

An Analysis of the Roles of the Practitioners in the Implementation of the Environmental Impact Assessment in South Africa

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Abstract

Various national, domestic, and international legal instruments provide for the significance of ensuring that, prior, during, and after any proposed or completed project, a thorough EIA must be carried out, to establish the extent of the impact and the effect of such a developmental project would have on the environment. To accomplish this, the role of Environmental Assessment Practitioners (EAP) became more imperative. This paper looks at the various roles of these practitioners, their professional advice based on their assessments, whether a project should get the go-ahead to continue or not, stating and indicating the imminent risks to the environment, how to mitigate them, and if need be how to abate the project.

Keywords: developmental projects, impact and effect assessments, environmental impact practitioners, South Africa.

JEL Classification: K30, K33, K38

1. Introduction

Environmental Assessment Practitioners (EAPs) are well-trained environmental specialists, practitioners and assessors, who are qualified to deal with environmental issues, they conduct an environmental impact assessment process, environmental audit, and stakeholder engagements to assess the impact of the proposed development project on the receiving environment.³ This includes amongst others, conducting a basic assessment process with a less severe impact on the receiving environment and full-scale assessment on large projects that might be detrimental to the environment.⁴ The EAPs are independently of developers.⁵ The EAPs are governed by various environmental legislation, and they now derive their powers from their newly established professional board called Environmental Assessment Practitioners Association of South Africa which aimed to promote ethical conduct and quality assurance of the environmental impact assessment reports and other related environmental laws.⁶ The Minister of Environmental Affairs appointed the Registration Board in February 2018, as the only registration body for environmental impact assessment practitioners to professionalize the sector and ensure all environmental assessment practitioners are registered and accountable to the body for the work they discharge to improve the quality of service rendered.⁷ All EAPs are encouraged to register with the body before they can start practicing and legally recognized.

This encourages them to be more professional in discharging their service and not to be biased or have a vested interest in projects they involved in as this might impact negatively on the profession and be detrimental to the environment. The EAPs must have appropriate professional expertise,

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³ EAPASA, (2016). The *Environmental Assessment Practitioners Association of South Africa (EAPASA)*, Rule Book of the Environmental Assessment Practitioners Association of South Africa, 'Advancing Environmental Assessment Practice in South Africa', https://www.dffe.gov.za/sites/default/files/docs/eapasa_rulebook.pdf.

⁴ Guinée, J. B. (Ed.). (2002). *Handbook on life cycle assessment: operational guide to the ISO standards* (Vol. 7). Springer Science & Business Media.

⁵ Glucker, A. N., Driessen, P. P., Kolhoff, A., & Runhaar, H. A. (2013). Public participation in environmental impact assessment: why, who and how?. *Environmental impact assessment review*, 43, 104-111.

⁶ Morrison-Saunders, A. (2018). *Advanced introduction to environmental impact assessment*. Edward Elgar Publishing.

⁷ Buthelezi, G. P. (2020). *Critical analysis of the independence of environmental assessment practitioners in South Africa* (Doctoral dissertation).

knowledge, educational background, and skills in conducting Environmental Impact A (EIAs). The EAPs must adhere to legal prescripts that govern their profession which are stipulated in the Environmental Assessment Practitioners of South Africa guideline, by acting professionally and ethically when utilizing their skills and knowledge.⁸ The EAPs normally conduct the EIA process to identify activities that might have a negative adverse on the receiving environment and come up with appropriate measures to prevent any environmental degradation. This will ensure sustainable development of such projects toward the environment, thus getting environmental authorization for the proposed developmental projects. The EIAs require EAPs and decision-makers to analyze and account for environmental value and justify their stand or decision to consider all processes are adhered to including potential environmental impact.⁹

2. The link between EIA and EAPs

Infrastructural development can often improve livelihood through improved infrastructure, provision of services basic services such as running water and roads, creation of employment, and improved local economic development.¹⁰ The EIA in South Africa is normally conducted on the new proposed developmental project and those projects that are going through upgrading or refurbishment.¹¹ The EIA is increasingly being used and implemented in the context of sustainable development for such proposed activities, projects, or development.¹² The development has to be managed in a way that does not cause environmental degradation and does not negatively affect livelihood and economic growth and stability. The EAPs are professionally trained to carry out assessments such as EIA. EAP is normally employed by the applicant, who are developers to conduct EIA on their behalf. Assessment Practitioners are responsible for conducting the EIA process and environmental audit and submitting the final comprehensive written report to the relevant competent authority for processing and authorization.¹³ Then, EIA will be issued based on information contained in the final report submitted. This make the EAPs to be at the center stage and cuts through assessments from the beginning until the last stage when the authorization is approved or rejected. The EIA is significant in that it is aimed at ensuring the safety of the environment by identifying a potential environmental problem that might occur at the early stage of development and ensuring that the development of projects that have gone through the EIA processes are sustainable. It assists in weighing the pros and cons of a project and arriving at a decision on whether to continue, mitigate or abandon the project forthwith.¹⁴ Also, the EIA predicts mitigating intervention to be imposed if the project degrades the environment¹⁵ It equipped decision-makers or authorities to make informed and correct environmental decisions.

