BP SOUTHERN AFRICA (PTY) LTD v MEC FOR AGRICULTURE, CONSERVATION, ENVIRONMENT AND LAND AFFAIRS 2004 (5) SA 124 (W)

Citation 2004 (5) SA 124 (W)
Case No 03/16337
Court Witwatersrand Local Division
Judge C J Claassen J
Heard March 31, 2004
Judgment May 25, 2004
Counsel P M Kennedy SC (with L H Barnes) for the applicant.
G J Marcus SC (with F M Sikhakhane-Muzi) for the respondent.
Annotations Link to Case Annotations

Flynote : Sleutelwoorde

Environmental law - Protection of the environment - Prohibition on undertaking of environmentally detrimental activities without written authorisation of competent authority as intended in s 22 of Environment Conservation Act 73 of 1989 - Scope of mandate of competent authority - Whether entitled to refer to departmental guidelines - Provincial department applying distance-stipulation contained in departmental guidelines in refusing application for authorisation to develop filling station - In light of complexity of considerations department required to take into account, department duty-bound to take departmental guidelines into account - Department exercising discretion in assigning weight to various considerations - In circumstances, distance-stipulation reasonable and reasonably applied.

Environmental law - Protection of the environment - Prohibition on undertaking of environmentally detrimental activities without written authorisation of competent authority as intended in s 22 of Environment Conservation Act 73 of 1989 - Scope of mandate of competent authority - Whether entitled to consider socio-economic considerations - Provincial department allegedly taking into account socio-economic considerations in refusing application for authorisation to develop filling station - Court itemising constitutional and statutory duties department entitled and obliged to take into account - Department's mandate requiring consideration of socio-economic considerations.

Environmental law - Protection of the environment - Prohibition on undertaking of environmentally detrimental activities without written authorisation as intended in s 22 of Environment Conservation Act 73 of 1989 - Duties of competent authority - Duty to call for additional information to remedy inadequate application - No obligation in terms of regulations under Act to call upon applicant for such supplementary information - Applicant entitled to renew or resubmit application, duly supplemented.

Constitutional law - Human rights - Right to environment in terms of s 24 of Constitution of Republic of South Africa Act 108 of 1996 - Such right on a par with other constitutional rights, specifically, rights to freedom of trade, occupation, profession and property - Where right to environment competing with other constitutional rights, no right enjoying priority over any others but all rights concerned to be balanced.

Headnote : Kopnota

The applicant sought the review and setting aside of a decision by the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs to refuse the applicant's application in terms of s 22(1) of the Environment Conservation Act 73 of 1989 (the ECA) for authorisation to

develop a filling station on one of its properties. In considering the application, the department applied certain departmental guidelines which provided, *inter alia*, that new filling stations would not generally be approved if they were situated within a three kilometer radius of an existing filling station. Secondly, the applicant sought the review and setting aside of the department's decision to apply that guideline in considering its application. Thirdly, it applied for an order remitting its application to the department for reconsideration. The department had refused the application on the basis that, *inter alia*, the distance-stipulation caused the proposed development to fall foul of its departmental guidelines, as well as the provisions of the National Environmental Management Act 107 of 1998 (NEMA) and the Development Facilitation Act 67 of 1995 (DFA).

The applicant contended that whilst clothing its refusal in the language of environmental concerns, the real reason for the department's refusal of its application had been its desire to regulate the economy so as to protect the commercial interests of existing filling stations. Such commercial interests, it contended further, were a socio-economic consideration which were unrelated to and had no significant relationship to the environment and which the department had therefore not been entitled to take into account in reaching its decision. According to the applicant the department's task in the present case had been to determine whether the proposed development would have an actual or potential detrimental impact on the environment. It contended that the department's decision had constituted unreasonable administrative action because it had exceeded its mandate in various respects. That mandate, it contended, had derived from the ECA and its regulations. The department responded that its mandate had derived, in addition to the ECA and its regulations, from the Constitution of the Republic of South Africa Act 108 of 1996, from NEMA and from the DFA, and that it had not exceeded that mandate in reaching its decision. The respects in which the applicant contended the decision had constituted unreasonable administrative action included the department's failure to call for additional information from the applicant in terms of the regulations to the ECA. The applicant contended not only that the decision had constituted unreasonable administrative action but also that the decision itself had been unreasonable because, despite the non-compliance of its application with the distance-stipulation, it had nonetheless had merit and had been deserving of approval.

