Fuel Retailers Association of Southern Africa
v.
Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, & Others

Constitutional Court of South Africa, Case CCT 67/06, 7 June 2007[1]

NGCOBO J:

Introduction

This application for leave to appeal against the decision of the Supreme Court of Appeal concerns the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. In particular, it concerns the interaction between social and economic development and the protection of the environment. It arises out of a decision by the Department of Agriculture, Conservation and Environment, Mpumalanga province (the Department), the third respondent, to grant the Inama Family Trust (the Trust) authority in terms of section 22(1) of the Environment Conservation Act, 1989 (ECA) to construct a filling station on a property in White River, Mpumalanga (the property).

Section 22(1) of ECA forbids any person from undertaking an activity that has been identified in terms of section 21(1) as one that may have a substantial detrimental impact on the environment without written authorisation by the competent authority. It was not disputed that the MEC Agriculture, Conservation and Environment, Mpumalanga, (the MEC) the second respondent, is the competent authority designated by the Minister. Before authorisation can be granted, a report concerning the impact of the proposed development on the environment must be furnished. The relevant authority has a discretion to grant or refuse such authorisation. In granting it, the relevant authority may impose such conditions as may be necessary to ensure the protection of the environment.

Section 21(1) of ECA empowers the Minister of Environmental Affairs and Tourism (the Minister) to identify activities which in his or her opinion may have a substantial detrimental effect on the environment. Subsection (2) sets out some of these activities and they include land use and transformation. In Schedule 1 of GN R1182, dated 5 September 1997, the Minister identified the activities that may have a substantial detrimental effect on the environment. These include the construction or upgrading of "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". It is common cause that the construction of a filling station falls within this category and thus requires the authorisation contemplated in section 22(1) of ECA.

[1] *Available at* http://www.saflii.org/za/cases/ZACC/2007/13.html

The decision to grant or refuse authorisation in terms of section 22(1) of ECA must be made in the light of the provisions of the National Environmental Management Act, 1998 (NEMA). One of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. One of these principles requires environmental authorities to consider the social, economic and environmental impact of a proposed activity including its "disadvantages and benefits".

The Fuel Retailers Association of Southern Africa (incorporated in terms of section 21 of the Companies Act), the applicant, challenged the decision to grant authorisation in the Pretoria High Court on various grounds. However, the only ground that concerns us in this application is that the environmental authorities in Mpumalanga had not considered the socio-economic impact of constructing the proposed filling station, a matter which they were obliged to consider. In resisting the application on this ground the Department contended that need and desirability were considered by the local authority when it decided the rezoning application of the property for the purposes of constructing the proposed filling station. Therefore it did not have to reassess these considerations.

The High Court upheld the contention of the Department and dismissed the application. So did the Supreme Court of Appeal. Hence this application for leave to appeal.

The Director-General, Environmental Management in the Department, the first respondent, as well as the Department and the MEC are opposing the application. For convenience they are referred to as the environmental authorities. The Trust represented by its trustees and Lowveld Motors (Pty) Ltd are also opposing the application.

Factual background

During July 2000, the Trust, through an environmental consultant firm, Globecon Environmental Management Services (Globecon), applied to the Department for authorisation to construct a filling station on the property in terms of these provisions. A scoping report, a geotechnical and geohydrological report (the Geo3 report) were submitted in support of the application. The scoping report dealt with, among other matters, socio-economic factors and the presence of an aquifer in the property. In addition, the scoping report contained an evaluation of the impact of the proposed filling station, identified certain areas of concern and proposed recommendations to address these concerns.

Under the heading "Socio-Economic Components", the scoping report referred to the implications of the proposed filling station for noise, visual impacts, traffic, municipal services, safety and crime, and cultural and historical sites. It also dealt with the feasibility of the proposed filling station and stated that—

> "Various other locations do exist for the proposed development, as the positioning of a filling station is dictated by traffic flow, visibility, availability of land and the location of other filling stations in the area.

> As the proposed filling station is directly targeting traffic moving between White River, Hazyview and the Numbi Gate of the Kruger National Park, a specific location along the said route was identified. Once the site was identified a feasibility study was done based on locating the filling station at the specific site. Once the feasibility of the filling station on the specific site was identified, and the availability of the property was confirmed, no other options were considered."