2.1. EAPs

In terms of NEMA EIA Regulation No. 849 section one, an EAP means an individual responsible for the planning, managing, coordination, or review of EIA.¹⁶ The EAP is a qualified and

⁸ Wang, L., Dilanchiev, A., & Haseeb, M. (2022). The environmental regulation and policy assessment effect on the road to green recovery transformation. *Economic Analysis and Policy*, 76, 914-929.

⁹ Broughton, E. K. (2011). *A framework for coherent decision-making in environmental impact assessments in the energy sector of South Africa* (Doctoral dissertation, University of Pretoria).

¹⁰ Srinivasu, B., & Rao, P. S. (2013). Infrastructure development and economic growth: Prospects and perspective. *Journal of business management and Social sciences research*, 2(1), 81-91.

¹¹ Vanclay, F. (2017). Project-induced displacement and resettlement: from impoverishment risks to an opportunity for development?. *Impact Assessment and Project Appraisal*, 35(1), 3-21.

¹² Thondoo, M., & Gupta, J. (2021). Health impact assessment legislation in developing countries: A path to sustainable development?. *Review of European, Comparative & International Environmental Law*, 30(1), 107-117.

¹³ Buthelezi, G. P. (2020). *Critical analysis of the independence of environmental assessment practitioners in South Africa* (Doctoral dissertation).

¹⁴ Glasson, J., & Therivel, R. (2013). *Introduction to environmental impact assessment*. Routledge.

¹⁵ Canadian Environmental Assessment Agency, 'Determining whether a project is likely to cause significant adverse environmental effects. <https://www.ceaa>.

¹⁶ Section 1 of NEMA EIA Regulation No. 849.

professional(s) assessor/consultant(s) appointed by the initiator/applicant to conduct an EIA on the proposed environment on behalf of the applicant or developer with the aim of the project being approved or authorized. The EAP are mainly environmental specialists, specializing in Environmental Management issues.¹⁷ They conduct EIA procedures, public participation, and investigate and report.

2.2. EAPs in conducting EIA

Various institutions, stakeholders, and other role players have specific roles assigned to them during the implementation of EIA processes. But the focus now is on the EAP. The EAP plays a vital role in ensuring that the environment is protected, preserved, investigate, and ensure that development sustainably takes place. The EAP conducts EIA at the earliest stage of the project and submits the complete written report to the competent authority for consideration. Competent authorities must make an informed decision on whether the project must proceed after proper EIA processes conducted have unfolded and a final written report is submitted. This in the long run will influence how competent authorities enforce EIA procedures, to ensure that diligent work is done. The EIR is preceded by impact identification and prediction of the development project on the environment, human welfare, as well as the economy, followed by a comprehensive and transparent consultation and participation process involving a wide range of stakeholders after which an EA is issued based on information provided in the EIR.¹⁸ Thus make EAPs are at the center of the decision-making process on project approvals.

2.3. Requirement for the EAPs

The following are the requirements for EAPs and Specialists in terms of section 13 of NEMA EIA Regulation No 326: the EAP must be independent, possess the necessary skills and expertise, ensure compliance with environmental regulations and legislation relevant to the proposed developmental project, perform the work related to the applicant objectively, even if this results in views and findings that are not favorable to the application, disclose to the proponent or applicant, registered interested and affected parties, and competent authority all material information in the possession of the EAP.¹⁹

2.4. Responsibilities of the EAPs

An EAP must ensure that it determines the level of assessment applicable to the proposed activity, conduct at least a basic public participation process including the submission of the required documentation, amend the reports or provide additional information if need be.

2.5. Independence of EAPs

The requirement for EAPs to be independent is a unique feature of the South African EA system.²⁰ EAPs are employed by the developer to conduct EIA on their behalf and submit the final report to the competent authority to approve or reject the proposed development. EAPs must be impartial and independent of the developer with no vested interest. EIAs must not be a revenue scheme or

¹⁷ Department of Health, 'Management of Environmental Impact Assessments (EIA) of Proposed Development Activities: A guiding handbook for Environmental Health Practitioners (EHPs). <https://www.health.gov.za/wp-content/uploads/2021/manual-EIA-2017-compressed.pdf>.

