in a balanced environment. 36(36) Because the ECA is pre-1994, the aforesaid wide definition of 'environment' already existed in our law when the interim and final Constitutions were drafted and promulgated.

The aforesaid wide and broad definition of environment is to be distinguished from the more limited definition of the concept 'protected natural environment' as referred to in s 16(1) of the ECA. A lively academic debate has existed for a long time concerning the true definition of the environment. On the one hand, a more limited approach has defined 'environment' as relating only to the natural environment or simply, God's created physical environment. In this sense, it would exclude social, cultural, economic and spatial environment, in short, the entire anthropogenic environment. At the other end of the spectrum, it was appreciated that it would be unrealistic to restrict environment to the purely natural environment because most of the erstwhile natural environment is no longer in that state but has, to a greater or lesser degree, been modified by humans, save in protected wilderness areas. In promulgating the ECA, South Africa chose to embark upon the extensive approach to environment by giving it a comprehensive definition, which is as all-embracing as may be imagined. 37(37)

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

The National Environmental Management Act 107 of 1998 (NEMA)

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

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

NEMA contains a preamble which recognises, *inter alia*, that everyone has the right to an environment that is not harmful to his or her health or well-being; that the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone; that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;

that everyone has the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development; that all spheres of government and all organs of State must co-operate with

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

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

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

'the surroundings within which humans exist and that are made up of -

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being'.

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

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

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

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

'2(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and -

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the

social and economic rights in chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) serve as *guidelines* by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

(d) . . .

(e) guide the interpretation, administration and implementation of this Act, *and any other law concerned with the protection or management of the environment.*

(2) Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and *social* interests equitably.

(3) *Development must be socially, environmentally and economically sustainable.*

(4) *(a)* Sustainable development requires the consideration of all relevant factors including the following:

(i) . . .

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(iii) - (vi) . . .

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

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

(b) Environmental management must be *integrated,* acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental options.

(c) . . .

(d) . . .

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

(f) - (h) . . .

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

(j) - (k). . .

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

(m) - (n) . . .

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

(Emphasis added.)

Chapter 5 of NEMA is intended to provide a legislative framework for the establishment of an Integrated Environmental Management programme. According to s 23(1), this chapter is intended to 'promote the application of appropriate environmental management tools in

order to

ensure the integrated environmental management of activities'. Section 23(2) provides:

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

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

(b) identify, predict and evaluate the *actual and potential impact on the environment, socio-economic conditions and* cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in s 2;

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment; . . .'.

(Emphasis added.)

Section 24, which is also part of chap 5, provides:

'24(1) In order to give effect to the general objectives of integrated environmental management laid down in this chapter, the potential impact on -

(a) the environment;

(b) socio-economic conditions; and

(c) the cultural heritage,

of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of State charged by law with authorising, permitting, or otherwise allowing the implementation of an activity.'

(Emphasis added.)

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

Section 24(3) provides for regulations to be made laying down the procedures to be followed and the reports to be prepared in respect of the investigation, assessment and communication of the potential impact of activities contemplated in ss (1). Section 24(7) prescribes the minimum requirements of the procedures for such investigations,

assessments and communication of the potential impact of activities. Of relevance to the present dispute is the following subsection, which provides:

'24(7) Procedures for the investigation, assessment and communication of the *potential impact* of activities must, as a minimum, ensure the following:

(a) Investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;

(b) investigation of the potential impact, including cumulative effects, of the

activity and its alternatives on the environment, *socio-economic conditions* and cultural heritage, and assessment of the significance of that *potential impact*;

(c) investigation of mitigation measures to keep adverse impacts to a minimum, *as well as the option of not implementing the activity*;

(d) public information and participation, independent review and conflict resolution in all phases of the investigation and assessment impacts;

. . . .'

(Emphasis added.)

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

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

The Development Facilitation Act 67 of 1995 (DFA)

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

'2. The general principles set out in s 3 apply throughout the Republic and -

(a) . . .

