

SUSTAINABLE DEVELOPMENT IN PRACTICE: *FUEL  
RETAILERS ASSOCIATION OF SOUTHERN AFRICA V  
DIRECTOR-GENERAL ENVIRONMENTAL  
MANAGEMENT, DEPARTMENT OF AGRICULTURE,  
CONSERVATION AND ENVIRONMENT,  
MPUMALANGA PROVINCE*

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## 1 Introduction

In the opening salvo of his dissenting judgment in *Fuel Retailers*<sup>1</sup> Justice Sachs notes the irony behind the fact that the first environmental rights case before the Constitutional Court came from ‘an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution’.<sup>2</sup> However, this fact does not come as a total surprise. The fuel sector and filling stations in particular have been involved in several cases concerning environmental matters. In some of these cases the issue of sustainable development, which is guaranteed in the South African environmental right, has taken centre stage.<sup>3</sup> As a result, even before *Fuel Retailers*, we have seen the emergence of a South African jurisprudence on sustainable development. *Fuel Retailers* distinguishes itself by having made it all the way to the Constitutional Court and so having provided an opportunity for this court to express itself on this matter.

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<sup>1</sup> 2007 6 SA 4 (CC) (*Fuel Retailers*).

<sup>2</sup> *Fuel Retailers* (n 1 above) para 109.

<sup>3</sup> The so-called filling station or fuel related cases include *All the Best Trading CC t/a Parkville Motors, and Others v S N Nayagar Property Development and Construction CC and Others* 2005 3 SA 396 (TPD); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W); *Capital Park Motors CC and Fuel Retailers Association of SA (Pty) Ltd v Shell SA Marketing (Pty) Ltd* unreported, case no 3016/05, 18 March 2005 (TPD); *Sasol Oil (Pty) Ltd & another v Metcalf* 2004 5 SA 161 (W); and *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* (368/2004) (2005) SCA 76.

However, it has to be made clear that this case is not primarily about section 24, the environmental right<sup>4</sup> of the Bill of Rights. It does not focus on the substance and normative content of the right. Rather, the cause of action lies in administrative law and governance and it is through this prism that one of the concepts central to section 24, 'sustainable development', is explored, analysed and evaluated. Much of the case is in fact devoted to sustainable development and Ngcobo J, writing on behalf of the majority, spent a significant part of the judgment exploring the development of the concept in international law, its application in South African law and finally its import and consequence for the matter at hand. In addition, Sachs J in his dissent provides a contrary, and to my mind a more conceptually sound analysis of sustainable development.

As a result of the majority's expansive overview of sustainable development and Sachs's cogent construction thereof, the case contributes significantly to the conceptualisation of sustainable development in environmental law, a process that is by its very nature ongoing. It underscores and buttresses the development of the concept through earlier case law and as such stimulates the debate on how exactly we should apply sustainable development.

In this note I view *Fuel Retailers* through the lens of sustainable development and explore the way in which the Constitutional Court has approached the concept. I refrain from engaging in a comprehensive analysis of the historical development of the concept or an in-depth analysis of the normative content thereof. I do, however, consider one of the core elements of sustainable development – integration, an element that took centre stage in *Fuel Retailers* and is at the heart of sustainable development decision-making. In particular, I investigate the value choices inherent in sustainable development decision-making and consider the failure of the Court to interrogate the practical and normative application of integration thoroughly. I furthermore assess the dissenting judgement of Sachs J and conclude that his interpretation provides some guidance on how to interpret instruments such as legislation and policy that require sustainable development.

<sup>4</sup> Section 24 reads: '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.'

## 2 The facts

The applicants in this matter objected to an authorisation that was granted by the Mpumalanga provincial environmental authorities for the establishment of a filling station in White River in Mpumalanga. The filling station was to be established in an area that was already the site of six filling stations within a five kilometre radius. An environmental impact assessment (EIA) was submitted to the Mpumalanga Department of Agriculture, Conservation and Environment (DACE) in terms of GN R1182 of 1997<sup>5</sup> issued under the Environment Conservation Act (ECA).<sup>6</sup> A record of decision (ROD) was signed on 9 January 2002 for the installation of three tanks for petrol and diesel, the erection of a convenience store, and ablution facilities. The ROD was issued on the basis of a scoping report, a geotechnical report and a geohydrological report.