¹⁸ Sandham, L. A., Van Heerden, A. J., Jones, C. E., Retief, F. P., & Morrison-Saunders, A. N. (2013). Does enhanced regulation improve EIA report quality? Lessons from South Africa. *Environmental Impact Assessment Review*, 38, 155-162.

¹⁹ NEMA EIA Regulations, 2014 as Amended, GNR No. 326.

²⁰ Retief, F. (2010). The evolution of environmental assessment debates: critical perspectives from South Africa. *Journal of Environmental Assessment Policy and Management*, 12(04), 375-397.

vehicle for consulting firms that are more concerned about making money and improving their turnover rather than the rigorousness of the process. Hence EIA needs to be independent ethical and professional as possible. According to Wessels and Morrison-Saunders (2012), one of the principles of EIA set by the International Association for Impact Assessment (IAIA) is that the process should be carried out with professionalism, rigor, fairness, objectivity, impartiality, and balance and be subject to independent checks and verification.²¹ The independency of EAP is very vital. In terms of section 13(1) of Regulation No. 40772, An EAP and specialist appointed in terms of regulation 12(1) or 12(2), must be independent. Section 1(1) of the regulation defines independence as: “specialist, or person has no business, financial, personal, or other interest in the activity or application in respect of which that EAP, specialist, or person is appointed in terms of these Regulations; or that there are no circumstances that may compromise the objectivity of that EAP, specialist, or person in performing such work; excluding – (i) normal remuneration for a specialist permanently employed by the EAP; or (ii) fair remuneration for work performed in connection with that activity, application or environmental audit.”²²

The EAP is required by law to complete a declaration of interest which must be submitted together with the application. The declaration of interest allows the EAP to declare his/her independence and does not have any vested interest in the project. If at any stage, the independence of the EAP is called into question, then the Competent Authority may suspend the application, refuse to accept any reports from the EAP, request the applicant to appoint an independent person to review the work done by the EAP and may also require certain aspects of the work to be redone.

2.6. The regulatory body for EAPs

The EAPASA is the sole new registration authority in South Africa that register and regulate the work of EAPs. This means that for one to practice and be recognized as an environmental practitioner, one has to first register with the body. The EAPSA was informed by section 24H(3)(a) of National Environment Management Act no 107 of 1998. The establishment of EAPSA aimed to professionalize and regulate the profession of EAPs. Registration with the body is one of the requirements to be recognized as a legitimate EAP.

Competent authorities are responsible for making decisions on applications for Environmental Authorization under EIA Regulation. Developmental activities that may result in substantial degradation of the environment must be identified, eliminated, minimized, prevented, and those which require environmental authorization must adhere to, and follow the EIA process to the end. Commencement with any identified activities from proposed developmental projects, before obtaining authorization from the relevant competent authority, is strictly prohibited and can result in harsh punishment to encourage compliance. In terms of section 24(2) of NEMA, the national Minister responsible for environmental affairs, or relevant MEC responsible for environmental affairs at the provincial level, has to pinpoint activities that cannot be implemented without authorization.²³ A detailed report on the impact of the proposed development on the environment must be furnished to the relevant competent authority, to enable informed decision making. The environmental expert, therefore, decides on whether to grant or refuse environmental authorization. The approval or refusal may be in whole or in part. An application may also be approved with conditions that stipulate that the applicant would still be required to comply with certain provisions for the smooth running of the project.

Where various authorities are responsible for the final decision-making, or environmental authorization for different aspects of the same project, they must be well-coordinated, and concurrent approvals or authorization be issued, to foster efficient development while at the same time encouraging environmental protection. The NEMA principles also encourage and reinforce

²¹ Wessels, J. A., & Morrison-Saunders, A. (2012). Defining the role of the independent environmental control officer (eco) in compliance monitoring and enforcement. *South African Journal of Environmental Law and Policy*, 18(1), 27-48.

²² Section 1(1) of NEMA EIA Regulation of 2014 as amended.

²³ Section 24 of Act 107 of 1998.

intergovernmental coordination in environmental matters. Therefore, all competent authorities responsible for issuing authorization after the completion of EIA processes may exercise their powers concurrently, by issuing separate specific authorization or joint environmental authorization.²⁴

The purpose of EIA regulations is, therefore, to ensure that the impact of developmental activities, for which environmental authorization is necessary, is properly assessed, and any activities that may potentially cause harm to the environment are mitigated, minimized, or avoided before authorization can be affected, and those which are suitable for authorization are approved. It must be duly noted that the EIA process enables the organ of state to fulfill its obligation when making environmental decisions that may significantly negatively affect the environment. It is imperative to wait until the EIA processes have been concluded before making such decisions.²⁵

3. The role of the National Sphere of government in ensuring that EAPs with the environmental law governing EIA

Compliance with the procedure laid down by the Minister in terms of section 24(4) of NEMA does not absolve any person from complying with any other statutory requirement, to obtain authorization from any organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of activities in question.²⁶ The relevant personnel of states exercises concurrent powers when dealing with developmental activities that might need approval or authorization from several departments. Department of Environmental Affairs is the custodian of NEMA and many other environmental legislations. The National Sphere of government refers to the departments such as the Department of Environmental Affairs, the Department of Water, and other national departments.

