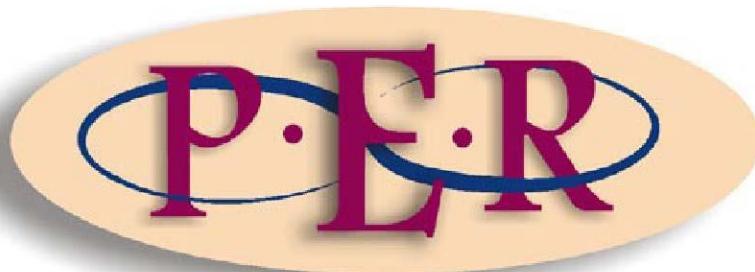


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**PUBLIC PARTICIPATION AND WATER USE RIGHTS**

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## **PUBLIC PARTICIPATION AND WATER USE RIGHTS**

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### **1 The role of public participation in environmental decision-making**

The realisation of environmental rights is grounded in many instances in the proper performance of regulatory (or administrative) functions by Government. Those regulatory functions must be performed in a manner which promotes procedural fairness while having due regard to relevant environmental, social and economic considerations. A relationship therefore exists between the protection of environmental rights and administrative decision making by environmental authorities tasked with implementing environmental law.<sup>1</sup>

The obvious point of departure in understanding this relationship is the *Constitution*.<sup>2</sup> While the right to "administrative action that is lawful, reasonable and procedurally fair"<sup>3</sup> is provided for in section 33 of the *Constitution*, environmental rights are provided for in section 24 thereof as follows:

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.

The right to administrative justice has been given effect primarily through the enactment of the *Promotion of Administrative Justice Act* 3 of 2000 (the PAJA). Section 3(1) of the PAJA provides that "administrative action which materially and adversely

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<sup>1</sup> Kotze 2004 *PER/PELJ* 61.

<sup>2</sup> *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

<sup>3</sup> Section 33 of the *Constitution*.

affects the rights or legitimate expectations of any person must be procedurally fair".<sup>4</sup> Administrative action (as defined in the PAJA) includes any decisions taken (or any failure to take a decision) by an organ of state exercising a public power under the *Constitution*, or in terms of any legislation, which adversely affects the rights of any person.<sup>5</sup> It follows that the requirements of administrative justice are applicable to decisions taken by environmental authorities exercising their public powers under environmental law, where such decisions adversely affect the rights of any person.<sup>6</sup>

In order to comply with the requirements for procedural fairness set out in the PAJA, administrators must ensure (amongst other minimum requirements set out in section 3(2)(b) of the PAJA) that any person who may be adversely affected by administrative action is provided:

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations; [and]
- (iii) a clear statement of the administrative action.<sup>7</sup>

While the procedural fairness requirements of a particular administrative process will depend on the circumstances in question, the PAJA also sets out certain considerations which are required to be taken into account in determining whether it is reasonable or justifiable to depart from the requirements of section 3(2).<sup>8</sup>

Significantly, section 3(5) of the PAJA, provides that:

Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2) [section 3(2) of PAJA], the administrator may act in accordance with that different procedure.

While section 3 of the PAJA sets out the requirements for procedural fairness of administrative action affecting "any person", section 4 of the PAJA introduces an innovative feature into South African administrative law in that it is specifically concerned with administrative action affecting members of the public.<sup>9</sup> Section 4(1)

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<sup>4</sup> Section 3(1) of the PAJA.

<sup>5</sup> Section 1 of the PAJA.

<sup>6</sup> De Ville *Judicial Review* 35.

<sup>7</sup> Sections 3(2)(b)(i), 3(2)(b)(ii) and 3(2)(b)(iii) of the PAJA.

<sup>8</sup> De Ville *Judicial Review* 233.

<sup>9</sup> Hoexter *Administrative Law* 407; Brynard 2011 *Administratio Publica* 102.

provides that where administrative action materially and adversely affects the rights of the public, an administrator must decide whether:

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.

If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements of section 4(1).<sup>10</sup>

For administrative action to materially and adversely affects the rights of the public (in which case section 4 is applicable), it must have a general and significant public effect, and the rights of members of the public must be at issue. To have a general effect, administrative action must apply to members of the public equally and impersonally.<sup>11</sup> Examples of administrative action affecting the public could include an increase in the cost of bus or train fares, a decision to build a power plant, or a decision to rezone land.<sup>12</sup>

Section 4 of the PAJA leaves the choice of participation process up to the administrator (although the administrator is mandated to choose one of the procedures set out therein).<sup>13</sup> The administrator's decision as to which process to follow, including the failure to decide on a process, does not, however, constitute "administrative action" (as any decision, or a failure to take a decision, under section 4(1) is specifically excluded from the definition of administrative action).<sup>14</sup> Consequently such a decision is not reviewable or otherwise enforceable under the PAJA. Hoexter<sup>15</sup> points out that this would seem to make the use of the procedures in section 4 entirely voluntary (although there is nothing to prevent the constitutional principle of legality from being

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<sup>10</sup> Section 4(4) of the PAJA.

<sup>11</sup> Brynard 2011 *Administratio Publica* 104.

<sup>12</sup> Hoexter *Administrative Law* 410.

