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COUNTRY REPORT: SOUTH AFRICA
Recent Judicial, Legislative and Policy Developments

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Introduction

This report will be a brief overview of the more important developments in environmental law in South Africa during 2011. The year was relatively quiet and a lot of attention was given to the country's hosting of the UNFCCC COP17 at the end of the year. There were, however, some developments that warrant discussion. I will consider these under four headings: cases, legislation, policy and draft legislation.

Cases

The most important cases of 2011 were the twin Supreme Court of Appeal decisions in *Maccsand (Pty) Ltd and another vs. City of Cape Town and Others*[1] and *Louw NO vs. Swartland Municipality.*[2] I discussed the decisions in these cases in the courts *a quo* in a previous country report for this review.[3] Essentially, the central issue in both cases was whether a decision by the (national) Department of Minerals granting mining rights made it unnecessary for the applicants to apply for appropriate land-use planning (to the relevant local government bodies in terms of provincial legislation) where the land was not currently zoned for mining, which was the case in both of these cases. The Department was of the view that the granting of mining rights in terms of the *Mineral and Petroleum Resources Development Act* (*MPRDA*)[4]

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[1] [2011] ZASCA 141.
[2] [2011] ZASCA 142.
[3] *IUCNAEL eJournal*, Issue 2011(1).
[4] Act 28 of 2002.

effectively 'trumped' the planning legislation (the *Land Use Planning Ordinance in the Western Cape* (*LUPO*)), making it unnecessary for the holder of such rights to get planning permission. In the courts *a quo*, the Department had been unsuccessful - the courts had found that the planning legislation was not trumped by the *MPRDA* and that the rights holders had to obtain the relevant planning permission.

On appeal to the Supreme Court of Appeal, the court held in *Maccsand* that:

> 'not one of the considerations that the Minister is required to take into account is concerned with municipal planning. She does not have to, and probably may not, take into account a municipality's integrated development plan or its scheme regulations.'[5]

The court thus held that 'it cannot be said that the *MPRDA* provides a surrogate municipal planning function that displaces *LUPO* and it does not purport to do so'.[6] This means that, once a mining right has been issued, the holder will not be allowed to mine unless *LUPO* permits such mining.

The Department argued that this finding leads to a duplication of functions that the legislature could not have intended, but the court correctly stated that the *MPRDA* and *LUPO* 'are directed at different ends' resulting in no duplication.[7] In any event, there are other legal situations where duplication of functions exists and this does not render one or other of the functions redundant. Consequently, the SCA found against the appellants, confirming the original decision - the *MPRDA* does not displace *LUPO*.

In the court *a quo*, it was argued that the mining rights holder was required to obtain environmental authorisation in terms of the *National Environmental Management Act* (*NEMA*)[8] prior to the commencement of mining. *NEMA* requires environmental authorisation for certain activities specified and identified in terms of the Act, following some form of environmental impact assessment. The finding of the court *a quo* was not because the mining operations *per se* were identified activities (they were, but mining-related activities were not regarded as operational listed activities until such time as declared to be so – and such declaration was never made) but

[5] *Maccsand* case (para 33).
[6] Ibid.
[7] Ibid, para 34.
[8] Act 107 of 1998.

because on one of the sites the mining would result in the removal of indigenous vegetation and on the other, the mining would result in the transformation of land use from public open space to another land use, both of which were identified activities. The court *a quo*, delivering its judgment on 20 August 2010, after argument had been made in April 2010, was not aware that the relevant *NEMA* regulations had been repealed (and replaced by the 2010 *NEMA* regulations) on 2 August 2010. Consequently, the declaratory order of the court *a quo* had been made 'in the absence of a live, concrete dispute and served no purpose'.[9] Although asked to provide guidance as to the relationship between *NEMA* and the *MPRDA*, the court declined to do so, reasoning that the exercise was essentially academic.

The *Louw vs. Swartland* case on appeal was argued alongside the *Maccsand* appeal and the decision reached in this case rested on the same reasoning as in *Maccsand*.[10] In my view, both of these decisions are consistent with other cases where the courts have been faced with the relative applicability of national and provincial legislation in the land-use planning sphere,[11] and the decisions are correct.

