THE ANOMALY THAT IS SECTION 24G OF NEMA: AN IMPEDIMENT TO SUSTAINABLE DEVELOPMENT *

Lauren Kohn**

Abstract

Section 24G of NEMA was introduced in 2004 to allow for the '[r]ectification of unlawful commencement or continuation of [a] listed activity' conducted in the absence of the requisite environmental authorisation; typically pursuant to an environmental impact assessment (EIA). The section essentially permits the ex post facto legalising of an otherwise unlawful act. This controversial addition to NEMA has unfortunately had precisely the adverse effect that the critics anticipated at the time of its introduction: it has come to be exploited as a developer's 'quick fix' to securing a (generally) short-circuited environmental authorisation once a development is already in essence a fait accompli. Practice reveals both industry and government alike to be guilty of this exploitation. This outcome has seemingly been exacerbated by an apparent reticence on the part of environmental authorities to endorse a rigorous ex ante EIA process. Instead, the authorities seem to favour the '24G approval process' which, in practice, is typically less burdensome and less transparent. The ultimate result of this abuse has been the subversion of the purpose of the EIA as a crucial planning tool to anticipate and prevent environmental harm before it ensues. This article seeks to analyse critically the failings of the 'section 24G anomaly', in light of recent case law and compliance and enforcement statistics, and against the backdrop of our legislative framework and the principles underpinning the EIA as a preventative mechanism to ensure sustainable development. It is argued that despite the 'vices' of section 24G, its key redeeming 'virtue' is that it incorporates the notion of an 'administrative fine'. Both its failings and its promise thus support the need for urgent and meaningful legislative reform – rather than ad hoc legislative tinkering – through the introduction of an administrative penalty system akin to that utilised in the United States and our 'home-grown hero' in the competition law domain. The introduction of such a system would not only remedy the abuse of section 24G, but would also improve environmental compliance and enforcement overall by serving as an effective 'one-stop-shop' to curb the spate of environmental crime.

1. Introduction

Over a hundred years ago, United States President Theodore Roosevelt, in an address before the 1908 White House Conference on Conservation, made the following statement, the relevance of which still echoes today:

> We have become great in a material sense because of the lavish use of our resources…But the time has come to enquire seriously what will happen when our forests are gone…when the soils shall have been further impoverished and washed into streams. These questions do not relate only to the next century or to the next generation. *One distinguishing characteristic of really civilized men is foresight…and if we do not exercise that foresight, dark will be the future*.[1]

* I would like to thank Professor Michael Kidd for his helpful comments on a previous draft of this article, and Professor Alexander Paterson, for sharing his insights and encouraging me to publish this piece. I must also express my gratitude for having been awarded the David & Elaine Potter Fellowship and the DAAD-NRF Scholarship for the purposes of my Masters studies. The opinions expressed, and conclusions arrived at, in this article are mine and are not to be attributed to the aforegoing funders. I wish to thank the University of Cape Town in conjunction with the David & Elaine Potter Foundation, as well as the National Research Foundation and the German Academic Exchange Service (DAAD), for the funding assistance.

** B.Bus.Sci LLB LLM (UCT), Attorney and Lecturer, Department of Public Law, Faculty of Law, University of Cape Town.

[1] President Theodore R. Roosevelt, Address Before the 1908 White House Conference on Conservation, in 'Proceedings of a Conference of Governors in the White House, Washington DC, May 13-15, 1908' (1909) at 3-12. Emphasis added.

In 2004, the National Environmental Management Amendment Act[2] introduced, inter alia, the section 24G rectification provision into our benchmark environmental management framework legislation, the National Environmental Management Act.[3] This amendment has come to epitomise a lack of the crucial foresight that President Roosevelt so aptly spoke of and, as a result, our environmental future is indeed starting to look increasingly dark. Section 24G is entitled, '[r]ectification of unlawful commencement or continuation of listed activity' and this title alone should have been enough of a forewarning of the adverse consequences that would ensue from such an anomalous provision. Any listed activity that commences without the proper authorisation, usually pursuant to an environmental impact assessment (EIA) – unless specifically exempted therefrom – is illegal and constitutes a criminal offence.[4] Section 24G encapsulates a legislative invitation to offenders to attempt an unscrambling of the egg: it invites those developers *already* in breach of our prophylactic legislative schema governing environmental authorisations to ask for forgiveness, instead of permission, through an application for ex post facto authorisation for an illegally commenced listed activity. The damage may already be done, but section 24G purports to legitimise it.

The '24G anomaly' was introduced in the absence of any meaningful legislative explanation as to the nuisance sought to be addressed by the odd provision.[5] The accompanying Explanatory Memorandum stated simply that, '[c]hapter 5 of NEMA requires certain amendments to streamline the process of regulating and administering the impact assessment process'.[6] Section 24G was introduced as one of the mechanisms aimed at achieving this broad objective. It was anticipated – albeit *not* explicitly in the Memorandum – that the section would bring developers that had proceeded without the requisite approvals (whether intentionally or inadvertently) back into the regulatory loop by providing authorities with a mechanism to evaluate those activities that had bypassed the EIA system.[7] In a sense, section 24G was the legislative answer to the dilemma encapsulated as follows in *Eagles Landing Body Corporate v Molewa NO*: '[i]n every case where *some* construction had been undertaken without the necessary authority…authorisation could never be given for the completion of the construction'.[8]

Section 24G empowers authorities to give this ex post facto authorisation in the *appropriate* circumstances. It was not intended to become a 'rubber-stamp authorisation' for

---

[2] 8 of 2004, 'the Amendment Act'. This Act came into effect on 7 January 2005: Proc 63 of 6 January 2005.
[3] 107 of 1998, 'NEMA'.
[4] Ibid at section 24(2)(a) read with section 24(4) and 24F.
[5] R Paschke & J Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: A critical review' (2006) 9 *PELJ* 120 at 146.
[6] Clause 2 of the Memorandum on the objects of the National Environmental Management Second Amendment Bill [B 56B – 2003], 'the Memorandum'.
[7] Michael Kidd & François Retief 'Environmental Assessment' in H.A Strydom & N.D King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 971-1047 at 994.
[8] 2003 (1) SA 412 (T) at para 101-2. This contention was advanced on behalf of the third respondent and endorsed, obiter, by Kroon J.

eager developers who have already left environmental degradation in their wake. Our legislature failed to anticipate this practical inevitability – a failure that is rendered all the more perturbing in light of the Memorandum's sweeping assertion that the amendments would have no 'constitutional implications'.[9] On the contrary, our legislature anticipated – somewhat ironically, in retrospect – that the amendments would result in 'improvements to the system of environmental impact management.'[10] As the critics predicted, quite the opposite result has ensued in practice.

The critics voiced their concerns about the 24G anomaly at the time of its introduction. Sadly these forewarnings were not heeded. Paschke and Glazewski, for example, warned that besides rendering otiose the very purpose of an EIA as a fundamental planning tool that 'provides a way to "look before you leap"',[11] section 24G's real danger lies in the fact that it gives a green light 'to over-hasty developers to undertake activities which may have a substantial detrimental effect on the environment'[12] by affording them the *possibility* of a 'quick fix approval' once the development is already a fait accompli. The potential for abuse was clear at the outset, yet section 24G found its way into our law, notwithstanding the critics' foresight, and the floodgates were opened. A recent string of case law, together with the statistics compiled by the Department of Environmental Affairs (DEA) – as set out in the latest two National Compliance and Enforcement Reports[13] – provide patent evidence of the abuse of section 24G. The failings of this provision have in fact been tacitly acknowledged by our legislature through the promulgation of the National Environmental Management Laws Amendment Bill,[14] which seeks, inter alia, to amend section 24G by increasing the administrative fine in order to serve the requisite deterrent effect.[15]

In this article, I seek to argue that such ad hoc amendments will not adequately remedy the nuisance of section 24G, which must be considered against the backdrop of our constitutional regime. This regime enshrines the value of environmental rights as 'fundamental, justiciable human rights, which by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in

---

[9] Clause 6 of the Memorandum (n 6).
[10] Ibid at clause 1.
[11] Nicholas A Robinson 'Environmental impact assessment: Essential methodology or paper tiger?' (2006) 13 *SAJELP* 97.
[12] Paschke & Glazewski (n 5) at 134.
[13] National Environmental Compliance & Enforcement Report 2010-11 ('the 2010-11 Report') and the National Environmental Compliance & Enforcement Report 2011-12 ('the 2011-12 Report'); collectively, 'the Reports'.
[14] 13 of 2012, 'the Amendment Bill'.
[15] Note that, subsequent to the finalisation of this article, on 6 June 2013 the National Assembly passed a follow-up Amendment Bill ('The National Environmental Management Laws Second Amendment Bill 13 of 2013, 'the Second Amendment Bill') which purportedly further remedies, inter alia, the failings inherent in section 24G, read with section 24F. This Bill has been transmitted to the NCOP for concurrence and, as it has not yet been promulgated, shall not be discussed in this article.

our country'.[16] The failings of section 24G, together with its key redeeming feature – the novel[17] incorporation of the 'administrative fine'– ought instead to be the impetus for meaningful legislative reform through the introduction of an administrative penalty system with an institutional structure akin to that established under our Competition Act.[18] In drawing on this local blueprint, as well as insights from the American system, I argue that such a system would not only address the nuisance of section 24G, but would also serve as the much needed 'one-stop-shop' to improve overall environmental compliance and enforcement in South Africa.

