoption of some general lines of policy, or some uniform basis of treatment becomes in certain cases inevitable. Take, for instance, applicants who have been convicted of offences against the liquor laws. The Statute nowhere enacts that such persons shall be incapacitated to acquire interests in licences held by others. And yet it is hardly conceivable that a licensing Committee should not as a matter of general principle regard their applications with disfavour. In the same way, though in lesser degree, a Committee may quite properly, as it seems to me exercise their discretion along uniform lines of policy founded upon considerations relating to the business or occupation of those who apply. There may be classes of business which, as a general rule, it is not desirable should be associated with an interest in the retail liquor trade. And the recognition of that principle as a guide in dealing with such applications need not prevent, in any particular case, the exercise of due discretion within the requirements of the Statute."

The aforesaid principles have found substantial recognition in England. In **R v Port of London Authority, ex p Kynoch Ltd** [1919] 1 KB 176 at 184, Bankes LJ said:

> "In the present case there is another matter to be borne in mind. There are one the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

A fortiori, in the present case the policy documents adopted by the Department were not only drafted in collaboration with the stakeholders in the industry but were also made known to the applicant and other role players as is required by section 3(3)(c) of GN R1183. Nowhere in the Guidelines is it stated that the Department will refuse to entertain an application, which falls outside the key issues listed and in particular outside the distance stipulation.

In **British Oxygen Co Ltd. v Minister of Technology** [1970] 3 All ER 165 at 170 j to 171 b, Lord Reid said:

> "What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing."

The above decisions were confirmed by the House of Lords in **Findlay v Secretary of State for the Home Department and Other Appeals** [1984] 3 All ER 801 (HL) at 827 j to 829 j. At 828a, Lord Scarman said that he had difficulty in understanding how the relevant State organ could properly manage the complexities of its statutory duty without a policy. It was held that the complexities are such that an approach based on a carefully formulated policy was called for. (See 828 d). Applying the policy would only be unlawful if it were irrebuttable i.e. if it precluded considerations of other factors. (See 829 c).

Ultimately the House of Lords held that applying the policy did not constitute a fettering of the official's discretion nor did it undermine his independence (See 829 h).

Baxter, *Administrative Law*, (1984) at 416 identifies three principles governing the circumstances in which a public authority may apply policy or standards. They may do so where: (i) this will not totally preclude the exercise of discretion; (ii) the policy, standards or precedents are compatible with the enabling legislation; and (iii) they are disclosed to the person affected by the decision before the decision is reached.[53] In my view all three of the above considerations mentioned by Baxter apply to the present case. I say this because, (i) the respondent categorically stated that the guidelines and in particular the distance stipulation did not preclude the exercise of her and/or the Department's discretion; (ii) the policy documents and guidelines as I have indicated are in fact compatible with the enabling legislation which determines the Department's mandate;[54] and (iii) the policy document was not only drafted in collaboration with stakeholders but it is also common cause that the applicant was aware of its contents.

In my view the complexity of the factors to be taken into account by the Department in exercising its discretion to refuse or allow an application for a new filling station is such that the guideline was indeed called for in the present instance. The Department was not only lawfully entitled, but indeed duty

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[53] See *also* Wade and Forsythe "Administrative L*aw"* (7th Edition) at 360 – 366.

[54] Of course, if I were wrong in holding that the guidelines were compatible with the ECA and/or NEMA, the question arises whether the decisions by the Department and the respondent are reviewable at all. In **Gillick v West Norfolk and Wisbech Area Health Authority and Another** [1985] 3 All ER 402 (HL) Lord Bridge of Harwich said at 427f-g: "But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction (of review) with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing *ex cathedra* opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision."

bound, to take it into consideration in arriving at a decision in regard to the applicant's application under section 22 of the ECA.

WAS THE GUIDELINE REASONABLE AND REASONABLY APPLIED?

It is well established that the decision-maker is required to take into account all relevant considerations and to ignore irrelevant considerations. Frequently, however, the empowering provision will not specify those considerations, which are relevant. In those circumstances the decision-maker may only take into account considerations relevant to the exercise of the power. As held above the Constitution, ECA, NEMA and DFA delineate explicitly a range of considerations, which must be taken into account, which makes the decision-making process very complex. In the present case the Department would have acted unlawfully and irregularly if those considerations were not taken into account in exercising its discretion. However, a court will not prescribe the weight to be attached to such considerations. In **Durban Rent Board and Another v Edgemount Investments, Ltd** 1946 AD 962, Watermeyer CJ observed at 974:

> "How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts *bona fide*, a Court of law cannot interfere."

The position in English Law has been summarised thus:

> "When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts have, however, been willing to strike down as unreasonable

> decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration."[55]

More recently the Constitutional Court in **Bato Star Fishing (Pty) Ltd v the Minister of Environmental Affairs and Tourism and Others** (Constitutional Court Case No. CCT 27/03, 12 March 2004 unreported) observed at paragraphs 48 and 49:

> "[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.
>
> [49] Section 2 of the Act requires the decision-maker to *have regard to* a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances."