Another two cases can also conveniently be dealt with together as they also deal with essentially the same legal issue: the cases of *Goede Wellington Boerdery (Pty) Ltd vs. Makhanya NO*[12] and *The Guguletto Family Trust vs. Chief Director, Water Use, Department of Water Affairs and Forestry*.[13] These cases both involved reconsideration of decisions of the Water Tribunal, an administrative tribunal established in terms of the *National Water Act.*[14] The initial administrative decisions, which had been taken on appeal to the tribunal, were both decisions relating to water use licences. In an application for a water use licence, section 27 of the Act requires the decision-maker to take into account 'all relevant factors', which include eleven factors that are specified in that section. These factors include factors relating to the likely effects of the water use, including how the use will affect the public interest, and its compliance with the national water resource strategy and water resource quality objectives. One of the factors is 'the need to redress the results of past racial and

[9] *Maccsand* case (para 37).
[10] Paras 10-35 of that judgment.
[11] See, for example, *City of Johannesburg Metropolitan Municipality vs. Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).
[12] Unreported case 56628/2020 (GNP).
[13] Unreported Case A566/10 (GNP).
[14] Act 36 of 1998.

gender discrimination' - the so-called 'transformation factor'.[15] In both of these cases, the Department refused to grant the licences because the applicants did not meet the requirements of the transformation factor (or, to be more accurate, did not meet the Department's understanding of what that factor entails). In effect, the Department had appeared to regard the transformation factor as a 'trump', in the sense that failure to meet the transformation factor criteria rendered consideration of the other relevant factors unnecessary.[16] The tribunal agreed with the Department's approach in both cases.[17]

The applicants in *Goede Wellington* asked the court to review the decision of the tribunal on the basis of its compliance with the *Promotion of Administrative Justice Act*.[18] In *Guguletto*, the appellants made use an appeal power in the *National Water Act* to appeal against the decision of the tribunal to the High Court.[19] In both cases, the powers of the High Court were essentially the same - review confined to questions of law rather than merits appeal. In both cases the courts held that the transformation factor was not a factor that could be exclusively determinative of the outcome of an application. In both cases, the courts held that the Department (and tribunal) had erred in deciding otherwise, and both decisions were set aside. Also in both cases, the court substituted its decision for the original decision, ordering that the licence be granted.

These judgments are significant in that they highlight the seriously flawed decision-making process in the Water Tribunal (these are not the only problematic decisions by that body, but further discussion is beyond the scope of this report). As essentially administrative law decisions, they are both difficult to fault. More can be said about the importance of transformation (affirmative action, in effect) than either of the courts in these two cases did, but that is also beyond the scope of this report. In my view transformation does warrant being accorded greater weight than other factors, but that does not mean that it can 'trump' all other factors.

[15] Section 27(109b) of the *National Water Act*.
[16] The Department argued that it had not done this and had considered all factors, but offered no evidence to this effect in the tribunal hearings.
[17] In fact, several parts of the two tribunal judgments are substantially similar to each other, suggesting that one judgment (it is not clear which) simply cut and paste from the other.
[18] Act 3 of 2000.
[19] In terms of s 49 of the *National Water Act*.

The final High Court decision of 2011 that falls under the heading of environmental law is *Eye of Africa Developments (Pty) Ltd vs. Shear.*[20] In the court a quo, the issue was whether an amendment to an environmental authorisation (record of decision - ROD) was a substantive one or not. This was important because, if it was, it was necessary to follow a procedural fairness process. The court decided that it was a substantive amendment.

On appeal, the SCA found that the purported amendment to the ROD had not, in fact, been made. The parties had been relying on a letter from the relevant official indicating that he was amenable to the amendment but he had not legally amended the ROD because the necessary jurisdictional facts for valid amendment were absent (there was no application for amendment as envisaged by regulation 40 and in compliance with the requirements of regulation 41 of the relevant *EIA Regulations* of April 2006 and, had the amendment been at the instance of the authority, regulation 45 had to be complied with as far as the process for amendment was concerned, and the facts indicated that it had not been followed).