2. Unpacking section 24G against the backdrop of the legislative framework

2.1. The prescripts of constitutional environmental governance

A proper assessment of section 24G demands that we look through the prism of the section 24 constitutional right,[19] as given effect through the detailed framework created by our flagship NEMA.[20] This constitutional mandate includes the need to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development.[21] As Claassen J noted in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs*, '[b]y virtue of s 24, environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the Constitution'.[22] The guiding principles that have to inform all such considerations are contained in section 2 of NEMA. This section serves as our cardinal environmental compass insofar as the principles enshrined therein *must* guide all actions that may 'significantly affect the environment'.[23] The most significant principle in this list of 'sustainability principles'[24] is, as the fitting categorisation suggests, the concept of ecologically sustainable development.[25] The principle of sustainable development demands, inter alia, 'that

---

[16] *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment* 1999 (2) SA 709 (SCA) at para 20.
[17] Terry Winstanley 'Administrative Measures' in Alexander Paterson & Louis J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225-239 at 237.
[18] 89 of 1998, 'the Competition Act'.
[19] Section 24 of the Constitution of the Republic of South Africa, 1996, 'the Constitution'.
[20] Willemien du Plessis & Louis J Kotzé 'Absolving historical polluters from liability through restrictive judicial interpretation: Some thoughts on *Bareki NO v Gencor Ltd*' (2007) 18 *Stell LR* at 171.
[21] Section 24(b) of the Constitution (n 19).
[22] 2004 (5) SA 124 (W) at 143.
[23] Du Plessis & Kotzé (n 20) at 177.
[24] Ibid.
[25] See the discussion on the importance of this concept in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) at paras 44-83, and see further at para 3.2.2.2 below.

a *risk-averse and cautious* approach is applied'[26] and 'that negative impacts on the environment and on people's environmental rights be *anticipated and prevented*, and where they cannot be altogether prevented, are minimised and remedied'.[27] Our commitment to sustainable development thus in turn entails a commitment to cautious, risk-averse, transparent and well-reasoned decision-making in all matters affecting the environment. The subsidiary principles which assist in the attainment of this ultimate objective are hence: the principle of preventative action and precaution;[28] the principle of public participation in decision-making and the environmental impact assessment (EIA) principle.[29]

The EIA is recognised as the 'instrument with the central and ultimate role of achieving sustainable development.'[30] It entails a protracted 'systematic and integrative process'[31] which requires input form a variety of stakeholders, including the general public as well as various experts, and ultimately culminates in an environmental impact report which serves as a litmus test for the viability – or otherwise – of a development.[32] In light of the consultative and participatory elements of the environmental authorisation process – quintessentially, the EIA – this process has been described as the 'most frequently encountered aspect of South African law in practice.'[33] It is therefore crucial that the legislative regime established to give effect to EIAs does so properly and thereby facilitates effective and efficient practical implementation. The EIA, with its preventative dimension, has become the world-recognised proven technique for ensuring that decision-makers avoid or minimise unanticipated adverse effects on the environment. McHugh thus hails it for having institutionalised, 'the foresight which President Roosevelt said distinguished the truly civilized' insofar as, '[i]t is now considered the first and probably the most important step in preserving the quality of the environment'.[34] Section 24G turns this fundamental rationale of the EIA on its head.

2.2. The workings of the 24G anomaly

Section 24G was given its home in chapter 5 of NEMA, entitled 'Integrated Environmental Management' (IEM). Section 23 sets out the general objectives of IEM, which include, inter alia, the promotion of the integration of the section 2 'environmental management principles' in

[26] Section 2(4)(a)(vii) of NEMA (n 3).
[27] Ibid at section 2(4)(a)(viii). Emphasis added.
[28] Elli Louka *International Environmental Law: Fairness, effectiveness, and world order* (2006) at 50.
[29] Tracy-Lynn Field 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime'(2006) 123 *SALJ* 409 at 413.
[30] Yuhong Zhao 'Assessing the environmental impact of projects: A critique of the EIA legal regime in China' (2009) 49 *Natural Resources Journal* 485. See also Robinson (n 11) at 97.
[31] C Wood 'Pastiche or postiche? Environmental impact assessment in South Africa' (1999) 81 *South African Geographical Journal* 52.
[32] Paschke & Glazewski (n 5) at 120-1.
[33] Michael Kidd *Environmental Law* 2ed (2011) at 239.
[34] Paul D McHugh 'The European Community Directive – An alternative environmental impact assessment procedure?' (1994) 34 *Natural Resources Journal* 589 at 592.

the making of 'all decisions which may have a significant effect on the environment';[35] the need to 'ensure that the effects of activities on the environment receive adequate consideration *before* actions are taken in connection with them';[36] and the need to 'ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment'.[37] In order to give effect to these objectives, section 24 makes provision for 'environmental authorisations' in respect of listed or specified activities. NEMA endorses the EIA as the archetypal 'environmental instrument' to be utilised in informing applications for environmental authorisations.[38] The EIA process established under section 24(4)(b) is extensive – it requires applicant developers to jump through a number of 'legislative hoops'. This anticipatory process is deliberately cumbersome such that its ultimate purpose as a *preventative* planning tool is fulfilled. As Robinson notes, '[w]hen EIA is subverted, or left to provide a "rubber-stamp" approval for a project already in the works, EIA appears to be a mere "paper tiger"' – not the 'essential methodology' it is intended to be.[39] Section 24G has enabled this unfortunate practical outcome: the abuse of the section by developers, and the irresponsible use of it by frequently complacent – and / or simply confused – environmental authorities, has, in large part, resulted in the EIA's dislodgment from its preventative schema as ex post facto 24G approvals have become commonplace. Furthermore, these approvals are typically given pursuant to a 'make-up EIA process' that in practice tends to be far less rigorous than that contemplated under section 24(4)(b). To this extent, the 24G anomaly makes a mockery of the EIA by rendering it a mere 'paper tiger'.

Section 24G introduced this notion of a 'make-up EIA' into our law. As the label suggests, this after-the-fact assessment process is made available to those developers who have already acted in breach of the law – whether intentionally or in good faith – by proceeding with a listed activity without the necessary approval. The section starts with the following telling words: '[o]n application by a person who has *committed an offence* in terms of section 24F(2)(a)…'.[40] In terms of the latter section, it is an offence for a person to commence a listed activity in the absence of the required environmental authorisation.[41] *On conviction* of such offence, the person in question is criminally liable 'to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.'[42] Section 24G invites those who have flouted the law, and stand to be prosecuted under section 24F(4), to apply to the Minister or relevant MEC, who 'may' then, at his or her discretion, direct the compilation of 'a report' and the undertaking of 'any further

[35] Section 23(2)(a) of NEMA (n 3).
[36] Ibid at section 23(2)(c). Emphasis added.
[37] Ibid at section 23(2)(d).
[38] Ibid at section 24(4)(b) read with section 24(4A).
[39] Robinson (n 11) at 99.
[40] Section 24G(1) of NEMA (n 3). Emphasis added.
[41] Ibid at section 24F(1)(a).
[42] Ibid at section 24F(4). Emphasis added.

studies', as deemed necessary.[43] The requirements for this discretionary 'report' are delineated in section 24G(1)(a), which, when juxtaposed with the minimum requirements contained in section 24(4)(b),[44] indicates that, given its ex post facto nature, the '24G report' is a thinner version of the 'real EIA McCoy'. For example, the '24G report' logically need not provide for 'impacts of the [developmental] *alternatives* to the activity',[45] given that the activity in question has, by definition, already commenced. This ex post facto process thus vitiates a *meaningful* proportionality assessment – which lies at the heart of the EIA as an IEM tool that prioritises prevention over cure – of whether less damaging 'developmental means' ought to have been employed from the outset to achieve the 'developmental end'.