The scoping report dealt with the potential impact of noise, visual factors and traffic and the effect on municipal services, safety and crime, and cultural and historical sites; as well as the feasibility of the proposed station. However, it did not address the potential economic impact on other filling stations in the area. With regard to environmental impacts it found that no plant or animal species were threatened. The geotechnical report suggested, however, that a subterranean aquifer would need protection from pollution and recommended that – if required by the Department of Water Affairs and Forestry (DWAF) – an impermeable base layer should be installed to prevent contamination, and that water quality be tested bi-annually.<sup>7</sup>

Fuel Retailers lodged an appeal to the MEC of DACE on the basis, *inter alia*, that the need, desirability and sustainability of the proposed filling station had not been considered and that the geophysical report regarding prevention of fuel leaks and possible contamination of the aquifer is inadequate. The appeal was considered and dismissed. In response, the Director argued that need, desirability and sustainability need not be considered, as these factors had been considered by the local authority when it had earlier approved the rezoning of the area from ‘special’ to ‘Business 1’,<sup>8</sup>

<sup>5</sup> GG 18261 of 5 September 1997.

<sup>6</sup> Act 73 of 1989. In terms of sec 22(1) read with sec 21(1) no activity which may have a substantial detrimental impact on the environment may be undertaken without written authorisation from the competent authority. In terms of sec 22(2) such authorisation may only be granted ‘after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment’; and after the furnishing of a report concerning the impact of the proposed development on the environment.

<sup>7</sup> At no point did DWAF require any preventive measures.

<sup>8</sup> As required by the relevant Ordinance 15 of 1986, which governs rezoning.

which allowed for the construction of a filling station at the identified site.

The applicants unsuccessfully applied to the High Court<sup>9</sup> and to the Supreme Court of Appeal<sup>10</sup> to set aside the ROD in terms of the ECA, the common law and the Promotion of Administrative Justice Act.<sup>11</sup> The applicants' arguments were based on a number of issues, but on application for leave to appeal to the Constitutional Court, only one issue was pursued, namely that the environmental authorities failed to consider the socio-economic impact of constructing the proposed filling station. The applicants argued that this obligation is wider than the assessment of need and desirability considered in the rezoning process and that it required DACE to assess, amongst other things, the cumulative impact on the environment produced by the proposed filling station and all existing filling stations in close proximity to the proposed one. In sum, the proper analysis required an assessment of demand or necessity and desirability, not the feasibility, of the proposed station and its impact on the sustainability of existing filling stations. In support, the applicant relied upon the provisions of section 24(b)(iii)<sup>12</sup> of the Constitution, as well as sections 2(4)(a), 2(3), 2(4)(g), 2(4)(i), and 23 of NEMA.<sup>13</sup>

<sup>9</sup> 2005 JDR 0915 (T).

<sup>10</sup> 2007 2 SA 163 (SCA).

<sup>11</sup> Act 3 of 2000.

<sup>12</sup> It provides: 'Everyone has the right ... to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that ... secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

<sup>13</sup> 2(4)(a): Sustainable development requires the consideration of all relevant factors including the following:

(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

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

(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

(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.

The environmental authorities accepted that the socio-economic impact of the proposed filling station had to be considered, but argued that they were not required to consider need, desirability and sustainability of the proposed filling station as it was taken into account by the local authority during the rezoning of the property and that 'rezoning forms part and parcel of the process of an application for authorisation in terms of section 22 of ECA'.<sup>14</sup> The applicant, in turn, argued that the two processes are distinct and separate. The local authority considers a rezoning application from a town-planning perspective and focuses on what land uses it would allow, whilst the environmental authorities are required to consider the impacts of the proposed development on the environment and on socio-economic conditions.<sup>15</sup> The applicant also noted that the rezoning had taken place approximately eight years prior to the approval of the application for authorisation in terms of the ECA and that significant environmental changes had occurred in the area since then.<sup>16</sup>

2(3): Development must be socially, environmentally and economically sustainable.

2(4)(g): Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

2(4)(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.

23: The purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities.

(2) The general objective of integrated environmental management is to –

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

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

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

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

(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and

(f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.

(3) The Director-General must coordinate the activities of organs of state referred to in section 24(1) and assist them in giving effect to the objectives of this section and such assistance may include training, the publication of manuals and guidelines and the co-ordination of procedures.

<sup>14</sup> *Fuel Retailers* (n 1 above) para 31.

<sup>15</sup> *Fuel Retailers* (n 1 above) para 32.

<sup>16</sup> *Fuel Retailers* (n 1 above) para 33.