<sup>13</sup> An administrator may depart from the requirements of ss 3 and 4 of PAJA, however, if it is reasonable and justifiable in the circumstances (as set out in ss 3(4) and 4(4)(a)).

<sup>14</sup> Section 1 of the PAJA.

<sup>15</sup> The exclusion in s 1 of the PAJA extends only to the decision made in terms of s 4(1) and does not include ss 4(2) and (3); Hoexter *Administrative Law* 409-410.

relied on, either to force the administrator to make a decision under section 4(1), or to review a decision that has been made). However, once a decision has been made to undertake a public enquiry or to follow a notice and comment procedure, it is clear that the administrator is bound to undertake those processes as prescribed in sections 4(2)-(3) of the PAJA (and the relevant regulations).

The PAJA has been described as "universal legislation"<sup>16</sup> in that it gives effect to the right to administrative justice by conferring rights upon all South Africans in so far as their dealings with organs of State are concerned. Importantly, the PAJA applies where the relevant legislation is silent on the subject of procedural fairness. The provisions of the PAJA will accordingly supplement enabling legislation and fill in the gaps where provisions are insufficiently detailed.<sup>17</sup> However, where enabling legislation stipulates its own requirements relating to fairness, those will apply provided that they are "fair".<sup>18</sup> In this regard it is noted that while sections 3 and 4 of the PAJA are of general application, sections 3(5) and 4(1)(d) of the PAJA contemplate the use of a fair but different procedure prescribed in terms of an empowering provision.<sup>19</sup> As such, if the legislation in question prescribes a less favourable standard for public participation than the PAJA, it must be carefully examined against the requirements of the PAJA in order to establish whether or not it is fair.<sup>20</sup>

Public participation plays an important role in providing people who may be affected by administrative action with an opportunity to engage and make representations. The information obtained during such processes therefore serves to ensure that administrative decisions are made from an informed perspective.

The overarching objective of environmental decision-making is the promotion of sustainable development, which "requires the integration of social, economic and

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<sup>16</sup> *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (W) 166C.

<sup>17</sup> *Hoexter Administrative Law* 367-368, 409.

<sup>18</sup> Sections 3(5) and 4(d) of PAJA; *Hoexter Administrative Law* 383. Also see *Zondi v MEC for Traditional Affairs and Local Government* 2005 3 SA 589 (CC); *Minister of Home Affairs v Eisenberg & Associates; In re: Eisenberg & Associates v Minister of Home Affairs* 2003 5 SA 281 (CC).

<sup>19</sup> "Empowering provision" is defined in s 1 of the PAJA as "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which administrative action was purportedly taken".

<sup>20</sup> *Hoexter Administrative Law* 411.

environmental factors in the planning, implementation and evaluation of decisions".<sup>21</sup> By enabling the ventilation of issues potentially affecting environmental rights, public participation constitutes an important mechanism for ensuring that decisions concerning the environment are premised on the principle of sustainable development.<sup>22</sup> As such, public participation may be used as an effective tool for establishing environmental priorities, understanding potential risks, and ensuring that sustainability imperatives are given due cognisance in decision-making processes.<sup>23</sup> Public participation in environmental decision making is therefore about linking the citizen to environmental governance, and provides the means through which environmental governance is exercised.

The importance of public participation in the protection of environmental rights has also been recognised by the Courts. In particular, the SCA recognised the role of public comment in administrative decision making affecting the environment in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*.<sup>24</sup> That case considered the requirement for public participation in an application for a mining licence made in terms of the now repealed *Minerals Act*.<sup>25</sup> In reaching its decision the Court pointed out that the inclusion of the environmental right in the Constitution, "... by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country".<sup>26</sup> Furthermore, it considered that the *audi-rule* is particularly important in the light of "the enormous damage mining can do to the environment and ecological systems".<sup>27</sup> While the appellant in that case argued that that there was no need for public participation at the application stage as this would be undertaken in the context of the development of an environmental programme in terms of section 39, the Court took the view that:

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<sup>21</sup> Preamble of the *National Environmental Management Act* 107 of 1998 (NEMA).

<sup>22</sup> Murombo 2008 *PER/PELJ* 111.

<sup>23</sup> Du Plessis 2008 *PER/PELJ* 22.

<sup>24</sup> *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) (Hereafter referred to as *Save the Vaal*).

<sup>25</sup> *Minerals Act* 50 of 1991.

<sup>26</sup> *Save the Vaal* para 20.

<sup>27</sup> *Save the Vaal* para 20.

The audi-rule applies when application for a mining licence is made to the Director in terms of sec 9 of the Act. Such a hearing need not necessarily be a formal one, but interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing.<sup>28</sup>

The importance of public participation during all stages of the environmental decision-making process was also considered by the Western Cape High Court in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*<sup>29</sup> to be a critical component of just administrative action. Significantly in that case the Court found that the decision to authorise the construction of a pebble-bed reactor affected the rights not only of individual persons, but also of the public in general. Consequently the decision was required to comply with section 3 and 4 of the PAJA.<sup>30</sup>

While the courts have recognised the fundamental role played by public participation in promoting decision-making which supports sustainable development, the relationship between environmental rights and administrative justice (and the role of public participation in that context) has also been recognised in the formulation of South Africa's environmental regulatory framework. In this regard, procedures and timeframes for public participation are in many cases set out in environmental legislation, as is the case with the *National Environmental Management Act*<sup>31</sup> (the NEMA).