3.1. The Department of Environmental Affairs in the implementation of EIA

The division of the Environmental Affairs is the competent authority and the main custodian of NEMA, and other environmental laws and regulations such as EIA. It is responsible for protecting and conserving the environment, while balancing socio-economic development, to ensure the livelihood of all the country's citizens is at the same time improved. The department provides the legal basis for enforcement and compliance with environmental laws. This is vital to safeguard nature and preserve it for present and future generations. It is the main competent authority in terms of section 24(C)(2) is the Minister of Environmental Affairs. This Department conducts and monitors EIA processes, and issues Environmental Authorizations and licenses. The applicant must employ the service of the EAP who is qualified for the application and conduct EIAs on behalf of the applicant/developer. EAP will conduct the EIA process including conducting public participation, once the whole process is completed, the practitioner will submit a final written audit report for decision making to a competent authority which is the Department of Environmental Affairs, which will then make a final environmental determination on whether to grant or refuse authorization based on the report. The applicant must seek guidance from the EAP to ensure that all necessary information is available before submitting an application form. The Department will decide whether to reject or accept with conditions or grant authorization based on the work of the environmental practitioner. In this regard, the work of the environmental practitioner is crucial in that the safety of the environment depends on the work they do. Certain projects can require environmental authorizations from different CAs depending on the circumstances. It is also possible for certain projects to require, in addition to an environmental authorization, a license or permission in terms of another law. A CA responsible for that license or permission would be specified in the relevant law. The following departments are among other competent authorities: Department of water and sanitation in the implementation of EIA; Department of Mineral Resource in the implementation of EIA; Department of Rural Development

²⁴ Section 24L (1) of Act 107 of 1998.

²⁵ National Environmental Management Act, 1998 publication of implementation guidelines for comment, Notice 654 of 2010.

²⁶ Section 24(7) of Act 107 of 1998.

and Land Reform in the implementation of EIA.

3.2. The Department of Water and Sanitation in the implementation of EIA

Department of Water and Sanitation's legislative mandate seeks to ensure that the country's water resources are conserved, used efficiently, and adequately supplied to all citizens of the country.²⁷ The department has the vital mandate of delivering quality clean water, and preventing wastage of water, as this is a scarce commodity. The department is responsible for issuing water use licenses, promoting effective and efficient water resource management, and enforcing water regulations. The department has a narrow and more focused mandate like water resources. The EPA. after conducting the EIA process, when applying for concurrent authorization must submit a written report to the department. All environmental information generated by the EIA process of any proposed developmental projects must be submitted to the department for consideration, or review before issuing a water license or authorization. The competent authority determines whether water availability represents a significant issue, from an environmental point of view. Any developmental activity that is likely to significantly affect a watercourse or water resource, directly or indirectly, requires a water use license. The competent authority can either issue or deny water use licenses.²⁸

3.3. The Department of Mineral Resource in the implementation of EIA

In post-1994 South African democratic dispensation, the mining industry was part of redressing the imbalances of the past by ensuring that all minerals beneath the soil are in the hands of the people through state control.²⁹ Mining is one of the sectors that cause activities that are detrimental to the environment.³⁰ Before any mining activities can take place, there is a need for environmental impact assessment must first be conducted. In this regard, the Department of Mineral Resource is a competent authority according to NEMA, in so far as listed activities that deal with mining-related developments are concerned. Before conducting prospecting, mining, exploration environmental impact must have been undertaken and submitted to the Department of Mineral Resource for environmental authorization. The Minister of Mineral Resource is the relevant authority for all activities related to mining, exploration, extraction, or primary processing of mineral or petroleum resources and other ancillary activities. In terms of section 24(O)(2) of NEMA, the Minister responsible for mineral resources, or the MEC responsible must consult with every State department that administers a law relating to a matter affecting an application for environmental authorization and mining rights.³¹

The department is the custodian of Mineral Petroleum Resource Development Act No 28 of 2002.³² The application for a mining license must be subjected to an EIA process, as specified in the EIA Regulations, promulgated in terms of NEMA. In terms of section 53 of MPRD, the approval of the Minister of the Department of Mineral Resource is thus required for any land surface use. For development to obtain environmental authorization, such development proposal must have gone through Environmental Impact Assessment processes, as a prerequisite for obtaining authorization.