In line with the aforesaid approach the SCA decided in **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd** 2003 (6) SA 407 (SCA) at paragraph 43:

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[55] See De Smith, Woolf and Jowel, "Judicial Review of Administrative Action" (5th Edition) at 557 paragraphs 13 – 015.

> "[43] The second main criticism is, why five percent? Again a question arises, if not 5% then how many per cent? This unanswerable question also is not answered. This is also not surprising. There comes a time in quantification decision-making when a discretionally chosen number has to be adopted to reflect an allowance which, also expressed as a percentage figure, is intended as an expression of degree, for example, large, moderate, small – as the case may be. This happens when a judge determines that the apportionment of fault is 60:40, when the contingency allowance for remarriage is determined at 20%, or where the general damages are fixed at R120 000-00. There are moments when the fixing of a number is not capable of exact rationalisation or explanation."

Applicant's attack on the Department's decision is not so much addressed to its reasonableness or otherwise. Its contention is that the Department had fettered its discretion in relying heavily on the distance stipulation as the dominant reason for refusing the application. In effect applicant's contention is that no distance stipulation whatsoever is permissible. However, once applicant has accepted that filling stations pose potential hazards to the environment, it is not open to the applicant to argue that a distance stipulation is wholly impermissible. Its contention is also that a distance stipulation constitutes a socio-economic standard to which the Department is not entitled to have recourse in exercising its discretion under the ECA. As indicated above there are numerous legislative provisions which entitle and oblige the Department to incorporate socio-economic considerations into its integrated approach to the protection of the environment.

The Department is duty bound to develop environmental law in accordance with the statutory provisions, which delineate its mandate. When interpreting the constitutional right to a safe and healthy environment entrenched in section 24, it is permissible to take cognisance of international law as provided in section 39(1)(b) of the Constitution. This is exactly what the Department did in relation to the drafting of the policy documents and the inclusion therein of a distance stipulation by reference to comparable approaches elsewhere.

The Department opted for a distance stipulation as one of the standards by which an application for the development of a new filling station will be considered. The fact that a better or different standard may have been set is irrelevant. In my view the Department acted *bona fide* in setting such a distance stipulation after consultation with the industry and particularly after it reduced the distance stipulation in favour of the petroleum industry. The Department's actions in this regard are *bona fide* and reasonable in that two of the stakeholders agreed with this standard. Some norm or standard had to be applied to prevent the proliferation of filling stations, which pose a potential danger to the environment. This danger lies in the limited end-use of filling stations upon their closure. In the light of the industry's recognition that more than 50% of such filling stations are operating at a net loss, the potential of future "grave yard" sites resulting from filling stations that have commercially failed, is a valid and real environmental concern. Applicant does not, however, suggest what standard should be adopted to limit the proliferation of filling stations and their potential hazardous impact on the environment. In such circumstance, the attack on the Department's election to adopt a distance stipulation seems quite unjustified.

Applicant does not dispute that the Department is committed to the promotion of sustainable development and economic growth in the province. The Department *bona fide* believes that economic growth and development does not have to be to the detriment of the environment and that timeous consideration of environmental factors can assist in establishing appropriate use of all the undeveloped land in the province that will not compromise the protection of the environment nor inhibit economic growth and development.[56]

The distance stipulation is, in my view, reasonable and was applied reasonably in the present circumstances as one of many other factors considered by the Department and the respondent in arriving at their decision. This case requires

[56] See paragraph 97.2 of respondent's answering affidavit.

the principle set out in the **Bato Star Fishing** case to be applied, i.e. the Department was called upon to strike an equilibrium between a range of competing considerations and followed a route via a distance stipulation to arrive at a decision to which this court should pay due respect.

DID THE DEPARTMENT ACT UNFAIRLY IN FAILING TO CALL FOR FURTHER INFORMATION FROM THE APPLICANT?

Applicant submitted that the decision-making process was unfair in that the Department failed to call upon the applicant to supplement its application with comparative assessments of feasible alternatives, assessments of impacts in accordance with the stipulated assessment criteria and the permeability of the soil and horizontal and vertical seepage of pollutants. In my view there is no substance in this criticism. Section 6(2) and (3) of Government Notice R1183 specifically deal with this problem. It states:

> "6(2) The relevant authority **may** after receiving the scoping report referred to in subregulation (1) and after considering it, request the applicant to make the amendments that the relevant authority requires to accept the scoping report.
> (3) After a scoping report has been accepted, the relevant authority **may** decide –
> (a) that the information contained in the scoping report is sufficient for for the consideration of the application without further investigation; or
> (b) that the information contained in the scoping report should be supplemented by an environmental impact assessment which focuses on the identified alternatives and environmental issues identified in the scoping report." (Emphasis added)

It will be noted from the above sub-sections that the Department is not **obliged** to request the applicant to amend or supplement its scoping report. In terms of section 6(3)(a) the Department is entitled to come to a decision on the scoping report as filed by the applicant if it contains in its discretion, sufficient information upon which a reasonable decision can be made. Applicant's contention in this regard seems to suggest that a duty rests upon the Department to go on calling for information until it is satisfied that the application can be

granted. The express terms of section 6(2) and (3) state the contrary. It should be borne in mind that the process of seeking authorisation is not in the nature of a *quasi*-judicial hearing. Furthermore, there is nothing to prevent the applicant from renewing its application or resubmitting its application complete with such additional information as it may deem sufficient to persuade the Department to make the necessary exception in order to grant its application. Applicant is now apprised of the instances in which the Department thought the application lacking and can therefore renew its application suitably supplemented, should it wish to do so.

