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WESTERN CAPE PROVINCIAL EVALUATION PROJECT

EVALUATION OF THE IMPLEMENTATION AND IMPACT OF ENVIRONMENTAL IMPACT ASSESSMENT (*EIA*) DECISION MAKING FINAL REPORT

Prepared for:

Directorate Planning and Policy Coordination
Western Cape Department of Environmental Affairs and Development Planning

Prepared by:

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Acronyms and Abbreviations

BAR	Basic Assessment Report
CCT	City of Cape Town
Constitution	Constitution of the Republic of South Africa, 1996
D-MOSS	Durban Municipality Open Space Systems
DPME	National Department of Performance Monitoring and Evaluation
EAP	Environmental Assessment Practitioner
EA&DP	Department of Environmental Affairs and Development Planning
ECA	Environment Conservation Act, 73 of 1989
EIA	Environmental Impact Assessment
EIA Regulations, 2010	Environmental Impact Assessment Regulations, 2010 (GNR 543 of 18 June 2010)
EIAR	Environmental Impact Assessment Report
EMP	Environmental Management Plan
I&APs	Interested and Affected parties
LUPO	Land Use Planning Ordinance, 15 of 1985
M&E	Monitoring and Evaluation
MEC	Member of the Executive Council
NEMA	National Environmental Management Act, 107 of 1998
NEP	National Evaluation Plan
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PEP	Provincial Evaluation Plan 2013/14–2015/16
PSOs	Provincial Strategic Objectives
RBM&E	Results-Based Monitoring and Evaluation
S&EIR	Scoping and Environmental Impact Reporting
SCA	Supreme Court of Appeal
SOPs	Standard Operating Procedures
TOR	Terms of Reference

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1. INTRODUCTION

The Western Cape Department of Environmental Affairs and Development Planning (the Department or EA&DP) appointed Cullinan & Associates as service provider to evaluate Court challenges against environmental impact assessment (EIA) and other administrative decisions made by the Department. One of the challenges facing the Department is the high number of High Court review applications against its EIA and other administrative decisions. These legal challenges results in delays in decision making to grant/refuse environmental authorisation for development projects, which in turn have cost and economic implications that are felt not only by the Applicant and Department, but can also impact on the economy of the Province.

The evaluation of the implementation and impact of EIA decision making project (the Project) forms part of the Western Cape Provincial Government's Provincial Evaluation Project (PEP). The intention is to evaluate the implementation of the environmental impact assessment (EIA) decision making process in the Province with the view to strengthening the current system of EIA review and decision making in the Western Cape and ensuring decisions that are more defensible and sustainable. The Terms of Reference (TOR) for this Project are appended in APPENDIX 1.

The report is organised into the following sections:

- **Background** which briefly outlines the purpose of the Project, the scope of work and expected outcomes;
- **Project approach and methodology** which includes a description of the approach and methodologies used in compiling the case law database and analysis, as well as the criteria for selecting cases and questions guiding the analysis of cases and the EIA decision making framework**;**
- **Principles of administrative law** which introduces the principles of administrative law which govern decision making by authorities and serve as overarching framework for all administrative decisions;
- **EIA decision making** framework which sets out the legislative context for EIA decision making and provides a roadmap of the fundamental elements in the EIA decision making process. The analysis of the Department's Standard Operating Procedures (SOPs) and guidelines is captured in this section which focuses on the correctness of procedures, completeness of information, what is relevant to the decision and how conclusions are reached in decision making;
- **Case analysis findings and trends emerging from Court challenges** which discusses the following major trends in respect of the selected case law based on analysis of the grounds of review: changed circumstances, requirement of authority, procedural fairness, disjointed decision making, reasonableness and effects of government inaction; and
- **Lessons learned and recommendations** which builds on the case analysis and highlights the major lessons from the case law and recommends measures that could be introduced to improve decision making and strengthen operating procedures and systems within the Department.

2. BACKGROUND

2.1 Purpose of the Project and scope of work

The Department is faced with an increasing number of Court applications challenging its decisions in terms of planning and EIA legislation. Judicial review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) is the primary method used to challenge the Department's EIA decisions and have substantial negative implications for the Department in terms of costs, time delays and additional resources and capacity required. In response to the above the Department intends to identify and utilise the lessons learnt from Court challenges in order to inform ways of strengthening the current system of environmental impact assessment review and decision making within the Department (the Project). The Project's aim is to ensure more defensible decisions and more sustainable decision making by the Department.