3.4. The Department of Rural Development and Land Reform in the implementation of EIA

The most effective strategy and tool of the apartheid regime was racial and territorial

²⁷ South Africa Yearbook 2014/2015.

²⁸ General notice 654 of 2010.

²⁹ Horne, R. (2017). Patterns of empowerment and disempowerment in the South African mining sector. *African Review of Economics and Finance*, 9(1), 3-32.

³⁰ White Paper on a Mineral Policy for South Africa of 1998 (GN R2359 in GG 19344 of 1998-10-20); hereafter White Paper, White Paper on Environmental Management (GN 749 in GG 18894 1998-05-15).

³¹ Section 24(O)(2) of Act 107 of 1998.

³² GN 2359 in GG 19344 of 20 October 1998.

segregation.³³ Land ownership and spatial planning were based on race and reflected strong patterns of the political and economic conditions of the apartheid era.³⁴ Racially based policies were the cause and promoted insecurity, inequality, landlessness, and poverty amongst the majority of black people, and the cause of inefficient land administration and land use.³⁵ Land reform was formulated to deal with the imbalances and injustices of the past.³⁶ Department of Rural Development and Land Reform as listed by NEMA exercises both functions which may affect the environment, largely address the issue of land reform, to ensure that historically disadvantaged groups have equal access to the land, and management of the environment, which have been categorized as those components dealing with Land Development Facilitation, Spatial Planning and State Land Management.

4. The role of the Provincial Sphere of government in ensuring that EAPs comply with environmental law

In terms of Regulation No R1184, the National Minister of Environmental Affairs and Tourism designates provincial proficient experts with the power to issue authorization, in terms of EIA regulations. The proficient authorities are accountable for administering EIA in South Africa at the Provincial level, the MEC is responsible for environmental affairs. In terms of section 6 of NEMA, MEC may make regulations in terms of subsection (5), only in respect of listed activities and specified activities, or areas in respect of which the MEC is the competent authority at a provincial level.³⁷ Application for environmental authorization should be submitted to his/her department, in this case, is Department of Economic Development, Environment, and Tourism.

4.1. The Department of Economic Development, Environment, and Tourism

In this regard, the MEC for Economic Development, Environment, and Tourism are responsible for administering the EIA at the provincial level, in particular in Limpopo Province. The developer after acquiring the service of the EAP whom after conducting environmental assessment will submit a detailed application form to the provincial department of Economic Development, Environment and Tourism for authorization. The department will after having received the application form make an informed decision. Once authorization is granted, the developer can continue with the proposed development.

5. The role of the Local Sphere of government in ensuring that EAPs comply with environmental law

The local sphere of government is very important because is at grass root level where the real service delivery take place. Bosman argues that local government has a responsibility of providing basic services while at the same time being frontline environmental regulator.³⁸ Most provinces have enacted laws setting out the level of influence that municipalities may practice. Municipalities can enact their own by-laws that deal with environmental management in ensuring that there is no degradation to the environment. However, if the by-laws are inconsistent with the NEMA and the Constitution, such by-laws will be invalid and void.

³³ Du Plessis, D. J. (2014, March). A critical reflection on urban spatial planning practices and outcomes in post-apartheid South Africa. In *Urban Forum* (Vol. 25, No. 1, pp. 69-88). Springer Netherlands.

³⁴ Todes, A. (2012). Urban growth and strategic spatial planning in Johannesburg, South Africa. *Cities*, 29(3), 158-165.

³⁵ Kloppers, H. J., & Pienaar, G. J. (2014). The historical context of land reform in South Africa and early policies. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 17(2), 676-706.

³⁶ Mokwena, R.J and Maluleke, W. (2020). South African rural communities and the land restitution process: the application of criminological and legal theories in identifying obstacles to rightful allocations of land. *Gender & Behaviour*, 18(3), 16145-16156.

³⁷ Section 24(6) of Act 107 of 1998.

³⁸ Bosman, C. (2003). New legal implication on South Africa Authorities' waste management responsibilities. In Freeman, S., McCall, J., McKay, C. and Trois, C. (Eds.) *International Waste Management. Biennial Congress and Exhibition*. Johannesburg: Shortens Publication Pty Ltd.