## **2 Provision for public participation in the *National Environmental Management Act* 107 of 1998**

The NEMA provides the underlying framework for integrated environmental management in South Africa. As such, many of the requirements set out in the NEMA are also applicable in respect of decision making in terms of other environmental legislation.

Pursuant to an agreement reached in 2013 between the Ministers of Environmental Affairs, Mineral Resources, and Water and Sanitation, various changes have been

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<sup>28</sup> *Save the Vaal* para 20.

<sup>29</sup> *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C).

<sup>30</sup> *Hoexter Administrative Law* 411.

<sup>31</sup> *National Environmental Management Act* 107 of 1998.

effected to South Africa's environmental framework with a view to streamlining and integrating environmental regulatory processes, primarily for the benefit of the mining sector. That new framework is known as the "One Environmental System".

While the NEMA sets out environmental management principles aimed at guiding all administrative decision-making concerning the environment, section 24 (read with the Environmental Impact Assessment (EIA) Regulations<sup>32</sup>) sets out a framework for the consideration of applications for environmental authorisation by the competent authority.<sup>33</sup> The NEMA recognises that sound environmental decision-making is intrinsically linked to the principle of administrative justice, and specifically includes a comprehensive framework for public participation in environmental authorisation processes. As such, the NEMA provides a measure against which to consider public participation requirements contained in other environmental legislation.

Section 2 of the NEMA sets out environmental management principles which "apply throughout the Republic to the actions of all organs of state that may significantly affect the environment".<sup>34</sup> Section 2(4)(f) specifically provides that:

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.<sup>35</sup>

Section 24(4)(a) of the NEMA also specifically requires that the investigation, assessment and communication of potential environmental impacts must ensure, with respect to every application for environmental authorisation, *inter alia* that:

Public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures.<sup>36</sup>

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<sup>32</sup> GN R982 in GG 38282 of 4 December 2014 (EIA Regulations).

<sup>33</sup> Environmental authorisation is required prior to the commencement of any activities listed in the Listing Notices promulgated in terms of the NEMA.

<sup>34</sup> Section 2(1) of the NEMA.

<sup>35</sup> Section 2(4)(f) of the NEMA.

<sup>36</sup> Section 24(4)(a)(v) of the NEMA.

While the requirement for public participation in environmental authorisation processes is clear from the above-mentioned requirements of the NEMA, detailed provision for public participation is also included in the EIA Regulations promulgated in terms of the NEMA. Significantly in this regard, the current EIA Regulations repealed and replaced the 2010 EIA Regulations from 8 December 2014. The current framework introduced numerous changes, including in respect of the timeframes allowed for processing applications for environmental authorisation.

In terms of the EIA Regulations, an environmental assessment practitioner must, in relation to an application for environmental authorisation which requires either basic assessment or scoping and environmental impact assessment, (1) conduct at least the public participation process set out in the EIA Regulations; (2) open and maintain a register of all interested and affected parties (I&APs); (3) consider all comments and representations received from I&APs following the public participation process; and (4) provide I&APs with an opportunity to comment on any reports prepared in relation to the basic assessment or scoping and EIA processes.<sup>37</sup>

The EIA Regulations set out the manner in which notice is required to be given to I&APs, specifically requiring written notice to be given to a range of potential I&APs, including the owners and occupiers of the land which is the subject of an application; neighbouring land owners; local authorities; any organ of state having jurisdiction in respect of any aspect of the activity; and any other party required by the competent authority.<sup>38</sup> Regulation 41 goes further to stipulate that all relevant information relating to an application for environmental authorisation must be made available to I&APs, and that public participation is facilitated in such a manner that all potential I&APs are provided with a reasonable opportunity to comment on the application.<sup>39</sup> Timeframes for the submission of comments by I&APs and State departments are also prescribed in terms of the EIA Regulations.<sup>40</sup>

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<sup>37</sup> Regs 41, 42 and 43 read with Annexures 1 and 2 of the EIA Regulations.

<sup>38</sup> Reg 41 of the EIA Regulations.

<sup>39</sup> Reg 41(6) of the EIA Regulations.

<sup>40</sup> Reg 3 of the EIA Regulations.

Any report prepared in respect of a basic assessment or scoping and EIA process is also required to include the details of the public participation process conducted, including the steps that were taken to notify potentially affected I&APs; proof that notice was given to I&APs; a list of registered I&APs and a summary of the issues raised by I&APs, together with the environmental assessment practitioner's responses thereto.<sup>41</sup> In considering an application for environmental authorisation, the competent authority must take into account all relevant factors, including the information contained in reports, comments and representations.<sup>42</sup>

Further to the provision for public participation in the context of environmental assessment processes, section 43 of the NEMA provides that any person may appeal a decision made in terms of the NEMA or any Specific Environmental Management Act (SEMA) to the Minister or MEC (as the case may be). In this regard it is pointed out that the EIA Regulations<sup>43</sup> specifically require that I&APs are notified of a decision regarding an application for environmental authorisation, and of their right to lodge an appeal in terms of section 43 of the NEMA read with the Appeal Regulations.<sup>44</sup>

Both the NEMA and the EIA Regulations make it clear that any decision by a competent authority in relation to an application for environmental authorisation is required to take account of all relevant considerations, including any issues identified by I&APs.<sup>45</sup> While the public participation process provided for in terms of the NEMA comprehensively addresses the requirements of procedural fairness insofar as I&APs are required to be notified of an application and provided with an opportunity to make representations, issues raised in that regard are also required to be captured in reports submitted to the competent authority. Crucially, the public participation framework provided for in scoping and EIA and basic assessment processes seeks to ensure that all relevant environmental considerations are taken into account by decision-makers.