One of the issues identified in the report as requiring attention was the protection of an existing aquifer, a significant clean groundwater resource below the surface of the property. In the past this aquifer had been used to augment the water supply in White River. The report noted that the aquifer needed protection from pollution. The report recommended that the water quality of the aquifer through the borehole should be tested bi-annually. It proposed that if the Department of Water Affairs and Forestry (Water Affairs and Forestry) required it, an impermeable layer should be installed in the base of the pit to ensure that no contaminants from the tanks reach the aquifer. In addition, it recommended that a reconciliation programme should be in place to detect any leakage. These recommendations were made in the light of the Geo3 report.

The applicant, through its environmental consultants, Ecotechnik, objected to the construction of the proposed filling station on several grounds, one being that the quality of the water in the aquifer might be contaminated. Ecotechnik submitted an evaluation report which criticised the consideration of alternatives to the development as being vague and non-specific and pointed out that "demand and activity alternatives were not investigated." The report also took issue with the manner in which the public participation process had been conducted, pointing out that there were interested persons who had not had the opportunity to express their views on a proposed filling station that might affect them.

There was a further exchange of reports by the opposing consultants which dealt with the adequacy or otherwise of the proposed measures for the prevention of the contamination of the aquifer. In the light of these reports and in particular, the existence of the aquifer, the Department referred the Geo3 report together with the objections raised by the applicant to Water Affairs and Forestry for comment.

In a very brief response, Water Affairs and Forestry accepted the Geo3 report and, on the issue of underground water, required "[t]he proposed developer [to] ensure that no pollution of the groundwater . . . take[s] place. And [that it] must be monitored as set out in the report and in accordance [with] all the relevant Regulations as set out by the Dept of Water Affairs and Forestry." Nothing was said about the installation of an impermeable layer, which according to the scoping report was to be installed if Water Affairs and Forestry required this. However, it subsequently transpired that the Water Quality Management and Water Utilization divisions of Water Affairs and Forestry had neither received nor commented on the Geo3 report.

The application was considered in the first instance by Mr Hlatshwayo, the Deputy-Director in the Department. On 9 January 2002 authorisation was granted over the objection of the applicant. A record of decision was issued, which contained the decision and conditions upon which authorisation was granted. This decision authorised the construction of a filling station, three fuel tanks, a convenience store, a canopy, ablution facilities and driveways providing access to and from the nearby streets. The record of decision was signed by Dr Batchelor, the Director of Environmental Management in the Department.

One of the conditions of the authorisation was that the necessary permits or approvals must be obtained from other government departments such as Water Affairs and Forestry. The record of decision sets out "key factors" which presumably influenced the decision. It noted that the property had "been rezoned from 'special' to 'Business 1'" and that all identified and perceived impacts were satisfactorily dealt with in the scoping report.

The applicant lodged an appeal against this decision. One of the grounds of appeal was that the need, desirability and sustainability of the proposed filling station had not been considered. It was alleged that this aspect was not addressed in the scoping report submitted by Globecon. It was also pointed out that the proposed filling station was within a radius of five kilometres from six other filling stations that adequately served the needs of the community. The applicant alleged that there had recently been a decline in the growth of fuel consumption in White River. The viability of existing filling stations would be affected and this had been exacerbated by the introduction of three new filling stations in the area.

In support of its ground of appeal based on need and desirability, the applicant relied on the Gauteng Provincial Government Guidelines (Gauteng Guidelines) which were developed by the Gauteng province to ensure that its responsibilities in respect of the protection of the environment are carried out in an efficient and considered manner. One of the general guidelines provides that new filling stations will generally not be approved where they will be "within three (3) kilometres of an existing filling station in urban, built-up or residential areas". This limitation on the distance between filling stations was influenced by international experience, views of interested persons and the legislative obligations under ECA and NEMA.

A further ground of appeal related to the inadequacy of the Geo3 report concerning measures to prevent fuel leaks. The applicants submitted a report by De Villiers and Cronje, a firm of consulting engineering geologists, which evaluated the Geo3 report and expressed the following opinion—

> "It is . . . highly probable that the residual granitic material at the level of the fuel tanks will have geo-mechanical properties that could be conducive to the spread of petro-chemical pollution into the underlying major aquiver should a leak occur in the fuel tanks. This could then contaminate the aquiver system beyond further utilization."