### 3 The judgment

The cause of action for judicial review centred on whether or not the environmental authorities had failed to take into consideration matters that they were required to consider before granting the authorisation under section 22(1) of the ECA.<sup>17</sup> Ngcobo J framed the issue as one that concerns the ‘nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment’; and, in particular, ‘the interaction between social and economic development and the protection of the environment’.<sup>18</sup> It is this latter aspect – that is, the interaction between social and economic development and environmental protection – that provides the impetus for the lengthy interrogation of sustainable development by the court.<sup>19</sup>

#### 3.1 Sustainable development

Ngcobo J’s departure point is the inherent challenge that gave rise to the concept of sustainable development: namely that the promotion of development requires protection of the environment, whilst the environment cannot be protected if development does not pay attention to the costs of environmental destruction.

This challenge has long been recognised and the Court details how this challenge gave rise internationally to the development of sustainable development and it traces this development to important events such as the Brundtland Report,<sup>20</sup> the 1972 United Nations Conference on the Human Environment or so-called ‘Stockholm Conference’<sup>21</sup> (which stressed the relationship between development and the protection of the environment), the 1992 United Nations Conference on Environment and Development or so-called ‘Rio Conference’ (which generated principles on sustainable development and provided a framework for the development of the law of sustainable development)<sup>22</sup> and, finally, the 2002 Johannesburg

<sup>17</sup> *Fuel Retailers* (n 1 above) para 39.

<sup>18</sup> *Fuel Retailers* (n 1 above) para 1.

<sup>19</sup> In *Fuel Retailers* (n 1 above) para 40 Ngcobo J confirms that in light of the dictates of sec 24 of the Constitution, the case does, indeed, raise a constitutional issue. What is disconcerting though is the way in which he frames sec 24. He states that sec 24 ‘guarantees to everyone the right to a healthy environment’. This is a positive framing of the right, whilst the right is in fact negatively framed, thus lessening the impact and extent of the right. One can only hope that this careless use of language was a mere oversight on the side of the Court.

<sup>20</sup> *Fuel Retailers* (n 1 above) para 44.

<sup>21</sup> *Fuel Retailers* (n 1 above) para 46.

<sup>22</sup> *Fuel Retailers* (n 1 above) para 49-50.

World Summit on Sustainable Development (WSSD) which, according to the Court 'reaffirm[ed] that sustainable development is a world priority'.<sup>23</sup>

In delineating the concept the Court refers to the Brundtland Commission's definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs,'<sup>24</sup> but noted that recent commentators have refrained from defining sustainable development and have instead chosen to identify 'the evolving elements of the concept of sustainable development'. These include:

the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.<sup>25</sup>

In highlighting the first principle – that of integration as fundamental to the concept of sustainable development – the Court notes that the formal application thereof 'requires the collection and dissemination of environmental information, and the conduct of environmental impact assessments' and argues that the 'practical significance of the integration of the environmental and developmental considerations is that environmental considerations will now increasingly be a feature of economic and development policy'.<sup>26</sup>

With regard to South African law, the Court is of the opinion that sustainable development offers a principle for the resolution of tensions between 'the need to protect the environment on the one hand, and the need for socio-economic development on the other hand'. The concept thus, according to the Court, provides a framework for reconciling socio-economic development and environmental protection.<sup>27</sup> Ngcobo J states: 'sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place'.<sup>28</sup> According to the Court the National Environmental Management Act (NEMA), which was enacted to give effect to section

<sup>23</sup> *Fuel Retailers* (n 1 above) para 46.

<sup>24</sup> *Fuel Retailers* (n 1 above) para 47.

<sup>25</sup> *Fuel Retailers* (n 1 above) para 51.

<sup>26</sup> *Fuel Retailers* (n 1 above) para 52 (references omitted).

<sup>27</sup> *Fuel Retailers* (n 1 above) para 57.

<sup>28</sup> *Fuel Retailers* (n 1 above) para 58.

24 of the Bill of Rights, defines sustainable development as being the 'integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations'.<sup>29</sup> Ngcobo J argues that 'whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development', with these considerations being 'underpinned by the right to socio-economic development', against 'environmental considerations, as underpinned by the right to environmental protection. In this sense it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development'.<sup>30</sup>

### 3.2 Sustainable development and the EIA process

The Court argues that the

nature and scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment.<sup>31</sup>

If this relationship is accepted, so Ngcobo J argues, it follows that socio-economic conditions have an impact on the environment. He illustrates this point by stating that the proposed filling station may have implications for the job security of existing filling stations, but may equally have environmental consequences, such as that if existing stations close down that will require rehabilitation of the environment after closure.<sup>32</sup>

He furthermore cautions that the proliferation of filling stations close to each other may increase the likelihood of adverse impacts on the environment. In this respect the Court reminds us that NEMA 'requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed'. As such 'a consideration of socio-economic conditions ... includes the consideration of the impact of the proposed development not only in

<sup>29</sup> *Fuel Retailers* (n 1 above) para 59. The reference indicated is sec 1(1)(xxix). It should be noted, however, that this section does not exist and this 'definition' is in fact from the preamble to NEMA.