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<sup>41</sup> Regs 41, 42 and 43 read with Annexures 1 and 2 of the EIA Regulations.

<sup>42</sup> Section 24O of the NEMA.

<sup>43</sup> Reg 4 of the EIA Regulations.

<sup>44</sup> GN R993 in GG 38303 of 8 December 2014 (National Appeal Regulations).

<sup>45</sup> Section 24O and 24(4) of the NEMA; Reg 18 of the EIA Regulations.

The public participation framework provided in the NEMA and the EIA Regulations has received some criticism, however, on the basis that it does not extend beyond the decision-making phase into project implementation and monitoring.<sup>46</sup> In this regard a more nuanced and sustained participatory framework which ensures that the public participate from the early stages of project design to project implementation has been suggested by some commentators.<sup>47</sup> Despite there being room for improvement insofar as project implementation and monitoring are concerned, it is clear that the public participation and appeal processes described above recognise the interplay between the constitutional imperatives of administrative justice and the protection of environmental rights. The framework for public participation provided in terms of the NEMA and the EIA Regulations consequently provides a yardstick against which to measure public participation in the water use licensing process.

### **3 Critical analysis of public participation requirements set out in the *National Water Act 36 of 1998***

*The National Water Act 36 of 1998* (the NWA) regulates water use through a range of mechanisms, including the requirement for a water use licence in respect of certain water uses set out in section 21 of the NWA. However, a water use licence is not required in relation to water uses listed in terms of Schedule 1 of the NWA; the continuation of an existing lawful use (which is a lawful use which took place prior to the commencement of the NWA); or a water use undertaken in terms of a general authorisation (which is an authorisation issued by the Minister authorising water use generally in relation to a specific water resource or within a specific area).

The *National Water Amendment Act 27 of 2014* (the Amendment Act), which came into force on 2 September 2014, forms part of the suite of amendment legislation which has been promulgated to provide for the integration and alignment of environmental regulatory requirements in the context of the One Environmental System. In particular, section 41 of the NWA (which sets out the application process

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<sup>46</sup> Murombo 2008 *PER/PELJ* 111; Du Plessis 2008 *PER/PELJ* 22.

<sup>47</sup> Murombo 2008 *PER/PELJ* 111.

for a water use licence) has been amended to take account of the integrated regulatory framework described above.

### ***3.1 Provision for public participation in decision making relating to water use licensing***

The preamble to the NWA recognises that water is a scarce resource which requires careful management for the benefit of all people, and that the public has a role to play in providing input on strategies aimed at managing water resources. However, despite recognising the link between sustainable water resource management and the environmental rights of citizens, the NWA has failed to provide an enabling platform for robust public participation in water use licensing processes.

Section 41(2)(c) of the NWA provides that a responsible authority which is required to consider an application for a water use licence "*may* invite comments from any organ of state which or person who has an interest in the matter" (own emphasis). Section 41(4) furthermore provides that:

- (4) A responsible authority may, at any stage of the application process, require the applicant—
  - (a) to give suitable notice in newspapers and other media—
    - (i) describing the licence applied for;
    - (ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;
    - (iii) giving an address where written objections must be lodged; and
    - (iv) containing such other particulars as the responsible authority may require;
  - (b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and
  - (c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.

In contrast, Section 41(2)(d) of the NWA provides that the competent authority "*must* afford the applicant an opportunity to make representations on any aspect of the licence application" (own emphasis).

The use of the word "may" in sections 41(2)(c) and 41(4) of the NWA makes the requirement for the competent authority to invite (or require) public participation in relation to an application for a water use licence discretionary. When contrasted with

the mandatory requirement in section 41(2)(d) for an applicant to be afforded an opportunity to make representations, it is clear that section 41 of the NWA does not provide an inclusive mechanism for public participation which ensures the ventilation of all potential issues by I&APs. Moreover, while section 41(4) does provide some guidance as to the information required to be provided in a media notice concerning a water use licence application, no detail is provided as to the nature and extent of the public participation procedure which ought to be undertaken in respect of interested and affected parties.

By their nature, water use licensing decisions have the potential to affect the availability and quality of water resources for individual water users, and to compromise the constitutional right of all citizens to have the environment protected for present and future generations. It follows that such decisions constitute administrative action which may materially and adversely impact the rights of individual water users, as well as those of the general public.