It concluded that—

> "It is therefore of the greatest importance that, in the absence of detail[ed] soil test results of all the sub-surface material at and below the level of the fuel tanks, the current and future value and intended utilization of the water from the aquiver be evaluated. (as well as the presence of any other water borehole situated on the same aquiver)."

The appeal was considered and dismissed by Dr Batchelor. . . .

The review proceedings

The applicant subsequently launched proceedings in the High Court, seeking an order reviewing and setting aside the decision to grant authorisation. The applicant alleged that its cause of action arose from section 36 of ECA, alternatively the common law, alternatively the Promotion of Administrative Justice Act, 2000 (PAJA).

The decision to grant authorisation was attacked on eleven grounds. One of the grounds was the failure to take into consideration or to properly consider the requirements of need, desirability and sustainability in relation to the proposed filling station . . . .

Both Dr Batchelor and Mr Hlatshwayo deposed to affidavits explaining how they dealt with the application. Their evidence is substantially to the same effect. It amounts to this: need and desirability are factors that are considered by the local authority when it approves the rezoning of a property for the purposes of erecting a proposed development. . . . The Department does not reconsider these factors. It is sufficient for an applicant for authorisation to state that the property has been rezoned for the construction of the proposed development. And if there is no reason to doubt this, based on this statement, the Department will ". . . accept that need and desirability has indeed been considered by the Local Councils . . . ."

The decision of the High Court

The High Court upheld the submission of the environmental authorities that the question of need, desirability and sustainability are matters that must be considered by the local authority when an application for rezoning is made and that it is unnecessary for the environmental authorities to consider these factors. . . .

The decision of the Supreme Court of Appeal

Like the High Court, the Supreme Court of Appeal upheld the practice of the environmental authorities of leaving the consideration of need, desirability and sustainability to the local authority. . . .

Issues presented

In this Court, the applicant contended that the environmental authorities themselves were obliged to consider the socio-economic impact of constructing the proposed filling station. The applicant submitted that this obligation is wider than the requirement to assess the need and desirability of the proposed filling station under the Ordinance. This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one. This in turn required the environmental authorities to assess the demand or necessity and desirability, not feasibility, of the proposed filling station with a view to fulfilling the needs of the targeted community, and its impact on the sustainability of existing filling stations. The applicant relied upon the provisions of section 24(b)(iii) of the Constitution, as well as sections 2(4)(a), 2(3), 2(4)(g), 2(4)(i), 23 and 24 of NEMA.

The environmental authorities . . . contended that, consistently with the practice that is followed in Mpumalanga, need and desirability of the proposed filling station was considered by the local authority when it considered the rezoning of the property. They submitted that it was therefore not necessary for them to reconsider these factors. . . .

The questions which fall to be considered in this application are therefore, firstly, the nature and scope of the obligation to consider the social, economic and environmental impact of a proposed development; second, whether the environmental authorities complied with that obligation; and, if the environmental authorities did not comply with that obligation, the appropriate relief. . . .

The relevant constitutional provision

The Constitution deals with the environment in section 24 and proclaims the right of everyone—

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

Sustainable development

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.

Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. . . .

The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.

The concept of sustainable development in international law

Sustainable development is an evolving concept of international law. Broadly speaking its evolution can be traced to the 1972 Stockholm Conference. That Conference stressed the relationship between development and the protection of the environment, in particular, the need "to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their population". The principles which were proclaimed at this conference provide a setting for the development of the concept of sustainable development. Since then the concept of sustainable development has received considerable endorsement by the international community. Indeed in 2002 people from over 180 countries gathered in our country for the Johannesburg World Summit on Sustainable Development (WSSD) to reaffirm that sustainable development is a world priority.

But it was the report of the World Commission on Environment and Development (the Brundtland Report) which "coined" the term "sustainable development". The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". It described sustainable development as—

> "[i]n essence . . . a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations".

This report argued for a merger of environmental and economic considerations in decision-making and urged the proposition that "the goals of economic and social development must be defined in terms of sustainability". It called for a new approach to development - "a type of development that integrates production with resource

conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to resources." The concept of sustainable development, according to the report, "provides a framework for the integration of environment[al] policies and development strategies".