Upon consideration of this report, and upon payment of an 'administrative fine',[46] which, at the determination of the competent authority, 'may not exceed R1 million',[47] the authority is empowered to follow one of two courses of action. He or she may either: (a) direct the offender to cease the activity – wholly or in part – and to rehabilitate the environment as per those conditions deemed necessary;[48] or (b) may issue an environmental authorisation subject to any applicable conditions.[49] In the event that ex post facto authorisation is granted, the wording of section 24G, considered in light of NEMA read holistically, arguably suggests that the applicant will lose the 'rectification disguise' and stand to be prosecuted and convicted under section 24F(4) *only if* any conditions of such belated authorisation are breached.[50] Given these sections' inherent ambiguities, Paschke and Glazewski cautioned that section 24G might be used in *practice* in such a way so as to operate 'retroactively' in that, 'the activity already undertaken may in effect be legitimated as an incidental result of the authorisation granted',[51] thereby rendering the section 24F criminal offence provision redundant in respect of the activity in question.[52]

Unfortunately, this prediction has come to pass as the section 24G(2)(b) 'election' has become the norm; rather than the exception. As the discussion below on the relevant case law

---

[43] Ibid at section 24G(1)(a)-(b).
[44] In contradistinction to the discretionary wording used in section 24G(1), section 24(4)(b) (read with section 24(4A)) provides a detailed list of what '*must*' be 'included' in an ex ante application for environmental authorisation pursuant to an EIA.
[45] Ibid at section 24(4)(b)(i). Emphasis added.
[46] Ibid at section 24G(2A).
[47] Ibid.
[48] Ibid at section 24G(2)(a).
[49] Ibid at section 24G(2)(b).
[50] This is one interpretation of the ambiguous wording used in section 24G(3) of NEMA (n 3) and the sub-section's confusing cross-reference to 'a penalty contemplated in section 24F(4)'. See Paschke & Glazewski (n 5) at 145(h) and 147(d) where the authors note that the ambiguities in the section leave open the practical possibility of a 24G authorisation absolving the 'offender' from criminal sanctions provided for in section 24F. Note that Kidd (n 33) at 245 interprets the provisions differently and argues that the administrative fine 'is in addition to the fine provided for in s 24F'.
[51] Ibid at 145(h).
[52] Ibid at 147(d).

indicates, 24G is favoured by *both* the confused and / or complacent authorities[53] – generally faced with a finalised development and thus willing to settle for 'scrambled eggs' – *and* the frequently devious developers who in turn use the 'scrambled egg defence' to argue that, 'the damage has been done so they might as well be allowed to continue'.[54] The provision has made it much more cost-effective and efficient for developers to break the law than to comply with it.[55] As a result, our EIA regime is falling horribly short of the mark. The 24G anomaly has unravelled the very purpose of the EIA as the environmentalist's crystal ball which 'attempts to identify and *predict* the potential impact of a given activity on the environment from a proposed development…and determine mitigation procedures'[56] *in advance of* a development. EIA is all about prevention – 'it is a process that *informs* decisions *before* they are taken.'[57] As Davis J warned in the case of *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerdery*,[58] our legislative framework should not permit the wrenching of the EIA from its particular purpose by recasting it as an independent remedy that is not truly a remedy at all. Section 24G is anomalous insofar as it has enabled just this.

2.3. The flawed concept of a 'make-up EIA'

Section 24G is a fundamentally dubious addition to our environmental framework legislation in that it introduces the 'flawed concept of a make-up EIA'.[59] Zhao puts it thus:

> The fundamental purpose of carrying out an EIA prior to the construction of a project is to identify and assess the potential adverse environmental impacts to be generated by construction and operation and to investigate alternative options and ways to prevent and mitigate the adverse impacts *before* harm is done. A make-up EIA occurs after the construction has started and sometimes close to the completion stage when environmental harm has already occurred and it is too late to consider alternatives or implement pollution control measures…*EIA Law should by no means create incentives for carrying out make-up EIAs by offering a seemingly better chance of approval and a fast-track approval process*.[60]

By introducing section 24G, our 'EIA Law' has inadvertently achieved this incongruous result. Besides the *practical* problems that have followed in the wake of its introduction, the section is *inherently* problematic when considered against the backdrop of the legislative framework, which must be viewed 'in its complex totality'.[61] Section 39(2) of the Constitution demands that a particular approach be adopted when interpreting legislation; namely, interpretation must

---

[53] Robinson (n 11) at 98.
[54] Public commentary submitted by CER to DEA regarding s 24G http://cer.org.za/wp-content/uploads/2011/08/CER-Submission-on-S24G-May-2011.pdf 12. Comment from Nicole Barlow of ECA.(Accessed 5 June 2013).
[55] Zhao (n 30) at 501.
[56] Liza D Fallon & Lorne K Kriwoken 'Environmental impact assessment under the Protocol on Environmental Protection to the Antarctic Treaty and Australian legislation' (2005) 2 *Macquarie Journal of International & Comparative Environmental Law* 67 at 69. Emphasis added.
[57] Ibid.
[58] 2002 (1) SA 478 (C) at 488.
[59] Zhao (n 30) at 515.
[60] Ibid. Emphasis added.
[61] *Silvermine* (n 58) at 488.

be performed in a way which promotes the 'spirit, purport and object of the Bill of Rights'. This necessitates a purposive,[62] contextual and value-laden approach to statutory interpretation that has, as its starting point, our constitutional prescripts.[63] One of these prescripts demands the adoption of measures, inter alia, 'to prevent pollution and ecological degradation'[64] and 'to secure ecologically sustainable development.'[65] NEMA is the legislative measure that was adopted to give effect to our section 24 environmental right[66] and it, in turn, makes the EIA the quintessential planning measure to ensure the achievement of sustainable development.[67] Section 24G flies in the face of the central purpose of the EIA and it thus sits uncomfortably in its home in chapter 5 of NEMA, which is dedicated to ensuring IEM and the concomitant objectives pursued in terms thereof.[68] Not only is it an alien in its immediate legislative home, but it is also an odd addition to NEMA viewed holistically insofar as it makes a mockery of the section 2 sustainability principles which underpin the Act and *must* guide the actions of organs of state in all decision-making that 'may significantly affect the environment.'[69] In particular, section 24G contradicts our commitment to a cautious and risk-averse approach to ensuring sustainable development.[70] The provision is thus rendered an incongruity when considered in light of both the language and the purpose of the over-arching legislative framework.

In the absence of any *compelling explicit* legislative guidance regarding the mischief sought to be addressed by the 24G anomaly at the time of its introduction,[71] its presence in NEMA, and in our broader constitutional order, has been rendered all the more circumspect. The above purposive and contextual statutory interpretative analysis shows section 24G in an unfortunate light as a legislative condonation – albeit an arguably inadvertent one – of a fast-track EIA process that has ultimately amounted to an affront to our *environmental right*. It may be that this should not have been so; that section 24G arose out of a well-meaning attempt at law reform aimed at bringing offenders back into the regulatory loop by providing environmental authorities with a tool, inter alia, to put mitigation measures in place to address any environmental damage that has already ensued in the wake of a development. To the extent that section 24G has enabled as much, it is conceded that the section may have its worth. However, it is submitted that the provision is nonetheless inherently problematic and as the below analysis of the case law and compliance and enforcement statistics indicates, the section's use in practice reveals that its costs certainly exceed its benefits.

---

[62] Du Plessis & Kotzé (n 20) at 174. See also *Mhlungu v The State* 1995 (7) BCLR 793 (CC) at para 8.
[63] JHE Basson 'Retrospective authorisation of identified activities for the purposes of environmental impact assessment' (2003) 10 *SALELP* 133 at147.
[64] Section 24(b)(i) of the Constitution (n 19).
[65] Ibid at section 24(b)(iii).
[66] Du Plessis & Kotzé (n 20) at 171.
[67] See Zhao (n 30) at 485 and Field (n 29) at 428.
[68] See section 23(2) of NEMA (n 3).
[69] Du Plessis & Kotzé (n 20) at 177.
[70] Section 2(4)(a)(vii) of NEMA (n 3).
[71] Paschke & Glazewski (n 5) at 146.

The second inherent failing of section 24G is that it limits the *administrative justice right*[72] which requires, inter alia, adherence to the prescripts of procedural fairness. One of these is the *audi alteram partem* requirement, in terms of which, in the environmental context, an interested and affected party should be given 'sufficient opportunity to state his objections at *the earliest possible opportunity* against the identified activity.'[73] Environmental law is often described as administrative law in action[74] and the EIA, as a cornerstone of environmental law, is a process premised on the importance of public participation. As Zhao notes, '[a]n EIA cannot achieve its goal of evaluating the environmental impact of a project fully without *first* obtaining the views of people most likely to be affected by the proposed project.'[75] Section 24G's ex post facto public participation process falls short of this mark in that any valuable input gained therefrom will be meaningless if it is unable to affect the outcome, and most of the time, 'the egg will have been scrambled' and this will be precisely the case.

Finally, section 24G is also fundamentally problematic from a *rule of law perspective* in that, as Davis J highlighted in the *Silvermine* case, 'it is vested law that lawful conduct cannot be based on a prior unlawful foundation.'[76] Insofar as section 24G purports to 'rectify' or legitimate an otherwise unlawful act, it seemingly permits just this. For all the aforegoing reasons – and notwithstanding the value of bringing 'offenders' back into the regulatory loop – section 24G is rendered an inherently anomalous addition to the legislative framework. Instead of mitigating the mischief of developments proceeding outside the regulatory framework, section 24G has exacerbated this mischief: the applicable case law reveals the 24G anomaly to be the real 'mischief' in and of itself.

3. Abuse of section 24G in practice: It has become more cost-effective to break the law than to comply with it

Where EIA laws – presumably inadvertently – endorse a choice between, 'high compliance cost versus minimal penalties for violations',[77] a violation will almost always seem more profitable.[78] This will result in developers budgeting upfront for a penalty amount that is insignificant when compared with the overall cost of development. The ultimate result will be the emergence of a 'widespread practice of ignoring and violating environmental laws'.[79] This has been precisely the outcome that has ensued in South Africa. I turn now to illustrate this

[72] Section 33 of the Constitution (n 19).
[73] Basson (n 63) at144. Emphasis added.
[74] See for example, L J Kotzé 'The application of just administrative action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence' (2004) 7 *PELJ* 1 at 2.
[75] Zhao (n 30) at 498. Emphasis added.
[76] *Silvermine* (n 58) at 488, as explained by Basson (n 63) at 143.
[77] Zhao (n 30) at 500.
[78] Michael Faure 'Effectiveness of environmental law: What does the evidence tell us?' (2012) 36 *William & Mary Environmental Law & Policy Review* 294 at 323.
[79] Zhao (n 30) at 501

practical outcome with reference to the two most recent DEA Reports,[80] together with the disconcerting stream of '24G case law'.