<sup>30</sup> *Fuel Retailers* (n 1 above) para 61.

<sup>31</sup> *Fuel Retailers* (n 1 above) para 71.

<sup>32</sup> As above.

combination with the existing developments, but also its impact on existing ones'.<sup>33</sup>

With respect to the EIA process, the Court notes that NEMA requires the consideration, assessment and evaluation of the social, economic and environmental impact of proposed activities and this 'enjoins the environmental authorities to consider and assess the impact of a proposed activity on existing socio-economic conditions, which must of necessity include existing developments'.<sup>34</sup> The Court explains that the objective of this exercise is not to stamp out competition or protect existing developments at the expense of future developments. Rather it requires a risk-averse and cautious approach when decisions are made.<sup>35</sup> It concludes that what was demanded of the environmental authorities was to consider 'the impact on the environment of the proliferation of filling stations as well as the impact of the proposed filling station on existing ones', an obligation which is 'wider than the requirement to assess need and desirability under the Ordinance'.<sup>36</sup>

It was common cause that this assessment never happened. The Court, however, contends that this duty fell on environmental authorities because the two organs of state have different roles and functions. Local authorities have a town planning role and as such a proposed development may satisfy the need and desirability criteria from a town-planning perspective, given that the local authority is not required to consider the social, economic and environmental impact of a proposed development. Environmental authorities, however, are required to do so by the provisions of NEMA.<sup>37</sup> The assumption that the duty under the Ordinance to consider need and desirability imposed the same obligation as is required by the duty under NEMA to consider the social, economic and environmental impacts of a proposed development, is therefore wrong.<sup>38</sup>

The Court, as a result sets aside the decision of the environmental authorities on a number of bases:

- (i) They misconstrued the nature of their obligations under NEMA and consequently failed to apply their minds to the socio-economic impacts of the proposed filling station in the instant case.<sup>39</sup>

<sup>33</sup> *Fuel Retailers* (n 1 above) para 72. See also para 74.

<sup>34</sup> *Fuel Retailers* (n 1 above) para 77.

<sup>35</sup> *Fuel Retailers* (n 1 above) paras 78-81.

<sup>36</sup> *Fuel Retailers* (n 1 above) para 82.

<sup>37</sup> *Fuel Retailers* (n 1 above) para 85.

<sup>38</sup> *Fuel Retailers* (n 1 above) para 86.

<sup>39</sup> As above.

(ii) They left the consideration of need and desirability to the local authority and consequently failed to properly discharge of their statutory duty.<sup>40</sup>

(iii) They failed to take into account socio-economic conditions as required by NEMA and as such they did not comply with a mandatory and material condition set by NEMA.<sup>41</sup>

(iv) Given the lack of consideration to the social and economic impact of the proposed filling station, including its cumulative impact on the environment, the environmental authorities failed to apply their minds to the matter.<sup>42</sup>

## 4 Discussion

### 4.1 Sustainable development through the cases

As mentioned above *Fuel Retailers* focuses on the concept of sustainable development and more specifically how it is to be interpreted, contextualised and applied in South African law. The Court thoroughly interrogated the concept's history and status in international law and concluded that it is now an established concept in international law. With regard to South African law the concept is still in its infancy.<sup>43</sup> A number of cases have, however, addressed sustainable development and over the last four years a South African jurisprudence has begun to see the light.

The first case to explore this concept was one very similar to *Fuel Retailers: Sasol Oil (Pty) Ltd & another v Metcalf*.<sup>44</sup> The applicants

<sup>40</sup> *Fuel Retailers* (n 1 above) paras 87-88.

<sup>41</sup> *Fuel Retailers* (n 1 above) para 89.

<sup>42</sup> *Fuel Retailers* (n 1 above) para 90-97. The Court emphasises the fact that the rezoning decision by the local authorities, on which the environmental authorities relied, had probably occurred in 1995, some eight years prior to the decision by the environmental authorities. This was done prior to the coming into effect of NEMA and it argues that it was necessary for the environmental authorities to consider the matter afresh in the light of the provisions of NEMA, given that a significant change in the environment could have taken place in the intervening period.