The 1992 Rio Conference made the concept of sustainable development a central feature of its Declaration. The Rio Declaration is especially important because it reflects a real consensus in the international community on some core principles of environmental protection and sustainable development. It developed general principles on sustainable development and provided a framework for the development of the law of sustainable development.

At the heart of the Rio Declaration are Principles 3 and 4. Principle 3 provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The idea that development and environmental protection must be reconciled is central to the concept of sustainable development. At the core of this Principle is the principle of integration of environmental protection and socio-economic development.

Commentators on international law have understandably refrained from attempting to define the concept of sustainable development. Instead they have identified the evolving elements of the concept of sustainable development. These include the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner. . . .

The principle of integration of environmental protection and socio-economic development is therefore fundamental to the concept of sustainable development. Indeed economic development, social development and the protection of the environment are now considered pillars of sustainable development. . . .

The concept of sustainable development has received approval in a judgment of the International Court of Justice. This much appears from the judgment of the International Court of Justice in Gabčíkovo-Nagymaros Project (Hungary/Slovakia) . . . .

It is in the light of these developments in the international law of environment and sustainable development that the concept of sustainable development must be construed and understood in our law.

The concept of sustainable development in our law

As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.

Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.

NEMA, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations". This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive.

One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management − *batho pele*. It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be "considered, assessed and evaluated" and that any decision made "must be appropriate in the light of such consideration and assessment". This is underscored by the requirement that decisions must take into account the interests, needs and values of all interested and affected persons.

Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between

environmental and socio-economic developmental considerations through the concept of sustainable development. . . .

Section 24 [of NEMA], which deals with the implementation of the general objectives of integrated environmental management, provides that—

> "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."

. . . Against this background, I now turn to consider the nature and the scope of the obligation to consider socio-economic conditions.

The nature and the scope of the obligation to consider socio-economic conditions

The nature and the scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment. Once it is accepted, as it must be, that socio-economic development and the protection of the environment are interlinked, it follows that socio-economic conditions have an impact on the environment. A proposed filling station may affect the sustainability of existing filling stations with consequences for the job security of the employees of those filling stations. But that is not all; if the proposed filling station leads to the closure of some or all of the existing filling stations, this has consequences for the environment. Filling stations have a limited end use. The underground fuel tanks and other infrastructure may have to be removed and land may have to be rehabilitated.

Apart from this, the proliferation of filling stations in close proximity to one another may increase the pre-existing risk of adverse impact on the environment. The risk that comes to mind is the contamination of underground water, soil, visual intrusion and light. An additional filling station may significantly increase this risk and increase environmental stress. Mindful of this possibility, NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed. . . .

There are two points that must be stressed here. First, the Constitution, ECA and NEMA do not protect the existing developments at the expense of future developments. What section 24 requires, and what NEMA gives effect to, is that socio-economic development

must be justifiable in the light of the need to protect the environment. The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions.

Second, the objective of this exercise, as NEMA makes it plain, is both to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit. . . .

What was required of the environmental authorities therefore was to consider the impact on the environment of the proliferation of filling stations as well as the impact of the proposed filling station on existing ones. This conclusion makes it plain that the obligation to consider the socio-economic impact of a proposed development is wider than the requirement to assess need and desirability . . . . It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.

What remains to be considered now is whether the environmental authorities complied with this obligation.

Did the environmental authorities comply with their obligations under NEMA?

It is common cause that the environmental authorities themselves did not consider need and desirability. They took the view that these were matters that must be "proven, argued and considered by the Local Council" when an application for rezoning is made . . . .

There is a fundamental flaw in this approach. Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.

The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption. They misconstrued the

nature of their obligations under NEMA and as a consequence failed to apply their minds to the socio-economic impact of the proposed filling station, a matter which they were required to consider. This fact alone is sufficient to warrant the setting aside of the decision. . . .

Here NEMA specifically enjoins the environmental authorities to consider, assess and evaluate the social and economic impact of the proposed filling station, including its cumulative effect on the environment as well as its impact on existing filling stations and thereafter to make a decision that is appropriate in the light of such assessment. . . .

Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved. Yet in other situations, it offers a principle that will facilitate the achievement of the balance. The principle that enables the environmental authorities to balance developmental needs and environmental concerns is the principle of sustainable development. . . .