3.1. The salient findings of the DEA Reports

3.1.1. The 2010-11 Report

A simple perusal of the 2010-11 Report does not leave one feeling optimistic: the overall national compliance and enforcement statistics generally leave much to be desired.[81] As far as section 24G goes, the key findings are equally dismal. First, table 2.6 lists the Gauteng Department of Agriculture and Rural Development ('the Gauteng Department') as an 'outstanding performer' for having issued the highest number of section 24G fines.[82] It is noteworthy that of the 58 fines issued, only 43 of them were actually paid amounting in total to a meagre sum of R3 597 370, meaning that an average fine of ± R84 000 was paid – an insignificant amount when compared with the average cost of most developments. The substantial number of 'S24G administrative fines'[83] issued in Gauteng may point to keen enforcement action on behalf of the Gauteng Department, but at the same time it also highlights the fact that section 24G as a *deterrence* mechanism is a non-starter. Interestingly, graph 1 indicates Gauteng as having the most Environmental Management Inspectors (EMIs) per institution by a substantial amount which in turn highlights a strong correlation between EMI presence and enforcement action. At table 4.1.1 the national enforcement statistics are summarised and since the 2008-09 financial year, the total amount of 'S24G administrative fines paid' has been reduced by approximately 50%. At first blush, this seems a good thing, however, read with the rest of the 2010-11 Report, and in particular with table 4.1.2, it is somewhat worrying in that the 'most prevalent crime' in almost every institution, nationally and provincially, is 'the unlawful commencement of [a] listed activity'. The prima facie conclusion is thus that a reduction in fines paid does *not* correspond with a reduction in section 24F offences. One last finding worth highlighting is set out at paragraph 8.2.3 entitled '[n]on-compliant government entities'. Eskom is listed as one such entity that has displayed a flagrant disregard for environmental laws. The 2010-11 Report notes that '[t]his is extremely concerning in that Eskom has well-capacitated environmental personnel which are dedicated to ensure compliance at most of its power generating facilities'.[84] Most worrying is the fact that the detected contraventions relate to the establishment of *new* infrastructure in the absence of

[80] The Reports (n 13).
[81] Table 2.2 of the 2010-11 Report (n 13).
[82] The other provincial departments barely feature, which is cause for further concern.
[83] Defined to mean, '[those fines] paid by applicants who wish to obtain an ex-post facto environmental authorisation despite the fact that they have illegally commenced with a listed activity in terms of S24F of NEMA' (n 13) at 2.
[84] Ibid at 57.

environmental authorisations and that '[a]ll of these matters have resulted in Eskom submitting applications to rectify non-compliances in terms of section 24G of NEMA.'[85] This highlights the fact that even organs of state are quick to exploit the 24G shortcut.

3.1.2. The 2011-12 Report

Parts of the most recent DEA Report leave one feeling slightly more hopeful. In particular, it is noteworthy that the DEA has formally recognised the value of administrative measures to improve environmental compliance and enforcement. Thus, in relation to 'industrial compliance and enforcement', it is noted that, 'resources are now being focussed on criminal *as well as administrative* enforcement processes'.[86] Table 4.1.1 sets out the overall national enforcement statistics and notably, the total amount of section 24G administrative fines paid has more than doubled, totalling R17 627 233 in respect of the 86 fines that were issued. Table 2.2 sheds some light on this dramatic increase by highlighting the fact that 'Vele Colliery contributed more than half of the amount (R9 250 000)'. Table 2.3, read with 2.6, shows that the most 'outstanding [compliance and enforcement] performance' is now happening at national level, with the National Department of Environmental Affairs recording 'the highest value of S24G fines paid, being R11 028 000 from 10 [out of 14] cases.' Disappointingly, table 4.1.2 reveals that the 'most prevalent crime reported' in almost every institution at national and provincial level is *still* 'the unlawful commencement of [a] listed activity' and, unlike the 2010-11 Report, the actual figures are provided and they certainly are cause for alarm. For example, in the past year, 196 and 191 such incidents were reported to the Western Cape Department of Environmental Affairs and Development Planning and the Eastern Cape Department of Economic Development and Environment Affairs respectively. These are disconcertingly high figures given the timeframe. Equally disconcerting are the statistics set out in the table detailing the findings from the 'strategic inspections' in the industrial sector:[87] a simple comparison with the statistics set out in the 2010-11 Report shows that industry continues to commence with listed activities without authorisation and thereafter invokes section 24G. Thus, a 'principle finding related to environmental non-compliance' in respect of almost all the 'facilities' is cited as, 'unauthorised activity for which a section 24G rectification application had been submitted'.[88] Finally, Eskom is again shamed as an obtuse offender and 'the organ of state with the highest rate of non-compliance with environmental legislation'.[89] The following statement is worth emphasising: '[t]he number of Section 24G applications that have been submitted to the DEA by Eskom are evident [*sic*] of continued non-compliance and *it would appear that the*

[85] Ibid.
[86] The 2011-12 Report (n 13) at table 2.4.
[87] Ibid from 35-53.
[88] Ibid.
[89] Ibid at para 8.2.2.

levying of these fines is not resulting in compliance or deterring the company from contravening the law.'[90]

3.2. Relevant case law

A detailed analysis of the applicable case law is beyond the purview of this article. Suffice it simply to highlight these cases insofar as they illustrate two key findings: (i) the abuse of section 24G as a quick fix for developers who have flouted the law at the expense of the *environment*; and (ii) the use of the section as an impediment to truly sustainable *development* in instances where the environmental impact is (prima facie) negligible. The cases discussed provide clear evidence of how the 24G anomaly has been exploited in practice by both industry and government, and they serve as support for an argument in favour of comprehensive and effective legislative reform.

3.2.1. Section 24G as the developer's quick fix

3.2.1.1. *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd*[91]

The applicant in this case ('Kiepersol') was a truly vexatious litigant. The respondents had successfully applied to court for a prohibitory interdict to compel Kiepersol to desist from conducting illegal listed activities; namely the construction of chicken houses and the running of a chicken breeding, rearing, egg-laying and packing business on land zoned for agricultural use (grazing), in the absence of the necessary environmental authorisations. Kiepersol ignored the court order – as well as the preceding section 31L pre-compliance notice[92] – and the respondents had to launch an additional application to compel compliance with the original order. Webster J granted the application and Kiepersol was slapped with a three-fold refusal to allow leave to appeal.[93] The fact that Kiepersol was plainly in the wrong should have been – and indeed was – quite apparent to it. All this notwithstanding, Kiepersol went about its daily (illegal) business knowing full well it was flouting the law and then took matters a step further by bringing an urgent application to prevent 'the respondents from continuing with [the] *lawful* process of execution based upon the court order[s]…'.[94] By the time this spurious litigation came before Ebersohn AJ, Kiepersol had become aware of section 24G and hastily lodged a rectification application with the relevant provincial department – which application, on the

[90] Ibid.
[91] [2008] JOL 22537 (T), '*Kiepersol*'.
[92] Ibid at para 38. A pre-compliance notice was issued by the relevant EMI in terms of section 31L of NEMA on 30 August 2007, pursuant to which Kiepersol was advised, inter alia, that 'a basic assessment is required prior to the commencement of the proposed activity'.
[93] Ibid at paras 20-1.
[94] Ibid at para 47.

facts, had not yet been granted – and paid the requisite administrative fine.[95] Ironically, in doing so, Kiepersol had rendered its defence before the court patently mala fides[96] and the judge took a hard line in the circumstances. He noted that the section 24G application, 'proved on its own admission that Kiepersol has acted and is still acting unlawfully.'[97] The court elucidated detailed reasons for its refusal to grant the order sought. These included, inter alia, the fact that Kiepersol: (i) through 'tactical manoeuvring' attempted to engineer non-compliance with the court orders and 'to compound illegal activity';[98] (ii) had acted with the ulterior motive of stretching out the legal process to obtain an advantage;[99] (iii) was, on its own version, undertaking illegal activities in contravention of the law;[100] and (iv) evidenced a 'recalcitrant and dishonest attitude'.[101] The application was dismissed and Kiepersol was hit with a hefty costs order. The court agreed with the respondents that Kiepersol had been 'systematically orchestrating a procedure in terms of which it could obtain the maximum benefit from its failure to comply with… [the law], while in the interim still profiting from its failure.'[102] The hasty invocation of section 24G was just one instance of such systematic and flagrant circumvention of the law. And so began our trajectory down the slippery 24G slope. A particularly telling statement in the judgment should have rung the warning bells: in refusing to condone non-compliance with the previous court orders, the judge reasoned that to do so would amount to 'condoning the illegal conduct of Kiepersol thereby granting it a further opportunity to profit from its illegal activities. This is not only contrary to the principle of the rule of law but also contrary to the spirit of the Constitution.'[103] This is precisely what the 24G anomaly has enabled.