<sup>43</sup> Note, however, that as early as 1971 our neighbouring (then) Rhodesian court recognised that the principle of inter-generational equity can have the effect of limiting other rights, such as property rights. Thus in *King v Dykes* 1971 3 SA 540 (RA) 545G-H MacDonald ACJ stated: '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.'

<sup>44</sup> *Sasol* (n 3 above).

sought the respondent's, the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs', authorisation in terms of section 22 of the ECA for the construction of a filling station and convenience store. This authorisation was refused and in its refusal GDACE was guided by departmental guidelines that it had developed to assist in decision-making. The guidelines stipulated that development must be socially, environmentally and economically sustainable and required that filling stations in an urban, residential or built-up area should not be situated within three kilometres of an existing filling station. The applicants thus approached the High Court for a declaration that certain sections of these guidelines issued by the respondent were *ultra vires* the ECA and were, therefore, invalid and unenforceable. They furthermore argued that whilst GDACE had the power to authorise the construction of structures for the storage and handling of hazardous substances at filling stations, this power did not include the erection of filling stations itself. As such the guidelines did not apply. Finally they argued that even if the power did include the erection of filling stations, GDACE was not entitled to apply the guidelines as they were predominantly based on socio-economic as opposed to environmental considerations. The High Court dismissed the *ultra vires* argument, but upheld the applicants' argument that GDACE did not have the power to require authorisation for the construction of filling stations *per se*.<sup>45</sup> It furthermore held that the sustainable development principles contained in section 2 of the NEMA did not extend the mandate of GDACE to take socio-economic (and not just environmental) factors into account.<sup>46</sup>

This decision was a set-back for sustainable development jurisprudence. It ignored the core element of integration as part of sustainable development.<sup>47</sup> The Brundtland Report, referred to by Ngcobo J in *Fuel Retailers*, contextualises the principle of integration and explains that sustainable development not only prioritises the needs of the poor, but that it also captures the limitations to development imposed by the present state of technology and social organisation on the environment's ability to meet present and future needs.<sup>48</sup> The Report suggests an inherent link between social and environmental needs and the need for technological advancement and development. An imbalance amongst these elements, where global patterns of development put the environment under pressure, places the earth in crisis. This principle of integration between three pillars – environmental protection, economic development and social

<sup>45</sup> *Sasol* (n 3 above) 170A-E.

<sup>46</sup> *Sasol* (n 3 above) 171E-172B.

<sup>47</sup> For a more in-depth critique of this case see Patterson A 'Fuelling the sustainable development debate in South Africa' (2006) 1 *South African Law Journal* 53.

<sup>48</sup> Report of the World Commission on Environment and Development: *Our Common Future* (1987).

needs – is thus widely recognised as a core element of sustainable development.<sup>49</sup>

This decision was eventually overturned by the SCA.<sup>50</sup> The SCA's reversal was, some ways, due to a conflicting judgement by the same court in yet another filling station case, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*.<sup>51</sup> The applicant in this case sought the review and setting aside of a decision by the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (GDACE) to refuse its application in terms of section 22(1) of the ECA for authorisation to develop a filling station on one of its properties. The Department based its refusal, *inter alia*, on environmental concerns. The applicant contended, however, that its application was refused not because the new filling station itself posed a danger to the environment, but rather, because of the fact that there were already two other filling stations within three kilometres of applicant's site and the Department regarded it as unacceptable to allow proliferation of filling stations where existing filling stations were economically vulnerable to more competition. It argued that under the guise of 'environmental concerns', the department was instead seeking to regulate the economy on the basis of what were essentially economic considerations unrelated to the environment.

The court explored the concept of sustainable development in somewhat more detail than in *Sasol* and in so doing considered the wide definition of 'environment' employed by ECA which defines it in section 1 as: 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms'. According to the court the broad definition of 'environment' would include all conditions and influences affecting the life and habits of man, which would also include socio-economic conditions and influences.<sup>52</sup> With reference to the state's obligation under section 24(b) with regard to sustainable development, the Court held that ecologically sustainable development and the use of natural resources must be promoted jointly with justifiable economic and social development.<sup>53</sup> It stated that:

<sup>49</sup> See for example P Sands *Principles of international law* (2003) 153. See also D Tladi *Sustainable development in international law: An analysis of key environmental instruments* (2007) 58.