Given the deficiencies in the public participation procedure set out in section 41 of the NWA, the procedural requirements of sections 3 and 4 of the PAJA ought properly to be read with the requirements of section 41 of the NWA, as applicable. As sections 3 and 4 of the PAJA both contemplate a procedure prescribed in terms of an empowering provision which is different but fair, the enquiry is whether or not the process prescribed in section 41 of the NWA meets the requirements of fairness. Owing to the discretionary formulation of sections 41(2)(c) and 41(4) of the NWA, this will ultimately depend on the nature and extent of the public participation called for by an administrator in respect of a given water use licence application. While the level of participation required in certain circumstances may be sufficient, this may not always be the case. In such circumstances the alternative procedures prescribed in section 3 and 4 of the PAJA ought properly to be applied to the extent that they exceed the requirements of section 41 of the NWA.

On a practical level, administrators are primarily guided by relevant enabling legislation. When the requirement to undertake any form of public participation is left to the discretion of the responsible authority (as is the case in respect of section 41

of the NWA), there is an inherent risk that the decision maker may incorrectly presuppose the outcome of a public participation process, resulting in the requirements of procedural fairness being overlooked, despite environmental rights being at stake. While sections 3 and 4 of the PAJA provide a minimum benchmark for public participation in all administrative decision making, it should not be assumed that administrators will, as a matter of course, go beyond the requirements of the relevant enabling legislation where it falls short of the requirements of administrative justice. The difficulties associated with the enforcement of the provisions of the PAJA in respect of a decision taken in terms of section 4(1) of the PAJA (on the basis that such a decision does not constitute "administrative action") are also likely to compromise the effectiveness of that section in supplementing section 41 of the NWA in the context of administrative action affecting the public. It follows that effective engagement by members of the public (including environmental justice groups) on water use licence applications may be compromised where an administrator fails to exercise his/her discretion in terms of section 4 in a manner which gives effect to administrative justice (or, for that matter, where the administrator fails to make any decision).

It is therefore clear that while the requirements of the PAJA (and the decision-making principles set out in the NEMA) remain applicable in respect of decisions undertaken in terms of section 41 of the NWA, the failure to comprehensively provide for public participation in the context of decisions relating to water use licensing means that the requirements of procedural fairness may "fall through the cracks" in some cases (notwithstanding the provisions of sections 3 and 4 of the PAJA). A process where I&APs are not provided with notification or any opportunity to submit representations in relation to an application for a water use licence (which application would, by its nature, be likely to have an impact on environmental rights) is entirely at odds with the right to administrative justice.

The limited (and discretionary) public participation process prescribed in terms of section 41 of the NWA also has implications for I&APs' right to an appeal in respect of a water use licence. In this regard the NWA provides for administrative appeals against decisions taken in terms of the NWA to the Water Tribunal (which is an administrative

tribunal established under the NWA). Importantly, the Water Tribunal is constituted by individuals with the necessary knowledge and expertise to consider an appeal pertaining to a range of issues set out in section 148 of the Act.

Section 148(1)(f) of the NWA provides a right of appeal to the Water Tribunal:

... against a decision of the responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies *by the applicant or by any other person who has timeously lodged a written objection against the application* (own emphasis).

While an applicant for a licence in terms of section 41 is entitled to an appeal in terms of section 148(1)(f), it is clear that an appeal is available to "any other person" only insofar as they have "timeously lodged a written objection against the application".

Given the discretionary approach to public participation provided in section 41 (alluded to above), I&APs will in some cases not be notified or provided with an opportunity to submit written objections (despite the potential adverse effects on their environmental rights). Those I&APs would consequently be barred from approaching the Water Tribunal on appeal. A further difficulty with the interpretation of section 148(1)(f) is whether or not the right of appeal provided for in that section is afforded to a person who submitted written objections in respect of an application for a water use licence, despite not being specifically invited to do so by the applicant (as the applicant was not required by the responsible authority to invite written objections in terms of section 41(4)(a)).

Inevitably, the deficiencies in section 148 of the NWA have given rise to appeals to the Water Tribunal. In *Gideon Anderson T/A Zonnebloem Boerdery v Department of Water and Environmental Affairs and Vuna Enterprises (Pty) Ltd*<sup>48</sup> the Water Tribunal was required to consider if the appellant in that case (Mr Anderson) had *locus standi* to appeal a decision by the then Department of Water and Environmental Affairs to grant a water use licence. In that case the Water Tribunal took the view that a person may object to an application for a water use licence only if objections had been

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<sup>48</sup> *Gideon Anderson T/A Zonnebloem Boerdery vs Department of Water and Environmental Affairs* (WT) unreported case number 24/02/2010 of 21 July 2010 (*Anderson*).

"invited" in terms of section 41(4)(a) of the NWA.<sup>49</sup> Moreover, the Water Tribunal held that an objection contemplated in section 148(1)(f) would always be preceded by a notice under section 41 inviting objections to be submitted within a prescribed period.<sup>50</sup> In the circumstances, the Water Tribunal found that because no objections had been invited by the applicant in terms of section 41(4), the appellant consequently had no right of appeal in terms of the section 148(1)(f) of the NWA.

While the curtailed appeal formulation applied in *Anderson* clearly conflicts with the prescripts of the *Constitution*, the PAJA and the NEMA, the *Anderson* case (and subsequent decisions of the Water Tribunal)<sup>51</sup> demonstrate that where mandatory public participation requirements are not explicitly included in environmental legislation, substantively relevant considerations may be overlooked by decision makers, notwithstanding the potential adverse impacts on environmental rights and the fact that such actions are in breach of the overarching requirements of lawfulness under the PAJA.