Held, that the department's task in the present case had been to determine whether the proposed development would have an actual or potential detrimental impact on the environment. Whether the department had acted administratively fairly in making that determination depended upon the scope of its mandate since it was the department's mandate which determined the considerations it had been required to take into account in reaching its decision. The dispute between the parties as to the considerations the department had been entitled to take into account thus translated into a dispute as to the scope of the department's mandate. The scope of the department's mandate was determined, in turn, by the sources of its mandate. The applicant contended for a narrower

mandate than that contended for by the respondent, emanating from only the ECA and its regulations, whereas the respondent contended for a much wider mandate which derived from all of the ECA and its regulations, the Constitution, NEMA and the DFA. (At 140C/D - G.)

Held, further, that the constitutional right to environment, embodied in s 24 of the Constitution, was on a par with the rights to freedom of trade, occupation, profession and property, embodied in ss 22 and 25 of the

Constitution, and these rights had to be balanced against one another in any situation in which all of them came into play. None of them enjoyed priority over any other of them. (At 143B - C/D.)

Held, further, that the definition of 'environment' as contained in s 1 of the ECA meant that the environment was a composite right, which included social, economic and cultural considerations in order to ultimately result in a balanced environment. (At 144H - 145A.)

Held, further, as to the applicant's contention that the department had exceeded its mandate by taking into account socio-economic considerations, that the department's statutory obligations in terms of the Constitution, the ECA, NEMA and the DFA made it abundantly clear that its mandate included a consideration of socio-economic factors as an integral part of its environmental responsibility. The applicant's contention that socio-economic considerations fell outside the department's mandate when considering applications under s 22 of the ECA to develop a filling station accordingly fell to be rejected. (At 151D/E - E and 151F - F/G.)

Held, further, that there were 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 was not implemented in a rigid and inflexible manner. The adoption of a guiding policy was not only legally permissible but, in certain circumstances, might be both practical and desirable. (At 153C - D.)

Held, further, that there were three principles governing the circumstances in which a public authority could apply policy or standards. They could do so where: (i) that would not totally preclude the exercise of discretion; (ii) the policy, standards or precedents were compatible with the enabling legislation; and (iii) they were disclosed to the person affected by the decision before the decision is reached. All three of those considerations applied to the present case because (i) the guidelines and, in particular, the distance stipulation did not preclude the exercise of the department's discretion; (ii) the policy documents and guidelines were compatible with the enabling legislation which determined the department's mandate; and (iii) the policy document had not only been drafted in collaboration with stakeholders but it was also common cause that the applicant had been aware of its contents. (At 154F - 155A.)

Held, further, that 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 was such that a guideline had been called for. In fact, the department had been not only lawfully entitled, but had been duty-bound, to take its guidelines into consideration in arriving at a

decision in regard to the applicant's application. (At 155A - B.)

Held, further, that whilst the Constitution, ECA, NEMA and DFA explicitly delineated a range of considerations which had to be taken into account by the department, the weight the department had to attach to such considerations ought not to be prescribed by the Court. (At 155D - E.)

Held, further, as to the applicant's contention that no distance stipulation had been permissible, that once the applicant accepted that filling stations posed potential hazards to the environment, it was not open to it to contend that a distance stipulation was not permissible. (At 156I - I/J.)

Held, further, as to the applicant's contention that a distance stipulation constituted a socio-economic standard to which the department had not been entitled to have recourse in exercising its discretion under the ECA, that there were numerous legislative provisions which entitled and obliged the department to incorporate socio-economic considerations into its integrated approach to the protection of the environment. (At 156I/J - 157A/B.)

Held, further, that the department had, in interpreting the constitutional right to a safe and healthy environment entrenched in s 24, taken cognisance of international law, as it had been entitled to do in terms of s 39(1)*(b)* of the Constitution. It had drafted its policy documents and included therein a distance stipulation by reference to comparable approaches elsewhere. (At 157B - C.)

Held, further, that the department had opted for a distance stipulation as one of the standards by which an application for the development of a new filling station would be considered. The fact that a better or different standard might have been set was irrelevant. The department had acted *bona fide* and reasonably in setting such a distance stipulation after consultation with the industry. Applicant made no suggestion as to what standard should have been adopted to limit the proliferation of filling stations and their potential hazardous impact on the environment. In such circumstances, the attack on the department's election to adopt a distance stipulation seemed quite unjustified. (At 157C - F/G.)