5.1. Municipalities

Municipalities as per NEMA, are not competent authorities. In terms of Regulation R1184, the National Minister of Environmental Affairs and Tourism designated the provincial competent authority on matters that falls under jurisdiction.³⁹ Provinces can endorse the enabling laws that allow municipalities as the competent authority, they still have a specific responsibility to ensure sustainable development.⁴⁰ The municipality can develop its law to give effect to the designated power as a competent authority and to deal with environmental matters within its jurisdiction. Basson and Du Plessis (2001) further argues that municipalities need to include environmental authorization when dealing with development that might be detrimental to its environment their by-law to protect the environment while ensuring sustainable development.⁴¹ In terms of the Spatial Planning and Land Use Management Act 16 of 2013, where an activity requires concurrent authorization, the relevant organs of states are empowered to issue joint/integrated authorization or individual authorization on specific activities aligned to their respective departments.⁴² The municipality can through co-operative governance and consultation with relevant department issue out concurrent authorization. If a municipality enacts a by-law that goes outside of the power reckoned in the enabling law, that by-law is deemed unlawful. For example, Polokwane Municipality has its by-law which it can enforce within its area of jurisdiction in order to protect its environment in line with section 24 of the constitution.⁴³ To enforce compliance, the Municipality Structures Act⁴⁴, provide a provision that forces compliance on municipalities, to ensure enforcement of environmental laws. On the other hand, the Municipal System Act 2000⁴⁵ establishes the enabling framework for municipalities to comply with their legal duty to enforce environmental law. If a municipality takes a decision or fails to make a decision, which results in the degradation of the environment, any individual can approach the court, alleging a violation by the municipality of their environmental right.

6. The role being played by the judiciary in ensuring that EAPs comply with the environmental law

Communities, non-governmental organizations, and interest groups often approach the court to pursue criminal cases against companies, developers, and competent authorities who fails to ensure environmental production when dealing with development projects. This has resulted in the court playing a major role in the development of environmental law, especially the further development of Environmental Impact Assessment regulations. The courts play a major role in fostering the implementation of environmental law and ensuring that section 24 of the Constitution is adhered to and effected. The courts have been active in providing clarity to the provision of environmental laws that seek to safeguard nature and prevent environmental degradation.

Today in South Africa any interested party can lay a criminal charge at the South African Police Station. It will be upon the National Prosecuting Authority to decide on whether to prosecute or not. In the case of *State v. Frylinck and others*, Mpofo Environmental Solutions cc employed Frylinck an environmental assessment practitioner, to conduct a BAR, for the proposed development of the Pan African Parliament buildings at Randjiesfontein 405JR, Midrand, Gauteng. Frylinck conducted an environmental impact assessment on the proposed development as a prerequisite for environmental authorization. On the submitted application form, the assessment report to the DEA

³⁹ Regulation No. R1184.

⁴⁰ Pillay, P. (2003). *The Implementation of Co-operative Environment Governance through Chapter 3 of the National Environmental Management Act 107 of 1998*, 2003, Conference proceedings: Co-operative governance in Southern Africa Centurion, PASA 253-260.

⁴¹ Basson, E and Du Plessis, W. (2004). Local Government and Environmental Law. In Constitution and Law IV: colloquium on local government law, 26 October 2001, Faculty of Law, Potchefstroom University for Christian Higher Education.

⁴² Section 30 of Act 16 of 2013.

⁴³ Section 151(3) of the Constitution of the Republic of South Africa, 1996.

⁴⁴ Act 117 of 1998.

⁴⁵ Act 32 of 2000.

indicated that there was no wetland on the site and that a wetland delineation study was not necessary.⁴⁶ DEA relied on Frylinck to grant authorization on the proposed developmental project. Later it was discovered the construction was causing severe damage to the wetland on the site, and the building of the complex had to be put on hold. Accused 1 was Mr. Stefan Frylinck, an adult male, and accused 2 a legal entity, a closed corporation. The two accused were charged with fraud, read with the provisions of section 103 of CPA, Act 51/1977, and contravening section 81(1)(a) of the Environmental Impact Assessment Regulations of 2006. In the judgment, the court found out that the defendant who is knowledgeable and experienced was deliberate neglect in execution of his duties by not sourcing the services a wetland specialist, or consulting with such a specialist. Both accused were found guilty of providing incorrect and misleading information, however DEA and accused 1 acquitted of fraud. This is a clear indication that sometimes Environment impact assessment practitioners and official authorities responsible for EIA sometimes attempt to circumvent the law by lying and providing misleading and incorrect information about their work on the site in favor of the developer. Hence, they must be registered and be recognized by a professional body. If they are found guilty, they must be stuck in the role of such a professional body. They often given excuse is that EIA processes are time-consuming, hence many circumvent the process. Be that as it may, Frylink's case highlights the important role played by EAP in the circle of the EIA process and environmental management. Environmental Impact Assessment Practitioners are required to be highly knowledgeable, have the expertise and specialist skills, and are legally bound to provide correct and accurate information before handling EIA processes.