The Project scope envisages three phases. The first phase concerns the identification and compilation of databases containing relevant case law reviewing EIA decisions by the Department, other relevant decisions by the Department and relevant decisions made by other competent authorities. The second phase concerns the review and analysis of the listed cases to identify trends, lessons, gaps and challenges relating to the existing EIA decision making process. During the third phase, the findings of phase two are used to formulate recommendations and guidelines on how to improve the existing system to make EIA decisions more defensible.

The Project is included as one of the 10 evaluations agreed upon as provincial priorities in the Provincial Evaluation Plan (PEP), 2013/14–2015/16. The PEP forms part of the roll-out of the National Evaluation Policy Framework and the National Evaluation System which is coordinated and overseen by the National Department of Performance Monitoring and Evaluation (DPME). The PEP is aligned to the National Evaluation Plan (NEP) which sets the benchmark for evaluations in the country. The guidelines for the National Evaluation System being developed by DPME set the minimum norms and standards within which evaluations and improvement plans should be produced. The PEP focuses on a variety of government interventions and Provincial Strategic Objectives (PSOs). It also takes into account the existing Province-wide Monitoring and Evaluation Framework in which the Results-Based Monitoring and Evaluation (RBM&E) approach is articulated.[1]

2.2 Expected outcomes

The Project was done in terms of, and is aligned with, the PEP. It is worth noting that the expectations contained in the PEP and those ultimately agreed to for the Project differ to a degree.

In terms of the PEP, the key focus of the evaluation is to seek ways of improving policies, procedures and processes relating to EIA "in order to reduce Court cases". From the outset of the Project, the parties acknowledged and agreed that the public will litigate regardless of the quality of decisions and that the recommendations should therefore be aimed at putting the Department in a better position to successfully defend its decisions.

[1] Western Cape Provincial Evaluation Plan 2013/14–2015/16, p5

The PEPs evaluation methodology is statistical in nature, setting evaluation questions such as these below:

- How many Court cases have been dealt with from 2009/10 to date?
- How many cases have been successful and how many not successful?
- How much has been spent since 2009/10 on Court cases?
- What is the relationship [correlation] between the implementation of the EIA processes or guidelines and the areas on which the public challenges the Department in Court?

Despite incorporating a statistical methodology in the initial iterations of the Project work plan, this methodology was found to be inappropriate and unhelpful for this Project. Firstly, only one of the three classes of cases is related to EIA decisions by the Department. Secondly, only a small selection of EIA related Court challenges were analysed, many of which were pending at this time. Accordingly, the sample is not a statistically correct reflection of the challenges to date and is incapable of providing credible statistics relating to the number of challenges, the number of successful challenges, litigation costs or correlations between implementation/ challenges.

Through ongoing engagement with the Department, the primary PEP outcomes, focussed on reducing the Department's involvement in Court cases, has shifted to more pragmatic outcomes aimed at ensuring that the decisions by the MEC are upheld on review. These outcomes will include recommendations relating to:

- improved argument and reasoning when setting out the reasons for decision;
- not only compiling requisite information but testing the sufficiency of such information; and
- priority grounds of review to protect against in future.

3. PROJECT APPROACH AND METHODOLOGY

3.1 Project approach

The following factors played a role in determining how to approach the evaluation of the implementation and impact of EIA decision making in the Province. The main consideration was to ensure that the approach would achieve the primary purpose of undertaking the evaluation as specified in the TOR[2]. From the stated project purpose - captured in the text box - it was clear that the work needed to focus on Court challenges and identify ways in which to strengthen and improve the Department's current system of determining whether or not an EIA had been carried out correctly, and whether or not the resulting information was adequate, to make a decision to grant or refuse authorisation.[3] Another consideration that determined the approach was the importance of producing deliverables that would not only meet the Department's expectations and requirements of the TOR, but would also add value. To achieve this, the approach needed to be both practical and innovative and also draw on both the Department and service provider's extensive governance and litigation experience in the environmental sector.