(b) . . .

(c) serve as guidelines by reference to which any competent authority shall exercise any discretion or take any decision in terms of this Act or any other law dealing with *land development*. . . .'

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

'3(1) The following general principles apply, on the basis set out in s 2, to *all land development*:

(a) . . .

(b) . . .

(c) Policy administrative practice and laws should promote efficient and integrated land development in that they -

(i) promote the integration of the *social, economic*, institutional and physical aspects of land development;

(ii) - (iii) . . .

(iv) optimise the use of existing resources including such resources relating to agricultural, land, minerals, bulk infrastructure, roads, *transportation* and social facilities;

(v) - (vii) . . .

(viii) *encourage environmentally sustainable land development practices and processes.*'

(Emphasis added.)

Evaluation

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

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

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

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

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

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

6. It must promote sustainable development, which requires consideration of all relevant factors, including a minimisation of degradation of the environment if it cannot altogether be avoided, a risk-averse

and cautious approach about future consequences of decisions and actions taking account of the limits of current knowledge. 46(46)

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

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

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

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

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

The guidelines

For purposes of this application, it is necessary to accept the allegations made by the respondent in her answering affidavit regarding the purpose of and process by which the

guidelines were drafted and

introduced. The Background Document 51(51) dated March 2002 sets out the department's approach to the management of applications in respect of the construction and upgrading of filling stations. It seeks to ensure that its responsibility in respect of the protection of the environment is carried out in an efficient and considered manner. It is also intended to assist the applicants in the fulfilling of their obligations when applying for authorisation pursuant to Government Notice R1183. The guidelines seek to implement the statutory obligations emanating from s 24 of the Constitution, the ECA and its regulations and s 24 of NEMA. It reflects the policy adopted by the department when implementing its environmental management programme. It identifies several key issues commencing with an acknowledgment that a need exists for the establishment of filling stations for purposes of transport and potential employment opportunities while simultaneously having to comply with the mandate to protect the environment. In my view, one cannot quarrel with the various key issues discussed in para 3 of the Background Document.

It furthermore records the comments received from the stakeholders in para 4. It is evident that the department duly considered the stakeholders' comments on a wide variety of topics including economic considerations, social impacts, noise impacts, visual impact, and then of course, the distance stipulation. In this regard, it is recorded that there were objections to the proposed 5 km consideration. Two of the objectors indicated that they would support the proposed consideration if it were to be changed to 2 km in urban areas. The basis of the stakeholders' objection to the distance stipulation is recorded in the following terms:

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

The department's response to these objections is recorded in the following terms:

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

> After reconsidering the comments and international review, the department has amended the final guideline to reflect a 3 km driving distance for urban areas and to a 25 km driving distance for rural areas.'

The applicant in the present matter chose not to take issue with the environmental concerns giving rise to these guidelines at all. Accordingly, the present application falls to be decided against the background of the undisputed potential environmental hazards posed by filling stations.

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

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

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

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

> particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.'

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

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

Lord Reid said:

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

The above decisions were confirmed by the House of Lords in *Findlay v Secretary of State for the Home Department and Other Appeals* [1984] 3 All ER 801 (HL) at 827*j* - 829*j*. At 828*a*, Lord Scarman said that he had difficulty in understanding how the relevant State organ could properly manage the complexities of its statutory duty without a policy. It was held that the complexities are such that an approach based on a carefully formulated policy was called for. (See 828*d*.) Applying the policy would only be unlawful if it were irrebuttable, ie if it precluded considerations of other factors. (See 829*c*.) Ultimately the House of Lords held that applying the policy did not constitute a fettering of the official's discretion, nor did it undermine his independence. (See 829*h*.)

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

drafted in collaboration with stakeholders but it is also common cause that the applicant was aware of its contents.

In my view, the complexity of the factors to be taken into account by the department in exercising its discretion to refuse or allow an application for a new filling station is such that the guideline was indeed called for in the present instance. The department was not only lawfully entitled, but indeed duty bound, to take it into consideration in arriving at a decision in regard to the applicant's application under s 22 of the ECA.