### **3.2 The Escarpment Environment Protection Group case**

The *Escarpmen Environment Protection Group*<sup>52</sup> case entailed a judicial review by the North Gauteng High Court of three decisions by the Water Tribunal regarding appeals lodged in terms of section 148(1)(f) of the NWA. All three of the appeals related to applications made in terms of section 41 of the Act for water use licences required in the context of mining activities. The Department of Water Affairs (DWA) (as the

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<sup>49</sup> *Anderson* para 23.9.

<sup>50</sup> *Anderson* paras 23.5, 23.6.

<sup>51</sup> For an in-depth criticism of the approach followed by the Water Tribunal prior to *Escarpmen Environment Protection Group v Department of Water Affairs* 2013 ZAGPPHC 505 (GNP) (*Escarpmen Environment Protection Group*), see Kidd 2012 *SAJELP* 25. The approach in the *Anderson* case was also applied in: *Carolyn Nicola Shear v The Regional Head: Gauteng Region – Department of Water and Environmental Affairs, the Department of Water and Environmental Affairs and Eye of Africa Development (Pty) Ltd* (WT 19/02/2009); *Escarpmen Environmental Protection Group & Wonderfontein Environmental Committee v Department of Water Affairs and Xstrata South Africa (Pty) Ltd* (WT 24/11/2009); *Escarpmen Environmental Protection Group v Department of Water Affairs and Exxaro Coal (Pty) Ltd* (WT 03/06/2010); *Escarpmen Environmental Protection Group and Langkloof Environment Committee v Department of Water Affairs and Werm Mining (Pty) Ltd* (WT 25/11/2009); *The Federation for Sustainable Environment v Department of Water Affairs* (WT 08/03/2011).

<sup>52</sup> *Escarpmen Environment Protection Group v Department of Water Affairs* 2013 ZAGPPHC 505 (GNP) (Hereafter referred to as *Escarpmen Environment Protection Group*).

responsible authority) had not directed the applicants to publish notices inviting written objections by a specified date. Written objections had been submitted to the DWA by the appellants, however, as the application had come to their attention by another means. The DWA granted the water use licences despite the submission of the written objections, prompting the aforementioned appeals to the Water Tribunal, which were dismissed on the basis that the appellants lacked standing as the written objections had not been submitted pursuant to a notice in terms of section 41(4). The review Court was consequently required to consider the legal standing of appellants to the Water Tribunal in circumstances where written objections had been submitted to the responsible authority despite their not having been invited in terms of section 41(4).<sup>53</sup>

In its deliberation of the issues, the Court first considered the requirements of section 41 of the NWA. In this regard it noted that the grant of a water use licence will in many cases affect the rights of other water users, and that affected persons are entitled, under section 33(1) of the *Constitution* and section 3 of the PAJA, to administrative action that is lawful, reasonable and procedurally fair. The Court furthermore noted that the PAJA prescribes that a responsible authority taking administrative action must consider in each case which procedure would most appropriately give effect to the right to procedurally fair administrative action.<sup>54</sup>

In the circumstances, it found that the word "may" in section 41 should be read as conferring a discretionary power to the responsible authority, but went further to state that the responsible authority is duty bound to require that steps be taken to facilitate public participation under section 41 in a "proper case".<sup>55</sup> The Court held further that the steps individually described in section 41 were not the only steps which could or should be taken in a given instance. The duty to take steps and the nature of the steps to be taken would accordingly depend on the circumstances of the case before the responsible authority, provided that "a responsible authority must take steps within its

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<sup>53</sup> *Escarpmment Environment Protection Group* para 6.

<sup>54</sup> *Escarpmment Environment Protection Group* para 20.

<sup>55</sup> *Escarpmment Environment Protection Group* para 23.

power to ensure compliance with s 33 of the *Constitution* and s 3 of PAJA".<sup>56</sup> The import of the Court's reasoning in this case is that the responsible authority, when faced with an application for a water use licence that will affect the rights or legitimate expectations of others, is required to ensure procedural fairness in its decision making by ensuring public participation through the steps set out in section 41, or otherwise. Significantly in this regard, the Court acknowledged the importance of public participation in environmental decision-making in stating that:

[P]articipation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. This decision making process both advances the constitutional values of openness and is advanced by providing platforms for those affected to air their views.<sup>57</sup>

In essence, the Court took the view that the responsible authority could use a range of mechanisms to bring the fact of a licence application to the attention of potentially affected parties. It therefore found it irrational to privilege, for the purposes of a potential appeal, the intended beneficiaries of notice through the media over classes of persons who receive notice in another way. The Court also noted that objectors who participated in the process not because notice was given to them but because of their own vigilance may well have legitimate concerns and that their entering the process through their own vigilance "is hardly a rational ground for a legislative denial of a right to participate at the next level, i.e. that of the Water Tribunal".<sup>58</sup> Accordingly, the Court found the Water Tribunal's narrow construction to be arbitrary, and set aside its decisions regarding the appeals in question, finding that the appellants had standing to pursue their appeal before the Water Tribunal.