3.2.1.2. *The Noordhoek Environmental Action Group v Wiley NO and Others*[104]

This judgment was delivered by Mantame AJ on 13 December 2011 and despite nearly three years having passed since *Kiepersol* the facts are perturbingly similar in certain key respects. The application was brought by the Noordhoek Environmental Action Group ('NEAG'), also – like *Kiepersol* – in the wake of non-compliance with an earlier court order. This previous judgment was handed down by Davis J on 19 February 2008[105] and in terms of it, the Old Cape Village Trust (represented by the 1st and 2nd respondents; 'the Trust') and registered owner of

[95] Ibid at para 27 & 29
[96] Ibid at para 32.
[97] Ibid at para 29.
[98] Ibid at para 50(h).
[99] Ibid at para 50(i).
[100] Ibid at para 50(j).
[101] Ibid at para 50(k).
[102] Ibid at para 52.
[103] Ibid at para 80.
[104] (27009/2010) [2011] ZAWCHC 486 (13 December 2011), '*NEAG*'.
[105] *Noordhoek Environmental Action Group v Wiley NO & Others* [2008] JOL 21943 (C).

the erf in question was interdicted and prohibited from using that erf (zoned as 'public open space'), or any portion thereof, as a permanent public parking area. The Trust was further ordered to demolish and remove all permanent parking structures and signage columns already erected on the erf in breach of the zoning scheme conditions. Like Kiepersol, the Trust appealed and leave was refused by both Davis J and the Supreme Court of Appeal.[106] This notwithstanding, the Trust did not comply with the court order and NEAG was compelled to bring contempt and enforcement proceedings. Interestingly, several months after Davis J had ordered the demolition of the permanent structures, the relevant provincial department advised the Trust that the demolition process 'might be a trigger to the environment in terms of the National Environmental Management Act'[107] and requested the appointment of an independent EIA practitioner to draw up a rehabilitation plan. Nothing, however, came of this[108] and instead, as was to be predicted, the Trust employed delay tactics, waiting until January 2011 to make use of the 24G quick fix. NEAG submitted that, 'the Trust sprang into action and made this application in order to regularise its unlawful conduct only after contempt of court proceedings were filed.'[109] This, so it was argued, amounted to mala fides. The court agreed and held that, 'an order of court cannot be evaded and or circumvented by… simply applying to the Premier in order to cure the defect that was already pointed out in Davis J's judgment. The said judgment still stands.'[110] The Trust was thus held to be in contempt and was ordered to give due effect to Davis J's order.[111] This case provides a further illustration of how section 24G is exploited to regularise unlawful conduct at the last minute.

3.2.1.3. Magaliesberg Protection Association v MEC, Department of Agriculture, Conservation, Environment and Rural Development, North- West Provincial Government[112]

This case epitomises a devastating blow to environmental justice and a stumbling block for environmental public interest litigation. Despite providing a useful excursus into those areas of law that permeate the melting-pot of environmental law issues, the findings of the court are disappointing. The applicant voluntary organisation ('MPA') went the whole nine yards in pursuing its case, but to no avail. Disconcerted at the discovery of the development of the Kgaswane Country Lodge ('the Lodge') in the Magaliesberg Protected Environment ('the MPE') in the absence of the necessary environmental authorisations,[113] MPA first raised various objections with the Lodge's independent environmental assessment practitioner

[106] *NEAG* (n 104) at para 5.
[107] Ibid at para 16.
[108] Ibid.
[109] Ibid at para 20.
[110] Ibid at para 23.
[111] Ibid at para 33.
[112] (1776/2010) [2011] ZANWHC 67 (15 December 2011), '*Magaliesberg*'.
[113] *Magaliesberg* (n 112) at para 5.

('Lesekha'). The response from Lesekha was that the development had, in the interim, received the ex post facto 24G stamp of approval by the provincial department ('the Department'). It is noteworthy that in granting this approval, the Department ignored a draft Environmental Management Framework and Plan (EMF)[114] which indicated, inter alia, 'that the area where the Lodge is located is a zone marked "highly sensitive" on the Environmental Sensitivity Map'[115] and that various listed activities such as 'hotels, public and private resorts and conference facilities'[116] would thus be 'undesirable in that particular area'.[117] MPA was concerned that the development of the Lodge in the MPE would, in the circumstances, cause harm, including 'the destruction of indigenous *founa* and *flora*'.[118]MPA thus proceeded to lodge an internal appeal with the MEC against the Chief Director's decision to grant the 24G rectification application. A host of review grounds under the Promotion of Administrative Justice Act[119] were listed. The MEC was, however, quick to dismiss the appeal essentially on the basis that the development of the Lodge was in line with 'the spirit of eco-tourism' in the area and thereby furthered the objective of ensuring sustainable development.[120] MPA then launched the review proceedings (and sought, inter alia, a demolition and rehabilitation order) which came before Leeuw JP who, disappointingly, reasoned along similar lines to the MEC. Selective reference was made to the legal framework; in particular, the court focused on the section 2(2) NEMA objective to 'place people and their needs at the forefront' of environmental management.[121] The touchstone of sustainable development was referred to, but no mention was made of its underlying principles – especially that which requires a risk-averse and cautious approach to development. One by one, each administrative law review ground was dismissed (not always, in my respectful view, justifiably).[122] On the question of rationality review for, inter alia, an alleged failure to consider the 'Rustenberg Spatial Development Framework',[123] the MPA warned that:

> [I]if the Lodge is not demolished, it will set a precedent and encourage other development to follow Kgaswane's example and commence construction activities without any authorisation in the belief now confirmed in precedent, that they will obtain ex post facto authorisation for any operations commenced unlawfully.[124]

The court did not heed this warning, dismissing it as 'mere conjecture and speculation'.[125] The section 24G authorisation, so it reasoned, was granted pursuant to due process and the conditions attached to it would ensure adequate protection of the environment. MPA's

---

[114] Ibid at para 40 & 44-5.
[115] Ibid at para 45(d).
[116] Ibid.
[117] Ibid.
[118] Ibid at para 56.1(a)
[119] 3 of 2000, 'PAJA'.
[120] *Magaliesberg* (n 112) at para 19.
[121] Ibid at para 33.
[122] A discussion as to why I submit as much is beyond the purview of this article.
[123] *Magaliesberg* (n 112) at para 54.1.
[124] Ibid at para 56.2.
[125] Ibid.

allegation that the mitigating measures were meaningless insofar as the development was a fait accompli, was ignored.[126] The court held that this 'eco-tourism' development was in accordance with the prescripts of sustainable development[127] and accordingly the application had to fail and the court refused to order the demolition of the Lodge.[128] Matters did not, however, end here and the court dealt a huge blow to environmental public interest litigation by exercising its section 32(2) discretion[129] in favour of the respondents and ordering the applicant NGO to pay the costs (including those of two counsel).

Thankfully this was not the end of the matter: on 30 May 2013 the Supreme Court of Appeal (SCA) handed down the sequel judgment in this saga,[130] and although it dismissed MPA's appeal on the merits,[131] it reversed the court a quo's order on the issue of costs, with Navsa JA noting that, 'the court below was a trifle harsh in criticising the MPA for persisting in the final relief sought by it'.[132] The SCA recognised MPA as an organisation genuinely concerned with the protection of the environment within the meaning of section 32 of NEMA[133] and thus held that, '[a]ccordingly, [the court a quo] should not have awarded costs'[134] against it. The judgment is furthermore a welcome sequel to its precursor insofar as Navsa JA sheds some light on the distinction between 'pre-building approval and ex post facto authorisation'.[135] In the latter case, although one is 'regrettably left with an already disturbed environment',[136] the value of the 24G authorisation process is that it gives consideration 'to whether any *further* degradation might occur,…. how much actual disturbance of the environment has already occurred',[137] and the necessary mitigation measures in the circumstances. However, by Navsa JA's own admission, ex post authorisation is nonetheless 'regrettable' and it has become all the more so given that it has become norm rather than the exception.

---

[126] Ibid at para 66.
[127] Ibid at para 69.
[128] Ibid at para 85.
[129] Section 32(2) of NEMA (n 3).
[130] *Magaliesberg Protection Association v MEC of Agriculture* (563/2012) [2013] ZASCA 80 (30 May 2013).
[131] Ibid at para 64(1). See paras 51-2 in which the judge elucidates the primary obstacle to MPA succeeding on the merits: '[a] fundamental problem facing the MPA is that it bore the onus of proof in satisfying the court below that it was entitled to an order for demolition, which it acknowledged was a far-reaching remedy…This was an issue not addressed at all by the MPA'.
[132] Ibid at para 63.
[133] Ibid at paras 61-3.
[134] Ibid at para 63.
[135] Ibid at para 55.
[136] Ibid at para 56.
[137] Ibid.