Was the guideline reasonable and reasonably applied?

It is well established that the decision-maker is required to take into account all relevant considerations and to ignore irrelevant considerations. Frequently, however, the empowering provision will not specify those considerations which are relevant. In those circumstances, the decision-maker may only take into account considerations relevant to the exercise of the power. As held above, the Constitution, ECA, NEMA and DFA delineate explicitly a range of considerations which must be taken into account, which makes the decision-making process very complex. In the present case, the department would have

acted unlawfully and irregularly if those considerations were not taken into account in exercising its discretion. However, a court will not prescribe the weight to be attached to such considerations. In *Durban Rent Board and Another v Edgemount Investments Ltd* 1946 AD 962, Watermeyer CJ observed at 974:

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

The position in English law has been summarised thus:

'When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.' 55(55)

More recently, the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (Constitutional Court case No CCT 27/03, 12 March 2004 unreported) *(56) observed at paras [48] and [49]:

'[48] In treating the decisions of administrative agencies with the appropriate

respect, a court is recognising the proper role of the Executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

[49] Section 2 of the Act requires the decision-maker to *have regard to* a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.'

In line with the aforesaid approach, the SCA decided in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para [43]:

'[43] The second main criticism is, why five percent? Again a question arises, if not 5%, then how many per cent? This unanswerable question also is not answered. This is also not surprising. There comes a time in quantification decision-making when a discretionally chosen number has to be adopted to reflect an allowance which, also expressed as a percentage figure, is intended as an expression of degree, for

example, large, moderate, small - as the case may be. This happens when a Judge determines that the apportionment of fault is 60:40, when the contingency allowance for remarriage is determined at 20%, or where the general damages are fixed at R120 000. There are moments when the fixing of a number is not capable of exact rationalisation or explanation.'

Applicant's attack on the department's decision is not so much addressed to its reasonableness or otherwise. Its contention is that the department had fettered its discretion in relying heavily on the distance stipulation as the dominant reason for refusing the application. In effect applicant's contention is that no distance stipulation whatsoever is permissible. However, once applicant has accepted that filling stations pose potential hazards to the environment, it is not open to the applicant to argue that a distance stipulation is wholly impermissible. Its contention is also that a distance stipulation constitutes a socio-economic standard to which the department is not entitled to have recourse in

exercising its discretion under the ECA. As indicated above, there are numerous legislative provisions which entitle and oblige the department to incorporate socio-economic considerations into its integrated approach to the protection of the environment.

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

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

Applicant does not dispute that the department is committed to the promotion of sustainable development and economic growth in the province. The department *bona fide* believes that economic growth and development does not have to be to the detriment of the environment and that timeous consideration of environmental factors can assist in establishing appropriate use of all the undeveloped land in the province that will not compromise the

protection of the environment nor inhibit economic growth and development. 56(57)

The distance stipulation is, in my view, reasonable and was applied reasonably in the present circumstances as one of many other factors considered by the department and the respondent in arriving at their decision. This case requires the principle set out in the *Bato Star Fishing* case to be applied, ie the department was called upon to strike an equilibrium between a range of competing considerations and followed a route via a distance stipulation to arrive at a decision to which this court should pay due respect.

C J CLAASEN J

Did the department act unfairly in failing to call for further information from the applicant?

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

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

(Emphasis added.)

It will be noted from the above sub-sections that the department is not *obliged* to request the applicant to amend or supplement its scoping report. In terms of s 6(3)*(a)*, the department is entitled to come to a decision on the scoping report as filed by the applicant if it contains, in its discretion, sufficient information upon which a reasonable decision can be made. Applicant's contention in this regard seems to suggest that a duty rests upon the department to go on calling for information until it is satisfied that the application can be granted. The express terms of ss 6(2) and (3) state the contrary. It should be borne in mind that the process of seeking authorisation is not in the nature of a *quasi*-judicial hearing. Furthermore, there is nothing to prevent the applicant from renewing its application or resubmitting its application complete with such additional information as it may deem sufficient to persuade the department to make the necessary exception in order to grant its application. Applicant is now apprised of the instances in which the department thought the application lacking and can therefore renew its application suitably supplemented, should it wish to do so.