The judgment does not specify what the basis of the appeal was, but on the basis that the purported amendment was invalid, the court dismissed the appeal. It is difficult to fault the reasoning of the court but it is interesting that the question of the validity of the 'amendment' did not even arise in the court a quo. It seems that all concerned, even the court, assumed its validity.

The final case worthy of mention was not a High Court decision but a decision of a Magistrate's Court. These judgments are not reported but I obtained a copy of the judgment and it is noteworthy not necessarily for the legal reasoning but the factual scenario. In the case of *S vs. Frylinck*,[21] the accused is an environmental consultant. He was being charged with both fraud and contravention of regulation 81(1)(a) of the 2006 *NEMA EIA Regulations*. The accused was found not guilty of fraud due to lack of intention. As for the second charge, the relevant regulation 81(1)(a) reads: 'A person is guilty of an offence if that person provides incorrect or misleading information in any document submitted in terms of these regulations to a competent authority'. The court held that the accused had been negligent and that the standard of his work (in compiling the report) had not measured up the standard of work

[20] [2011] ZASCA 226 (30 November 2011).
[21] North Gauteng Regional Magistrates' Court Case No. 14/1740/2010.

required. It appears that the main failure of the accused, in the eyes of the court, is that he failed to appoint or at least consult with a wetland specialist before he asserted that there was no wetland within 500 metres of the site.

On the factual evidence, I submit that the court was correct to have acquitted the accused of fraud because he had consulted scientists and the information that he had been provided suggested that there was not a wetland on the site. It was, consequently, not possible to conclude, on the facts, that he had intention to mislead the authorities, which would have been required for a successful prosecution of fraud. As for the statutory offence, the regulations do not specify the standard of fault required for contravention of regulation 81(1)(a), but the court decided that negligence was sufficient. From the facts set out in the judgment, it appears that the accused disregarded certain statements made by the expert that he did hire, and that there were enough pointers to warrant appointment of a specialist in wetland delineation. Contrary to the implications made by various media reports on the case, however, this was not a case of an environmental consultant completely ignoring the facts before him. His failure to measure up to the standard of the reasonable environmental consultant consisted of his failure to obtain advice from a suitably-qualified expert. This is the lesson that other consultants can derive from this case.

Sentencing was handed down in April 2011, and both Frylinck and his firm, Mpofu Consulting CC, were fined R80 000 each, with R40 000 of each being suspended. It is worth noting that the 2010 *EIA Regulations* that replaced the regulations applicable in the *Frylinck* case have more stringent maximum penalties for the equivalent offence: one year imprisonment and a fine not exceeding R1 million. This indicates the seriousness of the offence and the importance of environmental consultants' avoiding sloppy consideration of the developments under their review.

New Legislation

Although there has been no new original legislation (i.e Acts), there has been, as there usually is, considerable activity as far as delegated legislation is concerned (regulations and the like). The most significant is a notice that appeared late in the year. The Minister published a national list of ecosystems that are threatened and in

need of protection in terms of section 52 of the National Environmental Management: Biodiversity Act.[22]

According to the (very long) document, it 'contains the first national list of threatened terrestrial ecosystems and provides supporting information to accompany the list, including the purpose and rationale for listing ecosystems, the criteria used to identify listed ecosystems, the implications of listing ecosystems, and summary statistics and national maps of listed terrestrial ecosystems. It also includes individual maps and detailed information for each listed ecosystem'. This is the first list of ecosystems consisting of threatened ecosystems in the terrestrial environment. Future phases will deal with threatened ecosystems in the freshwater, estuarine and marine environments, and with protected (i.e. as opposed to threatened) ecosystems in all environments. Although MECs (provincial ministers, in essence) are given the power to declare ecosystems under section 52, they are encouraged to wait until the national lists are finalized before doing so.