3.2.1.4. *The Body Corporate of Dolphin Cove v Kwadukuza Municipality*[138]

This judgment of the KwaZulu-Natal High Court provides a welcome respite in the wake of the *Magaliesberg* saga. The first point this case headlines is the fact that organs of state (in this case, the Kwadukuza municipality, 'the Municipality') are just as quick to abuse the 24G anomaly as industry. Fortunately, Pillay J took a hard line against such abuse. The application was brought by the body corporate of Dolphin Cove ('Dolphin Cove') for the removal of a promenade on the Balito coastline. The Municipality had begun to reconstruct the promenade on the dunes bordering Dolphin Cove's property, in the absence of the necessary environmental authorisation from the provincial department ('the Department') and without having consulted with Dolphin Cove.[139] Having found that the promenade encroached upon Dolphin Cove's property,[140] the court went on to determine whether its construction nonetheless complied with NEMA. It held that it did not. At the time the matter came before court, the Municipality had lodged a section 24G rectification application, but no finding in respect thereof had yet been made[141] and the MEC had not even determined the amount of the administrative fine.[142] The background facts to this application are particularly dubious: (i) the Municipality acted in breach of the law, despite being aware that authorisation was required[143] and notwithstanding its own expert's cautions that, inter alia, the promenade should have been positioned further leeward to prevent increased deflation of the beach;[144] (ii) it also dragged its heels in bringing the section 24G application pursuant to the Department's request;[145] and (iii) the Department's behaviour was equally poor and indicative of both ambivalence and complacency in administering environmental authorisations.[146] The Municipality's 'eco-tourism argument', unlike in *Magaliesberg*, was not accepted by the court which reasoned that, '[p]ublic pressure and tourism are not compelling reasons to excuse the municipality's conduct… [and] [s]ection 24G is not an invitation to commit offences so that they can be corrected later.'[147] The court found the erection of the promenade to be unlawful on the basis that it encroached on property of private owners and because its construction was 'an offence and the department [had] not authorised it.'[148] In light hereof, and in light of 'the municipality's flagrant, repeated and continuing breach of the law and most importantly, the risk its promenade poses for the environment', an order for costs against the Municipality on the attorney and client scale was

[138] (8513/10) [2012] ZAKZDHC 13 (20 February 2012), '*Dolphin Cove*'.
[139] Ibid at para 47.
[140] Ibid at para 27.
[141] Ibid at para 35.
[142] Ibid at para 39.
[143] Ibid at para 44.
[144] Ibid at para 34. See also para 56 where the court notes that the Municipality 'refused to accept the advice of its own environmental expert, Mr Bundy, on three occasions'.
[145] Ibid at para 55.
[146] Ibid at paras 33 & 39.
[147] Ibid at paras 40-1.
[148] Ibid at para 49.

held to be justified.[149] Despite this welcome outcome, the facts of this case point to the disappointing conclusion that our government departments are ill-equipped to act as guardians of our environmental laws.

3.2.2. Section 24G as an impediment to development

3.2.2.1. Supersize Investments 11 CC v The MEC of Economic Development[150]

This judgment is both confusing and illuminating, and it is in fact – somewhat paradoxically – a confusing aspect of it that is particularly illuminating insofar as it highlights the anomalous nature of section 24G, read with section 24F, of NEMA, and in turn, the danger of ad hoc legislative tinkering. A detailed analysis of this rather peculiar judgment of Fabricius J is beyond the purview of this article. Suffice it simply to highlight its shortcomings insofar as they in turn highlight those of 24G. But first, it is important to note that the facts of this case seemingly necessitated the creative – albeit confusing – reasoning of the learned Judge. The applicant in this case ('Supersize') had commenced the development of an 'eco-estate' township, 'blissfully unaware'[151] of the fact that it had done so on the basis of a fraudulent environmental authorisation purportedly issued by the relevant provincial department ('the Department') but in fact submitted by the applicant's courier, a Mr Mathebula – who was subsequently charged with fraud and sentenced to imprisonment.[152] On being advised of the fraud by the Department, Supersize duly ceased all construction activities and awaited the proper authorisation based on the merits. This never came. Instead, two months later, Supersize was advised that its application could not be processed given that construction had commenced – albeit in good faith – before authorisation was granted.[153] Supersize then obtained an order of court compelling the department to consider the merits of its application. Again, this was not done and the internal appeal was equally unsuccessful; the Department – somewhat tellingly of the anomalous nature of section 24G – advising that 'invariably the EIA process can only be applicable to an activity that has not yet commenced'.[154] The court was thus asked to review and set aside this decision on various PAJA review grounds; the 'crux'[155] being that of 'error of law' on the basis that 'the MEC dismissed the Applicant's appeal on the erroneous assumption that the…application ought to have been dealt with in terms of section 24G of *NEMA*'.[156] Prima facie, this allegation *itself* strikes one as erroneous – section 24F makes the commencement of a

[149] Ibid at para 57.
[150] (70853/2011) [2013] ZAGPPHC 98 (11 April 2013), '*Supersize*'.
[151] Ibid at para 3.
[152] Ibid at para 4.
[153] Ibid at para 5.
[154] Ibid at para 7.
[155] Ibid at para 11.
[156] Ibid at para 13.3.

listed activity – on the plain wording *irrespective* of the fides of the developer[157] – in the absence of the requisite authorisation 'an offence' and the text of section 24G confirms the illegality of such 'unlawful' conduct and necessitates ex post facto approval for its continuation. However, as discussed above, the ambiguities inherent in the poorly drafted '24F and G partnership' create all sorts of practical difficulties; one of which is that presented by the facts of this case. Supersize was entirely innocent – proceeding with a purportedly eco-friendly community development that would presumably have beneficial socio-economic consequences – on the basis of an authorisation which, on the face of it, displayed 'nothing untoward or suspicious'.[158] The dilemma Fabricius J faced was how to give relief to Supersize and avoid penalising the latter for a third party's fraud and the Department's 'incompetence' and 'obstinacy'.[159] This is where the judgment gets confusing: Fabricius J, relying on a textual analysis of sections 24F and G, concludes that they both, 'in the present context refer to criminal proceedings against a person'.[160] Given that Supersize was innocent and thus had not been charged and convicted of the 'offence' in question, logically, so Fabricius J reasons, these provisions cannot apply to it.[161] In my view, the plain wording of the sections does *not* make this conclusion obvious, however, as a matter of logic, for a criminal offence to have been committed the requirement of *mens rea* must (save where the offence in question is a strict liability offence) be present and in instances such as the present case of the bona fide developer, this cannot be met. To this extent, the Judge's creative and insightful – albeit, respectfully, imperfect – reasoning illuminates the incongruities in sections 24F and G. Fabricius J then proceeds to rely on section 24 of NEMA – which is silent on the question of ex post facto authorisation – and the *Eagle's Landing* decision, purportedly to bolster this line of argument but unfortunately further confusing matters given that this latter judgment dealt with authorisations under our different predecessor EIA regime and it has since been criticized.[162] The judge nonetheless goes on to conclude that, *in the circumstances*, to insist upon the 24G approval process would lead to the absurd result of Supersize having to 'admit to a crime it had

---

[157] Section 24F is entitled 'Offences relating to commencement or continuation of listed activity' and provides that: '(1) Notwithstanding any other Act, no person may – (a) commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority…has granted an environmental authorisation for the activity; or (b) commence and continue an activity listed in terms of section 24(2)(d) unless it is done in terms of an applicable norm or standard. (2) It is an offence for any person to fail to comply with or to contravene – (a) subsection (1)(a); (b) subsection (1)(b); (c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity; (d) any condition applicable to an exemption granted in terms of section 24M; or (e) an approved environmental management programme. (3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment. (4) A person convicted of an offence in terms of subsection (2) is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.'

[158] Ibid at para 3.

[159] Ibid at para 15.

[160] Ibid.

[161] Ibid.

[162] See, for example, Basson (n 63) at 141.

not committed', pay a fine of up to R1 million and face the alternative of having to 'demolish what had been done and then again apply for authorisation'.[163] In light of the aforegoing, it was found that the Department's decision to dismiss the internal appeal was based on an incorrect interpretation of the applicable law and thus had to be set aside.[164] This decision was reached without more – there is no order to remit the matter back to the Department. Overall, this outcome may accord with what justice demands on the facts, but practically speaking, it leaves much to be desired: what is Supersize now to do in the circumstances? Proceed on the basis of the fraud? Like section 24G itself, the answer is not clear.