Held, further, that the distance stipulation was reasonable and was applied reasonably in the present circumstances as one of many other factors considered by the department in arriving at its decision. 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 the Court had to pay due respect. (At 157H - I/J.)

Held, further, that there was no substance in the applicant's submission that the decision-making process had been unfair in that the department had failed to call upon the applicant to supplement its application as needed. In terms of the regulations, the department was entitled, but not obliged, to call for such additional information. Furthermore, there was nothing to prevent the applicant from renewing its application or resubmitting its application complete with such additional information as it might deem sufficient to persuade the department to make the necessary exception in order to grant its application. (At 158A - C, 158E - E/F, and 158G - H.)

Held, further, that in the circumstances the department had not acted unfairly in failing to call for further information from the applicant. (At 158H/I.)

Held, accordingly, that the applicant had not succeeded in showing its entitlement to the relief sought and the application was dismissed. (At 160G.)

Cases Considered

Annotations

Reported cases

Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A): dictum at 923H applied.

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687): dicta in paras [48] and [49] applied

British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165 (HL): dictum at 170*j* - 171*b* applied

Britten and Others v Pope 1916 AD 150: dictum in 158 applied

Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA): dictum at 719C - D applied

Durban Rent Board and Another v Edgemount Investments Ltd 1946 AD 962: dictum at 974 applied

Findlay v Secretary of State for the Home Department and Other Appeals [1984] 3 All ER 801 (HL): dictum at 827*j* - 829*j* applied

Gillick v West Norfolk and Wisbech Area Health Authority and Another [1985] 3 All ER 402 (HL): dictum at 427*f* - *g* applied

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (2004 (11) BCLR 1169): dicta in paras [41] - [43] applied

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) (2000 (2) SACR 349; 2000 (10) BCLR 1079): dictum at 558E - F applied

Judgment in the Case Concerning the Construction of the Gabÿikovo-Nagymaros Project (Hungary/Slovakia 37 ILM 162 (1998): dictum at 204 applied

King v Dykes 1971 (3) SA 540 (RA): dictum at 545G - H applied

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA): dictum in para [43] applied

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033): dictum at 740F applied

Ngqumba en 'n Ander v Staatspresident en Andere 1988 (4) SA 224 (A): dicta at 261B & 263D applied

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): dictum at 634H - I applied

R v Port of London Authority, Ex parte Kynoch Ltd [1919] 1 KB 176: dictum at 184 applied

Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A): dictum at 541J - 542B applied

S v Williams and Another 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861): dictum at 648H applied

S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401): dictum at 650H - 651I applied

Silvermine Valley Coalition v Sybrand Van der Spuy Boerderye and Others 2002 (1) SA 478 (C): dictum at 487F followed

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996, ss 22, 24, 25 and 39(1)*(b)*: see *Juta's Statutes of South Africa* 2002 vol 5 at 1-147 and 1-150

The Development Facilitation Act 67 of 1995: see *Juta's Statutes of South Africa 2002* vol 6 at 2-382

The Environment Conservation Act 73 of 1989, ss 1 and 22(1): see *Juta's Statutes of South Africa 2002* vol 6 at 2-295 and 2 - 299

The National Environmental Management Act 107 of 1998: see *Juta's Statutes of South Africa 2002* vol 6 at 2-467.

Case Information

Application for the review and setting aside of a decision of the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs to refuse the applicant's application, in terms of s 22(1) of the Environment Conservation Act 73 of 1989, for authorisation to develop a filling station. The facts appear from the reasons for judgment.

P M Kennedy SC (with *L H Barnes*) for the applicant.

G J Marcus SC (with *F M Sikhakhane-Muzi*) for the respondent.

Cur adv vult.

Postea (May 25).

Judgment

C J Claassen J: The applicant sought, firstly, an order reviewing and setting aside a decision of the Gauteng Provincial Department of-

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Agriculture, Conservation, Environment and Land Affairs (the department) refusing applicant's application in terms of s 22(1) of the Environment Conservation Act 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 para 2(1) of the 'EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations', dated March 2002, 1(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 reviewing and setting 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(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) Ltd 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 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, five to eight 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, ie 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 to 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 its 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, ss 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 effect 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 s 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation 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(3)

The Minister, under s 21 of the ECA, promulgated government Notice R1182, published in the *Government Gazette* No 18261 of 5 September 1997. 4(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 . . . .'