> *"The focus of this Terms of Reference is to, based on Court challenges, evaluate the implementation of the environmental impact process within the Western Cape, in order to ascertain how to strengthen the current system of environmental impact assessment related review and decision making in the Western Cape."*

In light of the above considerations, the underlying approach entailed close and regular engagement with the Department, through its project manager and Project Steering Committee. This ensured that the expectations of both the Department and Provincial Evaluation Plan Project were taken into account throughout the Project's duration and in respect of each of the key Project phases and activities (these are described in more detail in the section on methodology which follows below). Close and regular interaction with the Department further served to ensure that the deliverables were aligned with the Department's specific need to improve its EIA decision making process and its ability to formulate defensible and robust decisions. Regular interaction took place between the service provider and Department regarding the scope and focus of the evaluation project, the sample of cases to be analysed and expectations with regards to identifying decision making trends. This interaction took the form of regular progress meetings with the Project Steering Committee, regular written progress reports, a workshop with key Departmental officials and ongoing communication with the Departmental project manager. As a result of this regular and close interaction certain refinements were made to the compilation of the case law database, the review and analysis of case law, review of the Department's decision making framework, and the identification of trends, lessons learned, gaps and challenges. Some examples of the practical application of the close working approach during the course of the Project are highlighted in the table below. Additional information is captured in the action minutes of the inception and progress meetings and the bi-monthly progress reports which are appended to this report (APPENDIX 2 - 4).

[2] Paragraph 1.2 of the Terms of Reference, p2.
[3] Section 1 of NEMA defines "review", when used in Chapter 5, to mean "the process of determining whether an assessment has been carried out correctly or whether the resulting information is adequate in order to make a decision.

Table 1: Practical application of close working approach

ISSUE/PROJECT ACTIVITY	ENGAGEMENT WITH DEPARTMENT
Compilation of case law database	The service provider proposed the format for analysing the cases and designed a template to capture information on the review of the selected individual cases. This was presented to and discussed with, the Project Steering Committee and subsequently amended to incorporate their comments and suggested changes. For example, the Department requested that the template also reflect where a Court held that the Department had made a good decision and indicate where the judgment was wrongly decided. The classification and selection of cases was done jointly by the Department and service provider to ensure a representative sample with regards to administrative review grounds. Based on discussion with the Department, additional environmental cases from other Provinces were included in class C cases (classification of cases and criteria used to select individual cases is described in more detail under point 3.2 below).
Analysis of case law	The service provider refined the case law analysis methodology to take into account assumptions that were verified in the Inception Meeting of 24 February 2014 and certain practical factors that became apparent in the early phases of the Project. These practical factors related to the: • completeness of the Department's records of review application matters; • availability and completeness of Court records; and • practical feasibility, and cost implications, of interviewing counsel to determine the trends, gaps and lessons relating to legal challenges.
Review of the EIA decision making framework	The service provider presented a conceptual outline of the EIA decision making framework to the Project Steering Committee for discussion and adoption. The concept framework was adopted without changes and used as the basis for reviewing the Department's internal SOPs procedures and guidelines.
Identification of trends, lessons learned, gaps and challenges	The service provider recommended that a 'brainstorm' session be held involving members of the consultant team and key officials involved in EIA decision making to reflect on the 'mapping' of the decision making framework and key findings with regards to the identification of trends, lessons learned, gaps and challenges. The brainstorm was not a requirement under the TORs and therefore not included in the bid proposal or budget. It was held on 11 July 2014 and involved decision makers, case officers and appeal officers from the Department.

3.2 Project methodology

The key elements of the project methodology are illustrated in figure 1. These elements capture all the phases and activities spelt out in the description of the scope of work contained in paragraph 2.3 of the TOR.

Figure 1: Key elements of methodology

To meet the TOR requirement of compiling a database of case law (phase 1 of the TOR), it was necessary to develop a template for capturing information pertaining to each of the cases reviewed. The following three key elements listed in figure 1 related to activities that had to be performed under phase 2 of the TOR, namely the review and analysis of trends, lessons learned, gaps and challenges. The development of practical recommendations corresponded with phase 3 of the TOR.