In all the circumstances, I am of the opinion that the department and/or the respondent did

not act unfairly in failing to call for further information from the applicant.

The decision of Willis J in the *Sasol* matter

The facts of this application are clearly distinguishable from those presented to Willis J in the *Sasol* application. In the present matter, it is common cause that a filling station is an activity which may have a substantial detrimental effect on the environment in terms of Government Notices R1182 and R1183 promulgated under ss 21, 26 and 28 of

the ECA. 57(58) In the *Sasol* matter, this was not common cause. On the contrary, the entire thrust of Willis J's judgment was to separate the concept of the development of a filling station from the control of storage and handling facilities within a filling station. In para [12] of his judgment, he expressly stated that:

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

(Emphasis added.)

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

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

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

3. No consideration was given to the fact that the application for authorisation was to be prepared by an applicant and considered by the competent authority in the light of relevant policies, legislation, 'guidelines', norms and standards. Neither in the *Sasol* case nor in the present case was the validity of the regulations in Government Notice R1183 in dispute. Thus, accepting that such regulation has the force of law, it has to be complied with in the process of considering an application for authorisation under s 22 of the ECA. Consideration of relevant policies and guidelines are therefore an

integral part of the decision-making process.

4. The interpretation by Willis J of s 1*(c)* of Schedule 1 to Government Notice R1182 does not appear to take account of its introductory words: 'The construction or upgrading of . . . .' The activity described in s 1 does not relate merely to 'storage and handling of petroleum products *within* a filling station'. In my view, the applicant

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

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

Conclusion

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

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

Applicant's Attorneys: *Bowman Gilfillan Inc,* Sandton. Respondent's Attorney: *State Attorney,* Johannesburg.

Endnotes

1 (Popup - Popup)

See record at pp 241/2.

2 (Popup - Popup)

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

3 (Popup - Popup)

Schedule 4 of the Constitution of the Republic of South Africa Act 108 of 1996 has determined the environment as a functional area in which national and provincial legislature have concurrent competence. The respondent is therefore the competent organ of State and custodian of the environment in the Gauteng Province. See also paras 13 and 14 of respondent's answering affidavit.

4 (Popup - Popup)

See annexure A3 to the founding affidavit, record at pp 55 - 57.

5 (Popup - Popup)

See s 2(1) of the Schedule to GN R1183, annexure A4 to the founding affidavit.

6 (Popup - Popup)

See s 3(1)*(d)*(vi).

7 (Popup - Popup)

See s 3(3)*(a)*(iv).

8 (Popup - Popup)

See annexure A5 to the founding affidavit.

9 (Popup - Popup)

See annexure A6 to the founding affidavit.

10 (Popup - Popup)

See para 3(vi) of annexure A6.

11 (Popup - Popup)

See para 1 of the letter dated 19 September 2001, annexure A7 to the founding affidavit.

12 (Popup - Popup)

See annexure A8 to the founding affidavit.

13 (Popup - Popup)

See para 3 of the scoping report, annexure A8.

14 (Popup - Popup)

See annexure A9.

15 (Popup - Popup)

See para 24 of the founding affidavit, annexure A10 attached thereto and para 50 of the respondent's answering affidavit.

16 (Popup - Popup)

See *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923H; *Ngqumba en 'n Ander v Staatspresident en Andere* 1988 (4) SA 224 (A) at 261B and 263D; and *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541J - 542B.

17 (Popup - Popup)

See record p 241 or 530.

18 (Popup - Popup)

See annexure A16 to the founding affidavit, record at p 214 or 230 or annexure R4 to the answering affidavit, record at p 544.