The bulk of the notice contains individual references to the ecosystems. There are 225 ecosystems in total, amounting to a total of 11 547 000 ha, which is 9.5 percent of the total land area of the country. It is noteworthy that, in many of the ecosystems, relatively little if any of the land area identified is under formal protection at present.

The notice correctly identifies some of the legal ramifications of the listing. First, the list of threatened ecosystems is directly relevant to the environmental authorisation process. One of the listed activities is the clearance of 300m2 of more of vegetation, which will trigger a basic assessment[23] in, inter alia, any critically endangered or endangered ecosystem listed in terms of section 52. Then, according to section 54, the need for protection of listed ecosystems must be taken into account in municipal Integrated Development Plans (IDPs)[24] and by implication in Spatial Development Frameworks (SDFs).[25]

[22] Act 10 of 2004. The relevant government notice is GN 1002 in *GG* 34809 of 9 December 2011.
[23] The less intensive of the two types of EIA provided for in South African environmental law (*NEMA*).
[24] These plans have to be drawn up by municipalities and deal with all development planning issues in their areas of jurisdiction, physical and otherwise.
[25] Required as part of IDPs.

Somewhat mysteriously, there is no mention in the notice of any decision in terms of section 53 of the Act, which empowers the Minister to declare threatening processes in listed ecosystems. Such processes would require environmental authorisation in terms of section 24 of NEMA. Section 53 seems to me to be the primary legislative provision giving protection to listed ecosystems and it is therefore odd that it has not yet been utilised, nor even mentioned in the notice. Relying only on the legal provisions mentioned in the government notice for protection of these listed ecosystems would, in my view, be inadequate.

Policy

The most important policy document in 2011 was the *White Paper on the National Climate Change Response*. There are several aspects of the *White Paper* that will or may require legislative interventions and it also identifies a few aspects that can be achieved through the use of existing law. Currently, South African does not have dedicated climate change response legislation - some provisions in the air pollution legislation[26] could conceivably be used to target greenhouse gas emissions. The *White Paper* calls for further investigation of a carbon tax, and it is likely that South African will follow international trends in this regard - Australia's recent carbon tax and its response will no doubt be carefully considered.

It is worth mentioning that the *White Paper* needs to be evaluated overall in the context of the commitment set out in the *White Paper* to implement mitigation actions that will collectively result in a 34 percent deviation from 'business as usual' by 2020 and 42 percent by 2025. This commitment on the international plane is conditional on the provision of finance and technical assistance and on the implementation of a binding climate agreement. Domestically, however, it is now part of official policy and it must be regarded as a target to which the policy aims. The *White Paper* is sure to be followed by numerous interesting, not to say controversial, developments, both legal and otherwise, in years to come.

Draft Legislation

There were several draft legislative instruments published during the year. I will mention these only briefly because fuller discussion will be warranted once they are

[26] *National Environmental Management; Air Quality Act* (39 of 2004).

in final form. The most significant is the draft *Spatial Planning and Land Use Management Bill* of 2011. In its current form, this will radically overhaul the land use planning framework in the country. It is, in part, aimed at replacing the *Development Facilitation Act*,[27] the main body of which was declared unconstitutional in the *Gauteng Development Tribunal* case.[28]

The draft *National Environmental Management Laws Amendment Bill* is aimed at amending certain provisions in *NEMA*, the *Biodiversity Act* and the *Air Quality Act*. Most of the amendments have the objective of facilitating implementation and enforcement.

Similar objectives underpin the draft *National Environmental Management: Integrated Coastal Management Amendment Bill*. The first few years of the principal Act's operation have highlighted areas of concern regarding implementation of what is a rather radical departure from the preceding legislative regime and it is these implementation issues that are being addressed in the amendments.

Conclusion

In the aftermath of COP 17, 2012 promises some interesting environmental law developments leading on from the *White Paper on Climate Change* and the further progress of the draft Bills mentioned here. It will also not be surprising to see the *Maccsand* and *Swartland* cases being taken to the Constitutional Court.

[27] Act 67 of 1995.
[28] Supra note 11.