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 ss 26 and 28 of the ECA, provides for regulations relating to applications for the authorisation of activities which have been identified under s 21 of the ECA. 5(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 authorisation 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(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(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 s 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 s 21(1) or prohibited in terms of s 23(2), concerning -
>
> *(a)* the scope and content of environmental impact reports, which may include, but are not limited to -
>
> (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 authorisation (s 4); the requirement to submit a plan of study for scoping (s 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 (s 6); the submission of a plan of study for environmental impact assessment (s 7); the submission of such environmental impact report (s 8); the consideration of the application (s 9); a record of the

department's decision (s 10); and the manner in which an appeal may be lodged (s 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(8) On 22 June 2001, applicant submitted its 'Plan of Study for Scoping' to the department. 9(9) It was recorded therein that, among the specific issues to be dealt with was 'the location of other existing filling stations within 5 kilometres of the site'. 10(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(11) Applicant's consultants, Mills and Otten, prepared its scoping report. 12(12) It was submitted to the department on 19 October 2001. Insofar 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(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 economic point of view, no impact between the existing sites and the new site is envisaged, the reason being that each of the three sites has its 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 0,8 m and proper damp-proofing precautions should be taken underneath structures. Cognisance should be taken of the perched water table in the design of subsurface containers and behind retaining walls.'

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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(14)

The record of decision follows the prerequisites set in s 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 R1182 and 1183 of ss 21, 22 and 26 of the Environment Conservation Act 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 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.

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

Development must be socially, environmentally and economically sustainable (s 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 (s 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 0,8 m from the surface).

3. Incompatibility of the proposed development in terms of the Development Facilitation Act 67 of 1995:

The promotion of optimum use of existing resources relating to transportation is compromised in terms of s 3(c)(iv) of the Development Facilitation Act 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.'

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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 para 1 of s 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 Kyalami 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'.

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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 2 km 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(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 Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 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(16)

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, ie it constituted unreasonable administrative action, more particularly because the department (i) failed to call for more information from the applicant in terms of ss 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 constitutionally-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

The respondent denied the applicant's contentions. In para 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 paras 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, ie '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)

The respondent also referred to the 'Key Issues' in para 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(18) where the following is stated: 19(19)

'Whilst recognising 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 effects, feasibility/sustainability, desirability, limited end-use and change in consumer behaviour. 20(20)

In paras 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 effects*" 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.

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(21)

Applicant did not dispute these allegations in its replying affidavit.

The 'virtual sterilisation of land use' referred to in para 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(22)

The respondent reiterated this argument in para 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 the department's obligation 'to ensure sustainable development in the Province'.

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

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In view of applicant's failure to dispute the allegations in para 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(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 para 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 para 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 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 5 km to 3 km in the March 2002 Guideline. 25(25)

All of the above allegations by the respondent stand uncontroverted.

As to the status of the checklist, respondent alleged in para 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 para 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(26) The applicant contended that the department's mandate is derived from ss 21, 26 and 28 of the ECA and its regulations. However, the applicant did concede, in para 10 of its replying affidavit that the department was obliged to be guided by the principles set out in s 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 para 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 dependent 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 fairly 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.

. . . .'

(Emphasis added.)

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The supremacy clause in the Constitution is contained in s 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 s 7 of the Constitution, which provides:

'7(1) This Bill of Rights is the cornerstone 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 s 36, or elsewhere in the Bill.'

(Emphasis added.)

In terms of s 7(2), the Government has a particular responsibility to sustain and promote the values of the Constitution. 27(27) The provisions of the Bill of Rights bind the State as well as natural and juristic persons. This is expressed in s 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(28) The Constitution also lays down certain principles of interpretation. These are embodied in s 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 s 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(29)

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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 s 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 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 s 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 719C - 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) (2000 (11) BCLR 1169) at 69B - 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 para [43], Yacoob J went on to say that programmes instituted by the State 'must be balanced and flexible'. In para [41], at p 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(30)

I am in respectful agreement with Prof Shadrack B O Gutto 31(31) that the constitutional right to environment is on a par with the rights to freedom of trade, occupation, profession and property entrenched in ss 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 rights. It will require a balancing of rights where competing interests and norms are concerned. This is in line with the injunction in s 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 s 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 recognised as far back as 1971 when, in *King v Dykes* 1971 (3) SA 540 (RA), MacDonald ACJ said at 545G - 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(32) It has been held that the goal of 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(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 s 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 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, s 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 utilisation of the *environment* and for matters incidental thereto'. The 'environment' is defined in s 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(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(35) which includes social, economic and cultural considerations in order to ultimately result