For purposes of project work flow planning, the high level phases and major activities identified in the TOR were refined and broken down in more detail to identify the specific activities and tasks that needed to be undertaken. These were then grouped according to the logical work flow[4] into six project activity phases in a detailed Project Work Plan. Figure 2 provides an overview of the six project activity phases that are described in more detail in the Project Work Plan. This sets out which specific activities and tasks were included in each of the six project activity phases; indicates the key milestone for each activity; and sets time frames. The activities involved in project inception and the methodology applied in compiling the case law data base and analysis of the case law and Departmental decision making framework are described in more detail below. Phases 4 and 5 entail report writing and the final phase is project handover. The activities involved in these project phases are essentially self-explanatory and do not require further elaboration.

The project work plan was presented to the Project Steering Committee at the Inception Meeting and amended to incorporate the changes suggested by the Project Steering Committee. The final version of the project work plan is appended in APPENDIX 5.

[4] Workflow in the context of this report refers to the activities and tasks that need to be undertaken to achieve the scope of work specified in the TORs, and the sequence and timing of these activities and tasks.

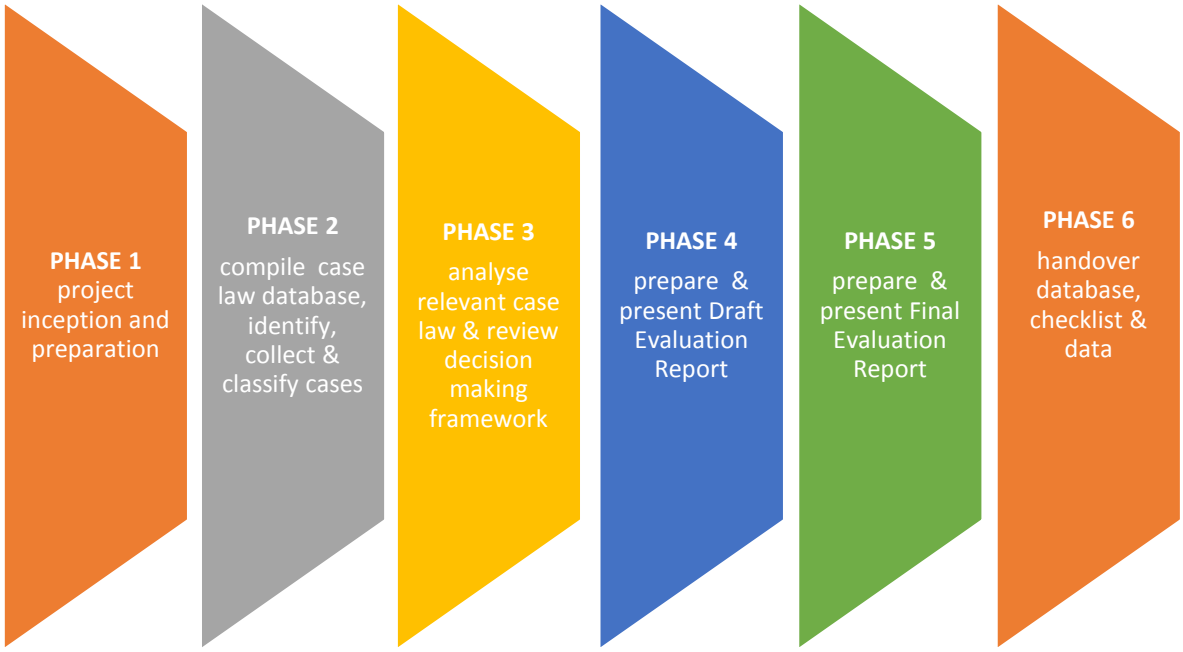

Figure 2: Project Phases

Phase 1: Project inception and preparation

The main objective of this first phase was to clarify and agree on the scope of work; finalise contractual arrangements with the Department; agree to progress reporting arrangements; confirm and agree on project deliverables; refine the project methodology; and develop and agree to a detailed Project Work Plan with milestones and time frames. Accordingly, this phase focused on project start up and the main activities included the Inception Meeting with the Departmental Steering Committee which took place on 24 February 2014; the development of the detailed Project Work Plan; the conceptualisation of the data capture template for the case law database; and the preparation of the Inception Report. The Draft Inception Report was submitted to the Department on 10 March 2014 and included the Project Work Plan and data capture form template. The Final Inception Report, which included some minor amendments to incorporate Departmental comments, was submitted to the Department on 23 April 2014.