In *Uzani Environmental Advocacy CC v. BP Southern Africa (Pty) Ltd*, under being granted leave by Judge President Mlambo, Uzani Environment Advocacy (CC) instituted a private prosecution against BP Southern Africa (Pty) Ltd, out of Gauteng Division. BP Southern African (Pty) Ltd herein referred to as BP was the accused in this matter. BP was accused of wrongfully and unlawfully undertaking activity identified which could have a substantially detrimental effect on the environment, by contracting a filling station, without prior authorization by the Minister for Environmental Affairs, or competent authority or a local authority, or an officer designated by the Minister. The Uzani instituted private prosecution under section 33 of NEMA against BP its unlawful commencement with listed activities, without the requisite environmental authorizations. In their defense, BP argued that the prerequisites for instituting a private prosecution contemplated in NEMA had not been met, that prosecution was not in the public interest, nor aimed at protecting the environment, and that private prosecution did not contemplate the fact that BP had submitted a section 24G application for rectification of the so-called "unlawfully commenced" activities in terms of section 24G of NEMA, during a period in which amnesty was available.

In this matter, *BP Southern Africa (Pty) Ltd* was found guilty of contravening the provisions of the Environment Conservation Act, 1989 (ECA) and the National Environmental Management Act, 1998 (NEMA) which require fuel retailers to conduct EIA and obtain environmental authorization prior to commencement of project to avoid environmental degradation. Undertaking a listed activity without environmental authorization is an offense in terms of 24F of NEMA, which stated that no person may commence an activity listed or specified, in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible, as the case may be, has granted environmental authorization for the activity.⁴⁷ This case further illustrates that obtaining environmental authorization is a prerequisite for continuation of development project and that developers cannot continue with developmental projects without obtaining the relevant environmental authorization before commencing with the listed activities that can be detrimental to the environment. This case further reminded us of the importance of undertaking EIA process and obtaining the necessary environmental authorization. This case set precedence.

In the case of *Fuel Retailers Association of Southern Africa (Pty) Ltd v. Director-General, Environmental Management, Mpumalanga and others*, the applicant, Fuel Retail Association

⁴⁶ Truter, J. (2014). Environmental law compliance - the noose is tightening, 3 June 2014/News/Legal Brief. <https://www.werksmans.com/legal-updates-and-opinions/environmental-law-compliance-the-noose-is-tightening/>.

⁴⁷ Section 24(2)(a) Act 107 of 1998.

opposed environmental authorization that was granted by the Mpumalanga provincial for the construction of a filling station in White River. The competent authority granted authorization for the installation of three underground fuel tanks each with the capacity of 21500 liters for octane leaded and unleaded petrol, respectively, and the third for diesel, the erection of a convenience store, a four-post canopy, ablution facilities, and a driveway onto the premises. Fuel Retailer appealed to MEC of DACE and later sought a High Court review of the decision by the Mpumalanga environmental authority to grant an authorization under section 22 of the ECA for the development of a petrol filling station in White River, Mpumalanga. The legal question was whether there was a duty on environmental authorities when making decisions about the construction of filling stations, to consider the environmental impact as well as socio-economic factors. The Pretoria High Court dismissed the application. Later the appellant approached the Supreme Court of appeal, which upheld the practice of environmental authorities, leaving the consideration of need, desirability, and sustainability to the local authority, on the basis that this authority has to consider these aspects in rezoning application.⁴⁸ The applicant applied for leave to appeal against the decision of the Supreme Court of Appeal concerning the nature and scope of the obligations of environmental authorities when they make decisions that have a substantial detrimental impact on the environment.⁴⁹ The appellant abandoned all the other grounds of review and pursued the failure of the MEC to consider the need, desirability, and sustainability of the filling station. The Constitutional Court stated that need, desirability, and sustainability were terms used by parties when referring to socio-economic considerations. Need, desirability and sustainability did not appear in either the ECA or NEMA. It was used in schedule 7 of the Regulations promulgated under the Town-Planning and Township Ordinance. The Constitutional Court explained that in light of the provisions of NEMA and the ECA, proper reference must be given to socio-economic considerations. Judge Ngcobo reasoned that unsustainable development is in itself detrimental to the environment, if the development such as a filling station may have a substantial impact on the environment. He further held that the authorities misconstrued the nature of their obligation, and as a consequence failed to comply with a compulsory and material condition prescribed by the law, for granting authorization to establish a filling station. The Constitutional Court granted the application for leave to appeal and upheld the appeal to the Courtside.

