SACHS J ABRIDGED JUDGMENT

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others

109. It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.

110. The brief dissent which follows is accordingly not based on factors related to the motivation of the applicant, but rather on how I believe the relevant law should be applied to the facts of this case. In this respect I would like to associate myself with eloquent and comprehensive manner in which Ngcobo J highlights the importance of environmental law for our society and establishes the legal setting in which this matter is to be determined. I also support the way in which he alerts the Department of Water Affairs and Forestry to its legislative responsibilities in this area. I agree with his conclusion that it was not appropriate for the authorities simply to rely on an earlier zoning decision by the Council. They should indeed have looked at the matter more broadly and in a more up-to-date manner. Where I part ways with his judgment is in regard to the materiality of that failure.

111. Section 6(2) of the of Administrative Justice Act authorises—

> "[a] court or tribunal . . . to judicially review an administrative action if—
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> . . .

(b) a mandatory *and material* procedure or condition prescribed by an empowering provision was not complied with". (My emphasis.)

As Hoexter observes:

"It would of course be delightfully simple if the failure to comply with mandatory provisions inevitably resulted in invalidity while ignoring directory provisions never had this consequence, but the reality is not so clear-cut. From our case law one sees that some requirements classified as 'mandatory' need not, in fact, be strictly complied with, but that 'substantial' or 'adequate' compliance may be sufficient. The reference in the PAJA to a 'material' procedure or condition may indeed be read as recognising this." (Footnote omitted.)

She goes on (correctly in my opinion) to support an approach which she believes sensibly links the question of compliance to the purpose of the provision, and quotes from *Maharaj and Others v Rampersad* where Van Winsen AJA stated the following:

"The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with [the] injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction *the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance.*" (Her emphasis.)

She notes with apparent approval the suggestion that this approach shows a trend away from the strictly legalistic to the substantive.

112. It seems to me that while the majority judgment did not find it necessary to evaluate the facts because a mandatory procedure was not complied with, if the evidence before the Court suggests that the failure was not of a material nature, it should not lead to the decision being set aside. my view the facts in the present matter as available from the

record do not establish that having a competitor to the filling stations owned by an Executive Member of the applicant[7] posed any measurable threat to the environment that needed to be considered. On the contrary, the facts reveal that all the ordinary environmental controls were in place and that any potential deleterious effect of possible over-trading was speculative and remote, in a word, makeweight.

113. As I analyse the evidence, the procedural default could have had little bearing on the overall nature of an enquiry framed by the principles and objectives of the National Environmental Management Act (NEMA).

113. Running right through the preamble and guiding principles of NEMA is the overarching theme of environmental protection and its relation to social and economic development. This theme is repeated again and again. Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms. Economic sustainability is thus not part of a checklist that has to be ticked off as a separate item in the sustainable development enquiry. Rather, it is an element that takes on significance to the extent that it implicates the environment. When economic development potentially threatens the environment it becomes relevant to NEMA. Only then does it become a material ingredient to be put in the scales of a NEMA evaluation.

114. In the present matter the evidence does not indicate that opening a new filling station would pose or suggest any undue threat to the environment. On the contrary, the relevant environmental authorities made a finding to the effect that environmental criteria were met. First the High Court and then the Supreme Court of Appeal rejected challenges made to this finding, and in this Court the applicant chose not to continue with its earlier attacks on it. Furthermore, the feasibility study indicated that the project appeared to be economically sustainable. As the Court of Appeal pointed out, any suggestion of a future graveyard of disused filling stations was purely hypothetical. I might add that though the

precautionary principle is an important one, particularly in relation to a potentially hazardous product such as petrol, it has little application where the threat to the environment is remote and any possible damage would be containable. must accordingly proceed on the assumption that the normal question of sustainable development does not arise, that is, that this case does not require us to decide whether on balance the gains made in socio-economic development by opening up a new enterprise could appropriately permit a certain degree of negative impact on the environment.

115. What the applicant's argument ultimately boiled down to was that the risk of overtrading was real and that this was an economic factor that should have been taken into account when the question of sustainable development was being considered. Absent some consequent threat to the environment, however, the question of possible overtrading is not one which I believe the decision-makers in this matter were called upon to consider.

116. In my view, commercial sustainability only becomes a relevant factor under NEMA when it touches on actual or potential threats to the environment. Thus, if there were a genuine risk that the introduction of a new industry would be ruinous to traditional forms of livelihood, thereby dramatically changing the character of the neighbourhood, that could be a significant socio-economic environmental factor. Similarly, if there were a real prospect of the landscape ending up as a disfigured and polluted graveyard replete with abandoned petrol tanks not easily removed, that would certainly require attention.

117. Conversely, if some damage to the environment were to be established, the economic sustainability of a proposed economic enterprise could be highly relevant as a countervailing factor in favour of a finding that on balance the development is sustainable. Thus, an enterprise that promised long-term employment and major social upliftment at relatively small cost to the environment, with damage reduced to the minimum, could well be compatible with NEMA. On the other hand, to allow a fly-by-night undertaking either to spoil a pristine environment, or to use up scarce resources, or to introduce undue health hazards, will probably be in conflict with NEMA.

118. But there is no evidence, above the level of speculation, that the arrival of a new kid on the block doing the same business in the same way in competition with existing filling stations would give rise to the risk of unacceptable degradation either to the physical environment or to the socio-cultural environment. I am therefore not persuaded that the

principles of sustainable development are engaged in this matter at all. The objective of NEMA, after all, is to preserve the environment for present and future generations, and not to maintain the profitability of incumbent entrepreneurs.

119. For these reasons, I would not set aside the determination of the decision-makers. In substance the decision-makers considered the factors to which NEMA required them to pay attention. Though the Fuel Retailers Association raised an objection that had technical merit, the failure by the decision-makers was innocuous as far as the environment was concerned and had formal rather than substantive significance. In my view the High Court and the Court of Appeal got it right in dismissing the applicant's challenge to the decision authorising the new filling station. I would accordingly refuse the appeal and uphold the decision of the Court of Appeal.