In all the circumstances, I am of the opinion that the Department and/or the respondent did not act unfairly in failing to call for further information from the applicant.

THE DECISION OF WILLIS J IN THE SASOL MATTER

The facts of this application are clearly distinguishable from those presented to Willis J in the **Sasol** application. In the present matter it is common cause that a filling station is an activity which may have a substantial detrimental effect on the environment in terms of Government Notices R1182 and 1183 promulgated under sections 21, 26 and 28 of the ECA.[57] In the **Sasol** matter this was not common cause. On the contrary, the entire thrust of Willis J's judgment was to separate the concept of the development of a filling station from the control of storage and handling facilities within a filling station. In paragraph [12] of his judgment, he expressly stated that:

> "I can see no reason why the respondent should not be able to regulate and control the storage and handling of petroleum products **within** filling stations without having to regulate all other aspects relating to the erection and construction of filling stations."
> (Emphasis added)

[57] See paragraphs 13 and 14 of the founding affidavit.

This distinction is not evident in the present case. Applicant did not seek to draw a distinction between the storage and handling of petroleum products within a filling station on the one hand as opposed to the development of the filling station in its entirety. As a result of the distinction drawn by Willis J, he concluded that the Department had no power to regulate the construction and erection of filling stations *per se* and thus consideration of the Guidelines dealing with the construction and erection of filling stations was held to be impermissible. In view of this crucial distinction between the facts in the **Sasol** matter and the facts in the present case, I am not bound by the conclusions of Willis J. However, should I be wrong in this conclusion, I have come to the conclusion that the narrow interpretation of the Department's mandate in the **Sasol** matter is clearly incorrect. I say this with the greatest respect to a colleague whose views I hold in high regard. I have come to this conclusion for the following reasons:

1. It does not appear from his judgment that Willis J was referred to the Department's mandate as being influenced by the constitutional imperative which emanates from section 24 of the Constitution.

2. Consideration was not given to the fact that section 26 of the ECA itself contemplates regulations which require the identification of economic and social interests which may be affected by an activity identified in terms of section 21(1) of the Act.

3. No consideration was given to the fact that the application for authorisation was to be prepared by an applicant and considered by the competent authority in the light of relevant policies, legislation, "guidelines", norms and standards. Neither in the **Sasol** case nor in the present case was the validity of the regulations in Government Notice R1183 in dispute. Thus, accepting that such regulation has the force of law, it has to be complied with in the process of considering an

application for authorisation under section 22 of the ECA. Consideration of relevant policies and guidelines are therefore an integral part of the decision-making process.

4. The interpretation by Willis J of section 1(c) of schedule 1 to Government Notice R1182 does not appear to take account of its introductory words: "The construction or upgrading of -- ". The activity described in section 1 does not relate merely to "storage and handling of petroleum products **within** a filling station". In my view the applicant in the present case correctly conceded that the schedule seeks to define the construction of the entire facility, which stores and handles petroleum products, as a hazardous activity. To prove the point, one may merely ask the rhetorical question: Absent the storage and handling of petroleum products in a filling station, what is then left of the "filling" station? In my view section 1 (c) seeks to regulate the entire construction of the facility and not merely the construction of storage tanks and petrol pumps on the site. It seems to me artificial to say that the Department is only entitled to look at the storage and handling facilities of petroleum products as an activity distinct and separate from the rest of the activities normally associated with a filling station. In any event, if it is accepted that the Department has a say in the construction of the fuel tanks and the petrol pumps as constituting storage and handling facilities of petroleum products, then for environmental purposes, it will remain a concern where and for how long those fuel tanks and petrol pumps will be operating. All the concerns listed in the guideline, including the future economic lifespan thereof, will still be relevant and applicable to such fuel tanks and petrol pumps even though they may be regarded as distinct and separate from the filling station. Ultimately, from an environmental point of view, it makes little sense to draw a distinction between, on the one hand a filling station *per se*, and on the other its facilities which store and handle hazardous products.

For the above reasons I have come to the conclusion that the Department has indeed the power to regulate the erection and construction of filling stations generally and *per se*, in the light of its constitutional and legislative mandate to develop an integrated environmental management policy.

CONCLUSION

I have therefore come to the conclusion for the reasons set out above that the applicant was not successful in showing an entitlement to the relief sought in prayers 1.1, 1.5 and 2 of the Notice of Motion. In the result the following order is made:

The application is dismissed with costs, which costs include the costs occasioned by the employment of two counsel.

DATED AT JOHANNESBURG ON THIS ……. DAY OF MAY 2004

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C.J. CLAASSEN
JUDGE OF THE HIGH COURT

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