<sup>50</sup> *MEC for Agriculture, Conservation, Environment and Land Affairs (Pty) Ltd & another* (n 3 above).

<sup>51</sup> 2004 5 SA 124 (W).

<sup>52</sup> *BP* (n 3 above) 145E.

<sup>53</sup> *BP* (n 3 above) 143C-D.

... sustainable development constitutes an integral part of modern international law and will balance the competing demands of development and environmental protection. The concept of 'sustainable development' is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa ... 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 inter-generational 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.<sup>54</sup>

The court thus concluded that the department was obliged to develop an integrated environmental management programme, which took cognisance of a wide spectrum of considerations, including international conventions and approaches as a result of the broad and extensive definition of 'environment' in ECA and the principles of NEMA which, *inter alia*, include the consideration of socio-economic conditions.<sup>55</sup>

With the more detailed attention to sustainable development provided by the Constitutional Court in *Fuel Retailers* we now have significant judicial guidance on interpreting and implementing sustainable development. In essence we now know that sustainable development is central to the environmental right and to environmental regulation. We also know that our jurisprudence acknowledges the inter-connected nature of environmental, social and economic considerations of sustainable development and that the principle of sustainable development aims (albeit, as argued further on, mostly unsuccessfully) to serve the purpose of facilitating the achievement of this balance. One could, therefore argue, that a central tenet of a 'South African jurisprudence' on sustainable development is the principle of integration.

## 4.2 Sustainable development applied

As noted by Ngcobo J in *Fuel Retailers*, the overarching definition of sustainable development is the one as espoused by the Brundtland Report: 'development which meets the needs of the present

<sup>54</sup> *BP* (n 3 above) 144A-144D.

<sup>55</sup> *BP* (n 3 above) 150D-E.

generation without compromising the ability of future generations to meet their own needs'.<sup>56</sup> In attempting to find the practical application of sustainable development it may be helpful to view this definition of the Brundlandt Report as the aim of sustainable development – that is, that which we want to achieve. This aim operates in acknowledgment of the fact that whilst human beings are driven by their developmental needs to use, exploit and even exhaust natural resources, this can and may not happen in a limitless way. Thus, as noted by Field, sustainable development could be described as the 'conceptual vehicle chosen by a diverse range of actors to negotiate the tensions arising from the need for social and economic development on a planet with finite resources'.<sup>57</sup>

This earlier definition has been elaborated upon by more recent authors through the identification of 'the evolving elements of the concept of sustainable development'.<sup>58</sup> I would suggest that these elements can, in turn, be viewed as the 'means to achieve the aim'. These means would therefore include: sustainable utilisation of natural resources, the pursuit of equity in the use and allocation of natural resources, and the integration of environmental protection and economic development.<sup>59</sup> These elements attempt to give concrete existence to a concept that may be viewed as elusive and impractical, largely because the concept involves competing considerations or normative tensions.

Out of the three elements, the integration principle has been identified as the key principle.<sup>60</sup> It is also the element that the Court focused on when it suggested that sustainable development requires integrating the often contesting demands of economic development, social development and environmental protection. This element remains, however, open to criticism. It has been suggested, not without justification, that its contents remain rather opaque.<sup>61</sup>

What, for example does 'integration' really mean and how is it practically achieved? If a waste site is situated close to a residential area, where that site generates an income not only for the managing company, but also for the residents that live nearby, should that site

<sup>56</sup> Report of the World Commission on Environment and Development: *Our Common Future* (1987) 8.

<sup>57</sup> Field T 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 *South African Law Journal* 409 411.

<sup>58</sup> *Fuel Retailers* (n 1 above) para 51.

<sup>59</sup> See Sands P *Principles of international environmental law* (2003) 253. Ngcobo refers to these elements, but also includes a wider range of elements (para 51). These three elements are, however, the most widely recognised elements of sustainable development.

<sup>60</sup> D Tladi *Sustainable development in international law: An analysis of key environmental instruments* (2007) 58.

<sup>61</sup> Tladi (n 60 above) 75.

be closed down so as accommodate environmental health considerations? Or should it be allowed to remain open in order to accommodate social and economic considerations? How does one integrate, if at all, these three contesting considerations? One could argue that integration is the 'happy medium' where one tightly regulates the operations of the waste site so as to minimise the exposure of the nearby residents, while still ensuring that the site contribute to the economy and provides a source of income for its workers. In reality this happy medium is a value choice. In this instance the decision-making is primarily driven by socio-economic considerations. Requiring strict operating conditions, however, means that the third pillar, the environment, remains part of the overall decision-making process.