The amended Inception Report is appended in APPENDIX 2 and the action minutes of the Inception Meeting and data capture form template are appended as Annexes 2 and 3 respectively to the Inception Report.

Phase 2: Compilation of case law database

The objective of this phase was to compile the case law database and accordingly the activities focused on identifying the best sources of information; finalising the selection of cases to be included in the case analysis; and identifying, collecting and cataloguing the selected cases. The two key activities covered in this phase were data gathering and the selection of cases to be analysed.

Data gathering

The initial arrangement, as agreed to at the Inception Meeting, was to rely primarily on the Court record which the service provider would uplift from the High Court. However, it soon became apparent that this arrangement was inefficient and causing delays because the High Court's records were incomplete and disorganised. The problems experienced in uplifting the Court record meant that the data gathering methodology had to be amended. To identify gaps, the status of information available from the Court record was captured in a spreadsheet. This was communicated to the Department with the view to locating the missing documentation on Departmental Court files and providing the service provider with electronic copies of the missing documentation. (The spreadsheet was appended to the first progress report, covering the period March – April 2014, which was submitted to the Department on 23 April 2014. The progress report is appended in APPENDIX 3 to this report.)

The Department's internal record keeping system for litigation matters was set up in 2009 and has been a work in progress since. Accordingly, the case files provided by the Department were primarily post 2009 and were received in varying degrees of completeness.

Certain class A and B cases offered limited insight because many are pending at this time and the settlement agreements for matters settled before judgment were not made available. Due to time and budgetary constraints it was agreed that legal counsel in the matters would not be interviewed as initially envisioned. The case law database was populated from information contained in founding documents and judgements available from the Court record and Departmental Court files.

Classification and selection of cases

The overarching objective of classifying and selecting cases was to isolate those cases able to improve the EIA decision making process and make the Department's decisions more defensible. In other words, cases which illustrated what the Department was doing wrong; what it was doing well; and what other decision makers were doing right or wrong. To ensure that defects, lessons and administrative principles are extracted from the most appropriate sources, cases were classified into the following three classes, namely:

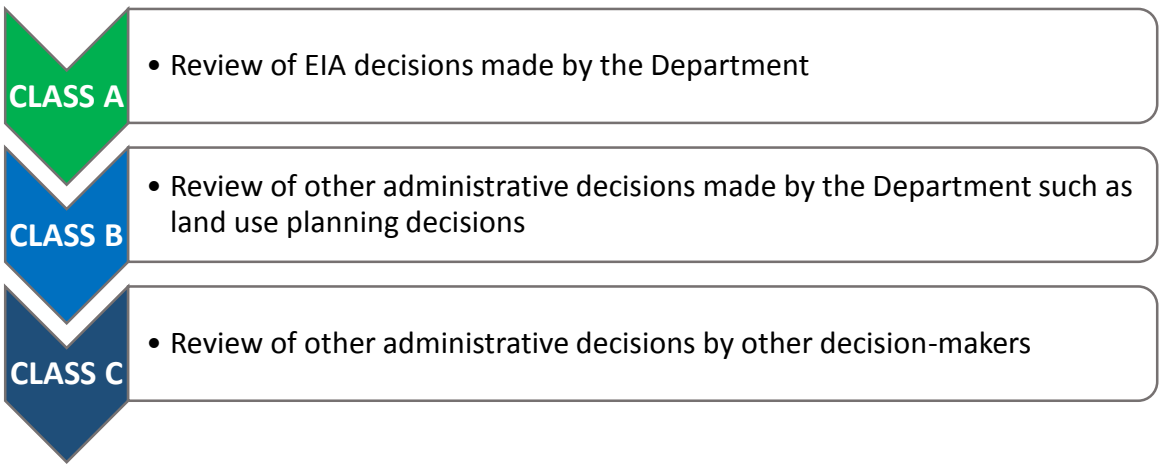

Figure 3 Classification of cases

The Department selected class A and B cases which it deemed valuable for this evaluation. These cases were sourced largely from the Department's internal record keeping system which limited the availability of case files predating 2009/2010.