The decision of the environmental authorities ordered to reconsider the application by Inama Trust, in light of the judgment. In addition, the Court ordered the environmental authorities to pay the cost of the application. Sustainable development is defined by Constitutional Court as “*the integration of social, economic and environmental factors into planning, implementation, and decision making for the benefit of present and future generations*”. This description integrates two of the globally acknowledged elements of the concept of sustainable development, which are the principle of sustainable integration of environmental protection with socio-economic development, and the principle of intergenerational and intergenerational equity.

Sustainable development originated from the Stockholm Declaration held in Stockholm in June 1972.⁵⁰ The principles aimed to connect the right to environmental protection, and growth, to ensure that development is sustainable for the benefit of present and future generations.⁵¹ For example, the filling station infrastructure which lies underground may harm the environment, hence the need to subject the development to all EIA processes to the letter, and obtain the relevant environmental authorization. In granting environmental authorization, the competent authority must go through the application thoroughly, to ensure compliance before granting such environmental authorization.

⁴⁸ 2007 (2) SA 163 (SCA) para 27.

⁴⁹ 2007 (2) SA 163 (SCA).

⁵⁰ Handl, G. (2012). Declaration of the United Nations conference on the human environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992. *United Nations Audiovisual Library of International Law*, 11, 6.

⁵¹ Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review. *Cogent Social Sciences*, 5(1), 1653531.

7. The vital roles of EAPs in EIAs

The EAPs play critical roles in ensuring that prior, during and after any operations or activities requiring EIAs have been undertaken, the existing laws regulating and governing such operations and activities are fully complied with. In discharging these roles, the EAPs have to exhibit maximum diligence and failure to, would attract consequences.

7.1. Summary of the overarching roles of the EAPs in EIAs

Below are summaries of the legal analysis of the significant roles of EAPs in EIAs, and It begins with insightful introduction followed by the link between EIA and EAPs, the EAPs, EAPs in conducting EIA, the requirement for EAPs, the independence of EAPs, the regulatory body for EAPs, the Role of organs of state as the competent authority in the implementation of EIA, The role of the national sphere of government in ensuring that EAPs with the environmental law governing EIA, the Department of Environmental Affairs in the implementation of EIA, the Department of water and sanitation in the implementation of EIA, the Department of Mineral Resource in the implementation of EIA, the Department of Rural Development and Land Reform in the implementation of EIA, the role of the provincial sphere of government in ensuring that EAPs comply with environmental law, the role of the local sphere of government in ensuring that EAPs comply with environmental law, The role being played by the judiciary in ensuring that EAPs comply with the environmental law, the Challenges being faced by EAPs in carrying out their roles, How EAPs may tackle and overcome these challenges.

7.2 Key implications

In discharging its duty, an EAP must ensure independence throughout without fear or favour. Should there be prejudice or bias, there are institutions available to hold an erring EAP responsible and accountable. Most times, consequences are very severe.

8. Concluding remarks

Many times, EIA processes have not been followed effectively by the EAP because of lack of experience or having vested interest in the project. The competent authority must be actively involved in the monitoring of EIA, from the first day they are conducted until the day decision has to be made. It is imperative that environmental assessment practitioners who are registered with a professional registration body that holds them accountable for their work must only be allowed to practice as EAP and conduct EIAs. The establishment of the formal professional registration body was a step in a good direction to ensure high moral ethics and professionalism. Because of the nature of their work and the ethics that come with the job, if they behave in a dishonest way they might risk being struck off the role. The fear of public exposure of bad or dishonest work and the fear of being struck off the roll of EAPs will go a long way to ensure the absence of bias in the production of EIA reports and the acceptable standards of integrity.⁵²

9. Recommendations

Every developmental project that falls within the listed activities, in terms of NEMA, and Environmental Regulations, must undergo compulsory EIA as a prerequisite for the continuation of such developmental projects. Because EIA is a prerequisite for developmental projects, there is a need for EAPs to sign a code of good ethics, before they start working on any project, to ensure that

⁵² Barnard, D. (1999). *Environmental Law for All: A Practical Guide for the Business Community, the Planning Professions, Environmentalists, and Lawyers*. Impact Books.

they do their work diligently, and in good faith. The EAPs must be registered with a legal professional body that oversees their work before they can be officially recognized as EAPs. The EAPs must conduct EIAs in full and follow all steps or processes including conducting stakeholders' engagements. The onus is on EAPs to develop efficient approaches in maintaining communication with communities, and all relevant stakeholders, to allow concerns to be brought forward, and to transparent sharing of EIA information, to avoid future complaints and protests during the implementation stages.

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