19 (Popup - Popup)

See record at pp 216, 232 or 546.

20 (Popup - Popup)

See paras 24 and 25 of the answering affidavit.

21 (Popup - Popup)

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

22 (Popup - Popup)

See record at p 218, 234 or 548.

23 (Popup - Popup)

See annexure R7 to the answering affidavit at p 571 of the record.

24 (Popup - Popup)

See record at p 241 or 530. It is common cause that the application was decided in terms of

this Guideline.

25 (Popup - Popup)

See para 69.2 of the answering affidavit and paras 44 and 45 of the founding affidavit.

26 (Popup - Popup)

See answering affidavit para 9 and paras 18 - 19.

27 (Popup - Popup)

See *S v Williams and Others* 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861) at 648H.

28 (Popup - Popup)

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

29 (Popup - Popup)

See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) at 558E - F.

30 (Popup - Popup)

See *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033) at 740F para [38].

31 (Popup - Popup)

See Chaskalson *et al Constitutional Law in South Africa* para 32.3*(c)* at 32 - 7.

32 (Popup - Popup)

As quoted Glazewski in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) at 424.

33 (Popup - Popup)

Per Justice Weeramantry in International Court of Justice: *Judgment in the Case Concerning the Construction of the Gab|Ey|f8kovo-Nagymaros Project* (Hungary/ Slovakia) 37 ILM 162 (1998) at 204.

34 (Popup - Popup)

See Chaskalson *et al Constitutional Law of South Africa* paras 32.2*(a)* and *(b)* at pp 32 - 2/3.

35 (Popup - Popup)

See Shadrack B O Gutto 'Environmental Rights Litigation, Human Rights and the Role of

NGO's and People's Organisations in Africa' (1994) 2 *South African Journal of Environmental Law and Policy* at 1.

36 (Popup - Popup)

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

37 (Popup - Popup)

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

38 (Popup - Popup)

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

39 (Popup - Popup)

See ss 1*(c)*, 2 and 7(2) of the Constitution and s 2(1)*(a)* of NEMA.

40 (Popup - Popup)

See s 2 of the Constitution.

41 (Popup - Popup)

See s 24 of the Constitution and the preamble to NEMA.

42 (Popup - Popup)

See s 39(1)*(b)* of the Constitution, the preamble to NEMA, ss 2(4)(i), 23(2) and 24(1) of NEMA, the definition of 'environment' in s 1 of the ECA and s 3(1)*(c)* of DFA.

43 (Popup - Popup)

See s 26*(a)*(iv) and (v) of the ECA.

44 (Popup - Popup)

See s 3(3)*(a)*(iv) of the Schedule to GN R1183 of 5 September 1997 and ss 2(4)(1) and 24(1) of NEMA.

45 (Popup - Popup)

See s 2(3) of NEMA.

46 (Popup - Popup)

See ss 2(4)*(a)*(ii), (vii) and (viii) of NEMA.

47 (Popup - Popup)

See s 24(1) of NEMA.

48 (Popup - Popup)

See s 24(7)*(b)* of NEMA.

49 (Popup - Popup)

See s 3(1)*(c)*(i), (iv) and (viii) of DFA.

50 (Popup - Popup)

See ss 1(4) and 23(2)*(d)* of NEMA.

51 (Popup - Popup)

See annexure A16 to the founding affidavit.

52 (Popup - Popup)

See record at 222.

53 (Popup - Popup)

See also Wade and Forsythe *Administrative Law* 7th ed at 360 - 6.

54 (Popup - Popup)

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

55 (Popup - Popup)

See De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5th ed at 557 paras 13-015.

56 (Popup - Popup)

Now reported at 2004 (4) SA 490 (CC) (2004 (7) BCLR 689). - Eds.

57 (Popup - Popup)

See para 97.2 of respondent's answering affidavit.

58 (Popup - Popup)

See paras 13 and 14 of the founding affidavit.