Before concluding this judgment, there are two matters that should be mentioned in relation to the duty of environmental authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the environmental authorities. The environmental authorities and Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations. . . .

The other matter relates to the attitude of the environmental authorities to the objection of the applicant to the construction of the proposed filling station. In the Supreme Court of Appeal they argued that the applicant's opposition to the application for authorisation was motivated by the desire to stifle competition which was "thinly disguised as a desire to protect the environment". In this regard, they pointed to the fact that the main deponent on behalf of the applicant, Mr Le Roux, owns other filling stations in the area. The Supreme Court of Appeal found that "there appears to be some merit in the contention." Whatever, the merits of the criticism may be, a matter on which it is not necessary to express an opinion, an environmental authority whose duty it is to protect the environment should welcome every opportunity to consider and assess issues that may adversely affect the environment.

Similarly, the duty of a court of law when the decision of an environmental authority is brought on review is to evaluate the soundness or otherwise of the objections raised. In doing so, the court must apply the applicable legal principles. If upon a proper application of the legal principles, the objections are valid, the court has no option but to

uphold the objections. That is the duty that is imposed on a court by the Constitution, which is to uphold the Constitution and the law which they ". . . must apply impartially and without fear, favour or prejudice." Neither the identity of the litigant who raises the objection nor the motive is relevant.

The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.

On that occasion members of the judiciary across the globe made the following statement—

> "We affirm our commitment to the pledge made by world leaders in the Millennium Declaration adopted by the United Nations General Assembly in September 2000 'to spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'".

In addition, they affirmed—

> ". . . that an independent Judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law".

One of these principles expresses—

> "A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process . . . "

Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.

Conclusion

The considerations set out above make it clear that the decision of the environmental authorities is flawed and falls to be set aside as they misconstrued the obligations imposed on them by NEMA. In all the circumstances, the decision by the environmental authorities to grant authorisation for the construction of the filling station under section 22(1) of ECA cannot stand and falls to be reviewed and set aside. It follows that both the High Court and the Supreme Court of Appeal erred, the High Court in dismissing the application for review and the Supreme Court of Appeal in upholding the decision of the High Court.

The relief

The appropriate relief in this case is to send the matter back to the environmental authorities for them to consider the matter afresh in a manner that is consistent with this judgment. . . .

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Nkabinde J, O'Regan J, Skweyiya J, and Van der Westhuizen J concur in the judgment of Ngcobo J.

SACHS J:

It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.

The brief dissent which follows is accordingly not based on factors related to the motivation of the applicant, but rather on how I believe the relevant law should be applied to the facts of this case. In this respect I would like to associate myself with eloquent and comprehensive manner in which Ngcobo J highlights the importance of environmental law for our society and establishes the legal setting in which this matter is to be determined. I also support the way in which he alerts the Department of Water Affairs and Forestry to its legislative responsibilities in this area. I agree with his conclusion that it was not appropriate for the authorities simply to rely on an earlier zoning decision by the Council. They should indeed have looked at the matter more broadly and in a more up-to-date manner. Where I part ways with his judgment is in regard to the materiality of that failure. . . .

It seems to me that while the majority judgment did not find it necessary to evaluate the facts because a mandatory procedure was not complied with, if the evidence before the Court suggests that the failure was not of a material nature, it should not lead to the decision being set aside. . . .

But there is no evidence, above the level of speculation, that the arrival of a new kid on the block doing the same business in the same way in competition with existing filling stations would give rise to the risk of unacceptable degradation either to the physical environment or to the socio-cultural environment. I am therefore not persuaded that the principles of sustainable development are engaged in this matter at all. The objective of NEMA, after all, is to preserve the environment for present and future generations, and not to maintain the profitability of incumbent entrepreneurs.

For these reasons, I would not set aside the determination of the decision-makers. In substance the decision-makers considered the factors to which NEMA required them to pay attention. Though the Fuel Retailers Association raised an objection that had technical merit, the failure by the decision-makers was innocuous as far as the environment was concerned and had formal rather than substantive significance. In my view the High Court and the Court of Appeal got it right in dismissing the applicant's challenge to the decision authorising the new filling station. I would accordingly refuse the appeal and uphold the decision of the Court of Appeal.