The practical and normative application of integration was only marginally addressed by the Court in *Fuel Retailers* as the 'collection and dissemination of environmental information', the 'conduct of environmental impact assessments' and the fact that environmental considerations 'will now increasingly be a feature of economic and development policy'.<sup>62</sup> While EIAs and policy tools may be useful in the practical application of the integration element of sustainable development, they clearly do not address other forms of decision-making, such as decisions regarding activities where no EIAs were conducted, nor do they explain how these decisions are to be made even when there is an EIA.

A current burning issue for example is that of land restitution and its relationship vis-à-vis sustainable development.<sup>63</sup> A number of current land claims include claims to land that have been declared protected areas. This includes both private and state-owned land, including for example claims in the Kruger National Park. In making a decision on whether to award such claims decision-makers would have to take into account the possibility that claimants may not utilise the land for conservation purposes, but rather to engage in other commercial ventures such as farming. This would clearly promote an economic and social goal as opposed to an environmental goal. However, whilst the environmental aim of preserving our natural heritage may weigh very heavy, equally so the would the idea of restoring land to people who were unjustly deprived thereof in the past.

The judgment also does not address the notion that the integration principle could be used equally effectively by diverse

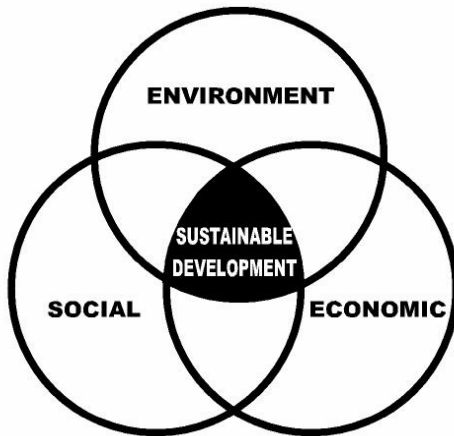
<sup>62</sup> *Fuel Retailers* (n 1 above) para 52.

<sup>63</sup> For a more detailed discussion see A Du Plessis 'Land restitution through the lens of environmental law: Some comments on the South African vista' (2006) 1 *Potchefstroom Electronic Law Journal* 1 1.

groups with conflicting aims, such as environmentalists versus those pursuing economic development aims.<sup>64</sup> Tladi argues that sustainable development is inherently a flexible concept, which would have the effect that for those advocating economic growth, the emphasis would fall on the economic growth value of sustainable development. As such sustainable development could mean 'lasting economic growth', with the aim being to sustain economic growth.<sup>65</sup> Such an understanding effectively dilutes and detracts from the original aim of sustainable development. The other two elements, sustainable use of natural resources and equitable utilisation of natural resources, attempt to safeguard the environment against unbridled economic development.

Decisions motivated by socio-economic considerations can therefore potentially be disguised as decisions prompted by environmental concerns. This was, in fact, the argument made by the applicants in *BP*, namely that the decision to refuse authorisation for the proposed activity was motivated not by environmental considerations, but rather by the socio-economic considerations as set out in the province's guidelines on EIAs.

True integration is often depicted as three circles that intersect with sustainable development situated in the intersection of these circles as shown in the diagram below.



However, whilst the diagram suggests optimal overlap it is always possible that reality indicates otherwise and there may be cases where there is very little overlap and where the greater part is in one

<sup>64</sup> As above.

<sup>65</sup> As above.

of the circles. In other words, the three elements, environmental sustainability, economic sustainability and social sustainability do not always carry equal weight in decision-making. When a decision-maker, whether it is an administrative official or a judicial officer, takes into account sustainable development in the decision-making process, he or she makes a value-based judgement. This judgment is informed by the values of environmental sustainability, and economic sustainability as part of the integration process. However, one (or sometimes two) of these values may inevitably triumph.

Tladi therefore suggests a more nuanced approach in the application of sustainable development, one that provides three variations of integration based on the value that is the preferred one in cases of conflict. In the economic growth-centred variation, economic growth takes centre stage, whilst in the environment-centred variation, the natural environment triumphs. Finally in the human needs-centred (or social needs centred) variation the social needs of humans are placed at the forefront.<sup>66</sup> He argues that such a variation approach allows decision-makers to decide which variation best serves the aims of sustainable development.<sup>67</sup> In essence his analysis suggests that sustainable development decisions are inevitably value driven. It means that decision-makers decide in advance which of the values they prefer to advance, and whilst still taking into account the other two values, base the decision on the preferred value.