The Court's interpretation of section 148 of the NWA in *Escarpment Environment Protection Group* recognises the requirement for administrative decision making to meet the procedural fairness requirements set out in the *Constitution* and the PAJA (and particularly sections 3 and 4 of PAJA). However, the Court pointed out that the

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<sup>56</sup> *Escarpment Environment Protection Group* para 23.

<sup>57</sup> *Escarpment Environment Protection Group* para 48.

<sup>58</sup> *Escarpment Environment Protection Group* para 50.

requirement to undertake public participation is left to the discretion of the responsible authority, although it must be undertaken where the circumstances necessitate it.

The Court's decision in *Escarpmment Environment Protection Group* reaffirms the position held in the Constitutional Court case of *Zondi v Member of the Executive Council for Traditional and Local Government Affairs*<sup>59</sup> that decision-makers entrusted with the authority to make administrative decisions are required to do so in a manner that is consistent with the PAJA. However, as addressed above, reliance on the PAJA to cure deficiencies in enabling legislation (such as the NWA) will not necessarily provide a fail-safe framework for participation. While an individual who has been prejudiced by inadequate public participation in administrative decision-making could seek redress from the Courts, this is often an impractical and prohibitively expensive option.

It therefore should not be assumed that administrators will go beyond the prescriptions of enabling legislation to ensure that their decision-making powers are exercised with due regard for administrative justice and the minimum requirements of the PAJA. Rather, the requirements of administrative justice ought to be specifically catered for in empowering provisions such as section 41 of the NWA, which should specifically enable participation by all interested and affected parties.

When considered against the backdrop of relevant constitutional imperatives and the model provided in the NEMA (which affords participation rights to both interested and affected parties), it is clear that section 41 of the NWA does not provide the comprehensive and robust approach to public participation which is appropriate in the context of environmental decision making, and particularly decisions concerning water resource management. Bearing in mind the imperative to integrate and align environmental regulatory processes, it follows that section 41 of the NWA would benefit from amendments to the effect that the public participation of all interested and affected parties "must" be undertaken in a manner similar to that provided in the

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<sup>59</sup> *Zondi v MEC for Traditional Affairs and Local Government* 2005 3 SA 589 (CC) para 101.

NEMA and the EIA Regulations (as opposed to the limited and discretionary provision for public participation currently contained in that section).<sup>60</sup>

#### **4 Implications of the integrated environmental authorisation process for public participation in water use licensing**

While the One Environmental System is focussed on streamlining regulatory processes, the changes effected to the NWA have created an opportunity to address public participation-related shortcomings in the NWA, at least in the context of integrated decision-making. From a holistic perspective, however, the deficiencies in the NWA still require attention in order to ensure that water allocation and licensing decisions are administratively just.

The amended section 24L of the NEMA aims to promote the integration of the regulatory processes and provides greater clarity regarding the circumstances in which an integrated environmental authorisation may be granted by the competent authority. The competent authority designated in terms of the NEMA and an authority empowered under a SEMA may agree to issue an integrated environmental authorisation. Significantly, the term "SEMA" is defined with reference to a range of environmental legislation, including the NWA.

The requirement in section 24L(2) of the NEMA that an integrated environmental authorisation "may be issued only if the relevant provisions of this Act and the other law or specific environmental management Act have been complied with" means that the public participation requirements prescribed in terms of the NEMA (amongst other environmental laws) may not be overlooked in an application for an integrated environmental authorisation. In other words, the practical effect of this provision is that the procedural requirements under the NEMA and each of the applicable SEMAs will need to be met in the context of an application for an integrated environmental authorisation.

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<sup>60</sup> Kidd also advocates the amendment of s 41 to provide for public participation similar to that provided in terms of the NEMA and the EIA Regulations (2010) (GN R543 in GG 33306 of 18 June 2010). See Kidd 2012 *SAJELP*.

The Amendment Act has introduced the requirement (in terms of the new section 41(5) of the NWA) for the Minister to align and integrate the water use licensing prescribed in terms of the NWA with the timeframes and procedures prescribed in terms of the *Mineral and Petroleum Resources Development Act*<sup>61</sup> and the NEMA. The details of such an aligned and integrated water use licensing process will probably be included in regulations promulgated in terms of the NWA.

Given the requirements of section 24L of the NEMA, the integrated environmental authorisation process contemplated in section 41(5) of the NWA will likely entail a level of public participation which corresponds with that set out in the NEMA. It follows that the integrated environmental authorisation process may offer greater public oversight in respect of decisions concerning water use licensing than is generally the case for applications in terms of section 41 of the NWA.

The Amendment Act also introduces an alternative appeal mechanism (in terms of section 41(6) of the Act) for applicants aggrieved by a decision of the responsible authority in respect of an integrated authorisation. In this regard, any aggrieved applicant for a water use licence arising out of the integrated process may lodge an appeal to the Minister of Water and Sanitation. This right of appeal is only afforded to an applicant for a water use licence, however, and does not apply in respect of any other person.