3.2.2.2. The Residents' Association of Hout Bay v Entilini Concession (Pty) Ltd[165]

The landmark judgment of *Fuel Retailers*[166] affirmed the touchstone principle of sustainable development as necessitating 'the integration of environmental protection and socio-economic development'.[167] Kidd has noted that in this respect, the judgment thereby endorses 'the three pillars approach' pursuant to which each of the three considerations (environmental, social and economic) 'must be pursued simultaneously and with equal effort'.[168] The *Entilini* judgment[169] is a welcome endorsement of this approach. The facts, however, are a disappointing illustration of how environmental public interest litigation can be an impediment to environmentally non-invasive socio-economic development. Insofar as section 24G is concerned, this case illustrates how it can be employed for the sake of 'sheer pedantry; formality for the sake of formality'.[170] The applicants in this case used section 24G as part of their '"shotgun approach" in raising a series of hyper-technical arguments challenging the construction of the control building [on Chapman's Peak Drive]'.[171] They sought an interim interdict to stop construction work on the building with its associated toll plaza, on the basis that it would encroach onto a farm situated within the Table Mountain National Park and which forms part of the Cape Floral Region Protected World Heritage Site.[172] Griesel J noted at the outset that, given that the construction of the toll plaza was approved 'with exemplary thoroughness and fairness by the relevant authorities'[173] ten years prior[174] – Entilini Concession (Pty) Ltd had been operating the relevant stretch of the toll road over since 2003[175] – and would go ahead as planned irrespective of the

[163] *Supersize* (n 150) at paras 13.1-3.
[164] Ibid at paras 15-16.
[165] (7648/12) [2012] ZAWCHC 52 (6 June 2012), '*Entilini*'.
[166] *Fuel Retailers* (n 25).
[167] Ibid at para 45.
[168] Kidd (n 33) at 17-18.
[169] *Entilini* (n 165).
[170] Ibid at para 37.
[171] Ibid.
[172] Ibid para 17.
[173] Ibid at para 37.
[174] Ibid at para 18.
[175] Ibid at para 2.

outcome of the interdict application, it was apparent that the applicants sought simply 'to delay its construction until further approvals have been obtained, or further "hoops have been jumped through"'.[176] Section 24G authorisation was raised as one such approval – as an alternative to the 'granting of fresh environmental authorisation for the control building and/or toll plaza'[177] – essentially on the basis that the building's encroachment in the region would disturb 'pristine areas of granite fynbos'.[178] Griesel J found this purported 'harm' to be 'inconsequential'[179] given that the site in question – a 'disused quarry… [with] little or no ecological value'[180] – formed 'a miniscule part of the overall protected area'.[181] One by one, each of the grounds to be satisfied to obtain interim interdictory relief was dismissed in favour of the respondent Province. In relation to the 'balance of convenience / prejudice',[182] Griesel J highlighted the extensive economic cost that the Province would suffer were the interdict to be granted,[183] as well as the adverse social implications of the inadequate, 'ramshackle'[184] 'temporary control structures at the toll booth' which presented 'harsh and occasionally dangerous working conditions [that]… make it difficult to retain staff'.[185] By contrast, the environmental 'prejudice' alleged by the applicants was so minor to almost amount to 'a case of *de minimus non curat lex* or… much ado about nothing.'[186] Although not explicitly expressed, the court exercised its discretion to refuse the interim interdict with due regard to the other pillars of sustainable development,[187] and thus refused the application for interim relief; albeit with no order as to costs.[188]

4. The way forward

4.1. The need for a 'big picture solution'

The above analysis of the case law, together with the statistics set out in the Reports, provides patent evidence of how section 24G is being abused in practice. Aside from its *inherently* problematic features, *practice* reveals that the 24G anomaly has come to be a huge stumbling block on our path to sustainable development. It has also negatively impacted upon the overarching project of improving compliance and enforcement in the environmental arena –

[176] Ibid at paras 18-19.
[177] Ibid at para 22(d).
[178] Ibid at para 26.
[179] Ibid at para 28.
[180] Ibid.
[181] Ibid at para 27.
[182] Ibid at para 31.
[183] Ibid at paras 32-4.
[184] Ibid at para 37.
[185] Ibid at para 35.
[186] Ibid at para 37.
[187] Ibid.
[188] Ibid at paras 39 and 42(b).

mainly because it has inadvertently incentivised non-compliance with our EIA regime as the gatekeeper of environmental sanctity – since, 'at first sight, a violation seems always more profitable'.[189] An improvement in compliance necessitates an improvement in deterrence and section 24G has had the opposite effect. The problem with this section is thus clear. The question that remains is what is the appropriate solution? My view is that it is not that which has been posited in the Amendment Bill.[190] Section 8 of the Bill proposes various amendments to section 24G. One of these is the raising of the maximum administrative fine from R 1 million to R 5 million. This has been proposed pursuant to the observation of, 'the trend of companies budgeting for the section 24G administrative fine and then commenc[ing] with an activity without an environmental authorisation.'[191] The DEA may have acknowledged the failings of section 24G and recognised the nuisance which needs to be addressed, however, it is submitted that the means proposed to address it lack the requisite nuance and will thus not adequately counter the abuse of 24G and the concomitant failings of our compliance, enforcement and sanctioning system. As Kidd has noted, 'the problems with the EIA process are being dealt with on a rather piecemeal basis…and it is hoped that officials will address the real problems, rather than tinker with the legislation.'[192] Sadly, the DEA has not followed this advice and the proposed amendments to our EIA regime espoused in the Amendment Bill leave much to be desired. It is submitted that such ad hoc amendments should be ousted in favour of meaningful legislative reform through the introduction of a fully-fledged administrative penalty system which would go a long way to improving our compliance and enforcement regime, which, 'it is generally accepted… is lacking.'[193] The abuse of section 24G is really just a manifestation of a bigger compliance and enforcement problem and thus, the 24G anomaly should be the impetus for the development of an integrated 'big picture solution'.

Section 24G does have a key redeeming feature which supports the argument for an integrated solution: it introduces the concept of the 'administrative fine' which is 'the only administrative penalty currently provided for in South African environmental law'.[194] Unfortunately, this 'virtue' of section 24G has had 'vice-like' practical effects as the drafters failed to introduce this concept in an effective way – the most obvious drawback being the insignificant penalty amount which practice reveals is factored in as a cost of development

---

[189] Faure (n 78) at 323.

[190] See (n 14 - 15). Note that I do not comment on the further revised amendments of section 24G (with the proposed new title, '[c]onsequences of unlawful commencement of activity') as propounded in the Second Amendment Bill in respect of which formal adoption by Parliament is still pending. For a summary of the relevant amendments set out in Clause 9 of the Bill, see paragraph 7of the Report of the Portfolio Committee on Water and Environmental affairs, 15 May 2013, available at http://www.pmg.org.za/files/doc/2013/comreports/130521pcwaterreport.htm [Accessed 7 June 2013].

[191] Memorandum on the objects of the National Environmental Management Laws Amendment Bill, 2012 (n 14) at 23.

[192] Kidd (n 33) at 265.

[193] Louis J Kotzé & Niel Lubbe 'How to silence a spring: The Stilfontein saga in three parts' (2009) 16 *SAJELP* 49 at 66.

[194] Kidd (n 33) at 279.

upfront and has thus actually *disincentivized* compliance. The introduction of an over-arching administrative penalty system would not only solve the immediate concerns surrounding section 24G abuse; it would also have various 'big picture' results. First, it would serve as the much-needed alternative to the overused command and control measure; namely the criminal sanction. It has been repeatedly emphasised in the literature that, 'the South African criminal justice system is ill-suited, ill-prepared and ill-resourced to be the sole forum for the levying of fines for environmental contraventions.'[195] The inherent drawbacks of criminal enforcement – particularly in the environmental context – which have been well documented,[196] support the need to develop a suitable alternative system of non-criminal sanctions. Secondly, the development of an administrative penalty system would answer the call for greater specialisation[197] on the part of those administering and enforcing environmental laws as it would necessitate the development of institutions staffed by well-trained and competent role-players instead of the 'overwhelmed provincial staff'[198] who all too frequently evidence a real lack of appreciation and understanding of our EIA regime. Thirdly, such institutional improvements will have the knock-on effect of giving our legislative framework the real teeth that it currently lacks insofar as the effectiveness of a legislative regime is determined in large part by the effectiveness of the institutions which underpin it.[199] The net result of all of these benefits would be improved deterrence[200] and thus a better functioning compliance and enforcement system. The failings of section 24G, together with its glimmer of hope – the notion of the administrative fine – should be the catalyst for this much-needed reform.

---

[195] Melissa Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) 16 *SAJELP* 93 at 102.

[196] See for example, Michael Kidd 'Alternatives to the criminal sanction in the enforcement of environmental law' (2002) 9 *SAJELP* 21 at 27-28.

[197] Louis J Kotzé & Andries J van der Walt Kotzé L & Van der Walt A 'Just administrative Action and the issue of unreasonable delay in the environmental impact assessment process: A South African perspective' (2003) 10 *SAJELP* 39 at 44: the authors highlight the problem of 'lack of environmental expertise' as one of the reasons for the reticence on behalf of authorities to administer properly our EIA regime.

[198] Wood (n 31) at 55.

[199] Charles M Kersten 'Rethinking transboundary environmental impact assessment' (2009) 34 *Yale Journal of International Law* 173. See also Faure (n 78) at 299.

[200] Faure (n 78) at 323-4 refers to these jurisdictions which employ administrative penalties to illustrate the point that such penalties are more effective in deterring violations than criminal measures. At 324 the author notes the following: '[m]ore powerful [than criminal measures] is probably the possibility for some environmental agencies to impose administrative fines. This exists for example in legal systems like Austria and the Netherlands that have, in addition to the criminal law, the possibility of administrative fines. German research shows that the likelihood that these administrative fines…are imposed for administrative violations (referred to as Ordnungswidrigkeiten) is substantially higher than the likelihood of a prosecution in a criminal court. Therefore…in systems which allow administrative fines in addition to criminal prosecution one can add substantially to expected costs and thus to deterrence.' See further Fourie (n 195) at 102 where the 'trends in comparative international jurisdictions' are explored. The USA, Belgium, Finland, Germany (described [at n 30] as having 'the most coherent and comprehensive system of regulatory enforcement'), Greece, Italy, Portugal, Sweden, Spain, Equitorial Guinae, Peru and Mexico are referred to as examples of countries with 'established systems of administrative non-criminal sanctions' (at 103).