If we then apply this ‘variation approach’ to integration, it would lead us to the conclusion that the decision in *Fuel Retailers* may fall within the economic growth or human centred (or a combination of both) variation since the Court has emphasised the failure of the environmental authorities to take socio-economic considerations into account? I would suggest not. Whilst the integration process is a value-driven process, the preferred value cannot be without a legitimate basis. In other words, a decision maker’s decision should be grounded in law and there should be some justifiable base in law for the preferred value. Such a basis may be found in a legal or policy instrument and may provide an indication of the preferred variation of sustainable development.

In this respect Sachs J’s dissent is instructive. In essence he provides us with the application of this ‘variation’ approach to the integration element of sustainable development and takes NEMA as his ‘legitimising base’. With regard to the application of the preamble and principles of NEMA, he notes that ‘economic sustainability is not

<sup>66</sup> Tladi (n 60 above) 80. His idea is not that placing one value centre stage would obliterate the other, but rather that it would re-enforce the other two.

<sup>67</sup> Tladi (n 60 above) 82.

treated as an independent factor to be evaluated as a discrete element in its own terms', but rather that the focus is on the inter-relationship between economic sustainability and environmental protection.<sup>68</sup> Accordingly, he argues, NEMA does not envisage that social, environment and economic sustainability should proceed along separate tracks, with each being assessed separately and only considered together at the end of the decision-making process. It is his contention that economic sustainability takes on significance only to the extent that it implicates the environment. As such, it is only 'when economic development potentially threatens the environment that it becomes relevant to NEMA' and it is only at this point that it should be considered within the context of the sustainable development requirements of NEMA.<sup>69</sup> Sachs bases this conclusion on the thesis that 'all environmental controls were in place and that any potential deleterious effect of over-trading was speculative and remote'.<sup>70</sup>

Sachs situates his position within the dictates of sustainable development as required by NEMA. The overall aim of NEMA is to first and foremost ensure environmental protection. NEMA thus grants priority to the environment-centred variation of sustainable development. In situations of conflict between economic, social and environmental considerations, the latter must be preferred. Given that NEMA operates within this model Sachs's argument that social and economic considerations are only 'triggered' once the environment is implicated makes sense.

Sachs could equally have used section 24 of the Constitution as his 'legitimising base'. Section 24(b)(iii) of the Constitution refers to the need to 'secure *ecologically* sustainable development'. [own emphasis]. It can be argued that 'ecologically' qualifies the type of sustainable development that is envisioned by the Constitution. It therefore clearly places an emphasis on environmental considerations and as such it places the environmental value centre-stage. Section 24 of the Constitution therefore mandates the environment-centred variation of sustainable development. Any decision-making regarding sustainable development that is mandated by section 24 should, therefore, be situated within this model.

The Sachs approach could be seen as 'applied variation' as it gives us some guidance on how to interpret instruments such as legislation and policy that requires sustainable development. In applying the model not only to the decision in the *Fuel Retailers* case but also the decision in the *BP* case, it exposes both for their inadequate and

<sup>68</sup> *Fuel Retailers* (n 1 above) para 113.

<sup>69</sup> As above.

<sup>70</sup> *Fuel Retailers* (n 1 above) para 112.

ultimately unsatisfying application of sustainable development. Whilst both decisions were at first glance 'good for the environment', they were really motivated by socio-economic considerations, as such applying economic centred variations of integration when the Constitution and NEMA really required environment centred variations. If the latter were applied, different outcomes would have followed in both cases.

## 5 Conclusion

*Fuel Retailers* may have been hailed as a victory for the environment and for environmental rights, but was it the correct decision from a normative point of view? Sustainable development is a truly laudable concept, but as pointed out it raises a number of challenges in negotiating the increasingly contested demands of development and environmental protection. It embodies competing values and requires other conceptual and normative framework to address these tensions and to provide practical solutions. On its own, the concept fails to address practical and normative considerations.

We therefore need a more principled, value-based approach to sustainable development that identifies the value that is being prioritised in particular circumstances. The variation approach to integration takes into account that certain norms and values will most often be paramount in sustainable development decision-making.

Whilst *Fuel Retailers* has highlighted the ongoing debate on sustainable development in the South African context, it ought not have been the final word. The majority judgement failed to interrogate the normative nature of sustainable development comprehensively and in the process provided us with an inherently flawed and incomplete application of the concept. Sachs' dissent provides an alternative, and more nuanced perspective on this complex norm.