## 5 Conclusions

The inter-related nature of administrative justice and environmental rights is recognised in environmental legislation such as the NEMA, particularly insofar as it serves to ensure that environmental decision-making is informed by all relevant social, economic and environmental considerations. In this regard, provision for comprehensive and robust public participation at all stages of environmental decision-making processes is an essential tool in meeting sustainability imperatives. The formulation of section 41 of the NWA, however, falls short of the standard for public

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<sup>61</sup> *Mineral and Petroleum Resources Development Act* 28 of 2002.

participation which ought to be applied where environmental rights are at stake. As a result of this failing, valuable input relating to social, economic and environmental concerns may be overlooked by the responsible authority in certain circumstances, notwithstanding the potential for environmental rights to be adversely affected.

The High Court in the *Escarment Environment Protection Group* case recognised the importance of public participation in environmental decision making. However, it is clear that the discretionary formulation of section 41 remains a weakness in facilitating decision making which promotes sustainable water resource management. Although the PAJA does provide a "safety net" in circumstances where enabling legislation does not adequately address issues of procedural fairness, in practice those requirements may be overlooked by administrators.

The public participation process prescribed in the NEMA and the EIA Regulations enables participation by all interested and affected parties, and is tailored to environmental assessment and decision-making processes. Such an approach is appropriate in the context of shared natural resources and environmental rights. The water use licensing process provided for in terms of the NWA would consequently benefit from the incorporation of a comprehensive public participation process similar to that prescribed in terms of the NEMA and the EIA Regulations.

**Note from the authors:**

After the submission of this paper for publication, Draft Regulations regarding the Procedural Requirements for Licence Applications were published for public comment in terms of Section 26(1)(k) of the *National Water Act* (draft regulations).

Chapter 8 of the draft regulations provides for public participation. In this regard, draft regulation 38(1) provides that "Following site inspection during the pre-consultation meeting, the Responsible Authority *may* require the applicant to undertake public consultation in terms of section 41(4) of the Act, including land claimants" (own emphasis). Although the draft regulations now prescribe a process for the public participation of I&APs in water use licensing applications, the formulation of draft regulation 38 nonetheless leaves the requirement for an applicant to undertake public

participation to the discretion of the administrator, consequently perpetuating the shortcomings of section 41 of the NWA in this regard. The draft regulations are also not clear on certain aspects of the public participation process prescribed in respect of water use licence applications. For example, draft regulation 40 does not stipulate any timeframes for the submission of comments by I&APs. Moreover, the draft regulations also fail to specify that I&APs will have access to supporting technical documents submitted as part of an application for a water use licence.

It therefore appears that while the draft regulations have moved some way towards providing a comprehensive and robust framework for public participation in water use licensing, there remain some substantive issues which must be addressed before the Regulations are published in their final form.

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### **LIST OF ABBREVIATIONS**

DWA	Department of Water Affairs
EIA	Environmental Impact Assessment
I&APs	Interested and Affected Parties
NEMA	National Environmental Management Act 107 of 1998
NWA	National Water Act 36 of 1998
PAJA	Promotion of Administrative Justice Act 3 of 2000
PER/PELJ	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
SAJELP	South African Journal of Environmental Law and Policy
SEMA	Specific Environmental Management Act

**PUBLIC PARTICIPATION AND WATER USE RIGHTS****P King\*****C Reddell\*\*****SUMMARY**

The conservation and protection of water resources is paramount in the safeguarding of environmental rights and the attainment of sustainable development in South Africa. Although the *National Water Act* 36 of 1998 (the NWA) seeks to provide a framework for ensuring the sustainable use of water resources, its application has been hindered by capacity and enforcement constraints, a legacy of water pollution (primarily as a result of mining and industrial activities), and poor resource management. To aggravate this situation, the difficulties in effectively implementing the NWA are exacerbated by inadequate public participation in water use licensing processes. Public participation in environmental decision-making has increasingly received recognition for its role in ensuring administrative justice and the protection of environmental rights. While environmental legislation (in many cases) sets out procedures for ensuring that public views are taken into account in environmental decision-making processes, the judiciary has also recognised the pivotal role of public engagement in ensuring administrative justice where environmental rights are at stake. Sound public participation practices play an important role in identifying issues requiring consideration in the context of environmental assessment processes, as well as in ensuring that communities are empowered to monitor, identify and report on potential contraventions of environmental legislation. Water is a vital natural resource which is under significant pressure in South Africa. In the circumstances, effective public participation is crucial to ensuring the protection and equitable use of water resources. It follows that provision for comprehensive public engagement in water use licensing processes is integral to ensuring the sustainable management of water resources. While provision

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is made in the NWA for public engagement in the context of water use licensing processes, such participation is limited, and in some cases discretionary. This, in turn, has the effect of curtailing the right to an administrative appeal in respect of a decision by the competent authority to grant water use rights. This paper will explore the role of public participation in environmental decision-making with a view to identifying the shortcomings of the NWA in this regard, as well as the effectiveness of the *Promotion of Administrative Justice Act* 3 of 2000 (the PAJA) in supplementing the NWA's shortcomings. It will also consider the implications which recent changes to South Africa's environmental legal framework will have for public participation in water use licensing, particularly in the context of mining-related activities.

**KEYWORDS:** administrative action; administrative justice; environmental law; environmental rights; constitutional law; constitutional rights; integrated environmental authorisations; One Environmental System; procedural fairness; public participation; sustainable development; water law; water tribunal; water use licensing.