4.2. How would the administrative penalty system work in relation to section 24G?

The arguments in favour of the development of a 'one-stop-administrative-penalty-shop', together with the proposals for its institutional structure and mandate, have been well canvassed in our literature, as well as that of comparative international jurisdictions,[201] and I do not intend to reinvent the wheel, given the scope of this article. Kidd argued in 2002 already that, 'administrative penalties have a role to play in South African enforcement measures'.[202] Fourie took this argument to the next level in her persuasive 2009 paper entitled, '[h]ow civil and administrative penalties can change the face of environmental compliance in south Africa'.[203] It is now 2013 and our regulatory regime has yet to have this 'face-lift'. We need not even rely on the convincing example set by other jurisdictions such as the United States, Germany, Austria and the Netherlands, for example[204] – our home-grown hero in the competition law domain provides the blueprint to enable this development in the environmental sphere.[205]

In light of the aforegoing, it is argued that NEMA (and possibly also the specific environmental management acts (SEMAs)[206] should be amended to make provision for such an administrative penalty regime to be administered by an independent specialist environmental tribunal ('the Tribunal'), staffed with presiding officers who are well informed on environmental law. The Tribunal should be a tribunal of record[207] and its mandate should be to

---

[201] See Fourie (n 195); Faure (n 78) at 324 and for a comprehensive discussion of the American system, see Richard R Wagner 'Administrative decision-making by Judges in the United States' Environmental Protection Agency Administrator's civil penalty process: Whatever happened to the law?' (2008) 28 *Journal of the National Association of Administrative Law Judiciary* 80.

[202] Kidd (n 196) at 37.

[203] Fourie (n 195).

[204] Faure (n 78) at 323-324.

[205] The regime provided for under the Competition Act (n 18) can be summarised briefly as follows. Chapter 4 of the Act provides for the establishment of three specialist bodies: part A establishes the independent Competition Commission (the Chief Executive Officer of which is 'the Commissioner'), part B establishes the Competition Tribunal and part C establishes the Competition Appeal Court. The functions of the Commission are set out in section 21 and include, inter alia, the investigation and evaluation of alleged contraventions of prohibited practices under the Act (for which purpose the Commissioner may appoint inspectors with various powers, including those of search and seizure) and the referral of certain matters to the Tribunal – which is a 'tribunal of record'. The Tribunal's functions (set out in section 27) are essentially adjudicative in nature: it adjudicates on any prohibited conduct under the Act, as well as any other matter which may be considered by it under the Act, and it hears appeals from and reviews decisions of the Commission which are referred to it. The Tribunal's remedial powers are fairly wide: section 27(1)(d) empowers it to 'make any ruling or order necessary or incidental to the performance of its functions in terms of this Act', including, in specific instances, the award of an administrative penalty under section 59 (for, inter alia, various prohibited practices and for non-compliance with certain provisions of the Act). The maximum penalty is 10% of the offending firm's annual turnover and exports in the preceding financial year. Section 59(2) provides for various factors (including the nature and extent of the contravention and ensuing loss) to guide the Tribunal in awarding an appropriate penalty. Section 36 establishes the Competition Appeal Court as a court of record with similar status to that of a High Court and section 37 provides for the Court's functions. It may review a decision of the Tribunal, consider an appeal from the Tribunal and give any judgment and make any order, including an order to confirm, amend or set aside a decision of the Tribunal, as well as an order to remit a matter to the Tribunal for a further hearing. For further analysis of the administrative penalty regime established under the Act, see Fourie (n 195) at 113-7.

[206] Defined in section 1 of NEMA (n 3).

[207] Fourie (n 195) at 114.

adjudicate on any prohibited conduct under NEMA (and possibly also the SEMAs).[208] Alternatively, if this is initially too ambitious in the South African context, the mandate could be circumscribed during the Tribunal's infancy by limiting it to the adjudication of prohibited conduct solely in the domain of environmental authorisations. The Tribunal would likely need to be supported by a specialist appeal court with the same status as a High Court, much like the Competition Appeal Court.[209] The EMI – already the most noteworthy role-player in environmental compliance and enforcement[210] – would fulfil a more advanced role akin to that of the Competition Commission, and would be responsible for, inter alia,[211] referring all prima facie cases to the Tribunal for adjudication. Criminal prosecution would be reserved for the most egregious cases and would run either in parallel with, or pursuant to the outcome of the administrative proceedings.[212] I turn now to propose how this administrative penalty regime would apply in relation to section 24G.

It is submitted that, where a person has unlawfully commenced a listed activity without the requisite environmental authorisation, in breach of section 24F(1)(a), that person should no longer have the right to apply for 'rectification'. Rather, the EMI, (as *dominis litis*) having investigated the matter and with evidence of a prima facie case, should, as a matter of course, refer it to the Tribunal for adjudication. If, during the course of investigation by the EMI, strong evidence points to mala fides on the part of the offender in question, the EMI may choose to refer the matter to the National Prosecuting Authority (NPA) for parallel criminal prosecution.[213] The Tribunal would conduct a public hearing into the matter 'as expeditiously as possible and in accordance with the principles of natural justice.'[214] This may be done informally or in an inquisitorial manner, depending on the facts of the case. The standard of proof would be the civil standard of a balance of probabilities. The evidence as assessed on this standard will, at the discretion of the presiding officer, determine: (a) whether 'rectification' should be granted; and (b) the amount of the administrative fine. Both of these decisions should be informed by guidelines promulgated by regulation in order to allow for flexibility. The fine should also *not* be capped at a fixed maximum amount in line with the 'deterrence hypothesis', in terms of which: 'a potential polluter will make a rational calculus of the costs and benefits of complying with environmental regulation and will only comply when the expected costs of a violation are higher than the potential gains.'[215] A degree of legal uncertainty should thus be

[208] Fourie (n 195) postulates a wider mandate – and it is hoped that this might ultimately be achieved – but it may perhaps be overly ambitious; certainly during the Tribunal's infancy.
[209] Ibid at 115.
[210] See, for example, the Reports (n 13), which clearly illustrate this.
[211] See Fourie (n 195) at 114, for possible additional functions comparable to that of the Competition Commission.
[212] Ibid at 105, drawing on the US example.
[213] Ibid.
[214] Ibid at 116.
[215] Faure (n 78) at 321.

retained insofar as it 'serves to reduce undesirable behavioural alterations'.[216] As Nash notes, 'introducing uncertainty into the precise content of ex post rules limits the ability of societal actors to adjust their ex ante behaviour'.[217] The answer, he notes, is 'constrained randomness'.[218]

The penalty should be determined based on assessment of various factors including the economic benefit derived from flouting the law,[219] as well as gravity of the harm and severity of the loss that ensued as a result thereof.[220] If a prescribed maximum penalty is to be set, it should not be a fixed amount, but rather a percentage (e.g. 10%) of the total asset value of the development in question. Ex post facto authorisation should be permitted in certain limited circumstances only, which will ensure the requisite degree of nuance that the proposed amendment fails to achieve. Thus, based on an assessment of the evidence, 'rectification' should be permitted *only*: (a) in the absence of intent (/mala fides); (b) where there is no evidence of persistent wrongdoing; and (c) depending on the severity and extent of the harm suffered.[221] Where, on the other hand, the facts point to patently egregious conduct, for example where the person is a 'repeat offender', or the harm is particularly severe, then ex post facto authorisation should be refused, a suitable rehabilitation order should be made and the administrative fine should be suitably hefty. The latter particularly 'culpable subset of offences'[222] should then, as a matter of course, be addressed through the criminal justice system in the normal course.

5. Conclusion

In this article I have sought to highlight both the inherent failings and the practical abuses of the section 24G anomaly. The section has proven to be an affront against our EIA regime as the key measure utilised to give effect to the environmental right and its underlying commitment to sustainable development. These failings of section 24G must be considered against the backdrop of our legislative framework, and in light of the broader-scale failings of our environmental compliance and enforcement system, as well as our criminal justice system. Such a holistic assessment points to the inescapable conclusion that meaningful legislative reform is required. I have argued that this reform can best be achieved through the introduction

---

[216] Jonathan Remy Nash 'Allocation and uncertainty: Strategic responses to environmental grandfathering' (2009) 36 *Ecology Law Quarterly* 809 at 825.
[217] Ibid.
[218] Ibid at 827.
[219] See Marcia E Mulkey M 'Judges and other lawmakers: Critical contributions to Environmental Law enforcement' (2004) 4 *International Journal of Sustainable Development, Law and Policy* 2 at 7, who notes that, 'in general the maximum penalty should be sufficient to recapture the economic advantages from non-compliance where appropriate.'
[220] Fourie (n 195) at 110 & 115.
[221] There may be additional factors (eg the degree to which the respondent has cooperated with the EMI and the Tribunal etc.) but these are the key criteria that ought to be considered.
[222] Kidd (n 33) at 276.

of an administrative penalty system in South African environmental law. Both the failings of section 24G, as well as its redeeming incorporation of the notion of an administrative fine, render this flawed section the ideal catalyst for the creation of the legislative and institutional infrastructure needed to develop this ‘big picture solution’.