The service provider was responsible for recommending class C cases to the Department and the final selection of these cases was approved by the Project Steering Committee. The choice of class C cases was based on the following criteria which was presented to, and approved by, the Department and Project Steering Committee:

- cases confirming fundamental principles of administrative law;
- cases confirming principles of EIA decision making; and
- cases providing lessons and examples of sound decision making processes.

The rationale for including class C was twofold. Firstly, persons involved in the decision making process are less likely to make fatal errors if they are aware how the principles administrative law finds expression in case law and how a Court will assess the decision making process under review. Secondly, certain decision making processes are more robust than others and it is prudent to compare the EIA decision making process with other decision making processes to assess whether checks and balances can be transplanted from the one to the other.

The cases selected under each class are identified below and the class case lists are appended in APPENDIX 8, 9 and 10.

Class A cases

This class of cases covered cases in which the EIA decisions made by the Department had been challenged. Nine cases were selected under this category to identify strengths and weaknesses in the Department's EIA decision making process.

- ✓ *Sea Front for All*
- ✓ *Hangklip/Kleinmond Federation of Ratepayers Association*
- ✓ *SLC Property Group Pty (Ltd) and Longlands Holdings Pty (Ltd)*
- ✓ *Dealtime Trade 63*
- ✓ *Shadewind Pty (Ltd)*
- ✓ *Gonnemanskraal Home Owners Association*
- ✓ *Lions Watch Action Group*
- ✓ *Durbanville Community Forum*
- ✓ *Astral Operations*

Class B cases

The following 12 cases were selected to provide examples of strong or weak administrative decisions made by the Department in land-use planning decisions which had been challenged:

- ✓ *Houtbay & Llundudno Environmental Action Group*
- ✓ *Clairisons*
- ✓ *Lagoon Bay Lifestyle Estates*
- ✓ *Colmant*
- ✓ *Habitat Council*
- ✓ *Green Collection Four (2010)*
- ✓ *Green Collection Four (2011)*
- ✓ *Folkes Holdings*
- ✓ *Llundudno Civic Association*
- ✓ *Wesson*
- ✓ *Lezmin*
- ✓ *Ithemba Farmers Association*

Class C cases

This class of cases served to illustrate general principles on how courts will assess the decision making process on review. The following 11 cases were selected to highlight pivotal administrative law principles and procedures in decision making:

- ✓ Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen
- ✓ Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another
- ✓ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others
- ✓ Minister of Health and Another v New Clicks SA Pty (Ltd) and Another
- ✓ Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others
- ✓ Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others
- ✓ Fuel Retailers Association of South Africa v Director-General: Department of Environmental Management
- ✓ Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Limited trading as Pelts Products and Others
- ✓ Vaal Environmental Justice Alliance v Acerlormittal
- ✓ Interwaste (Pty) Ltd v Ian Coetzee
- ✓ Retail Motor Industry Organisation & Circuit Fitment CC v Minister of Water and Environmental Affairs
- ✓ Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another
- ✓ AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the Southern African Social Security Agency and Others

Phase 3: Analysis of case law trends, gaps and lessons learned

The main objective of phase 3 was threefold, namely to:

- establish trends in review applications lodged against EIA and planning decisions made by the Department;
- review the EIA decision making framework that is used in the Department with the view to identifying gaps and other aspects that should be addressed to improve the Department's decision making; and
- identify lessons learned from judgments against other decision makers that could contribute to improved EIA review and decision making within the Department.

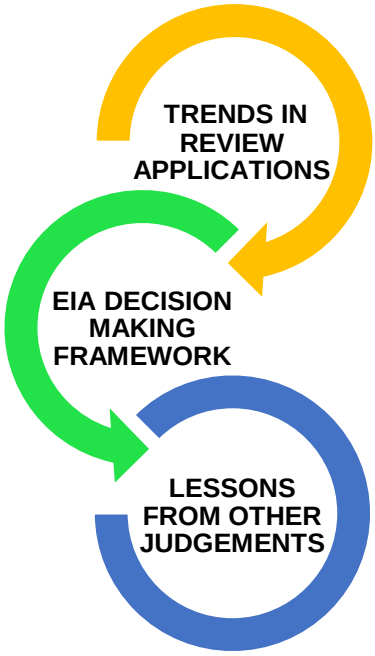

Figure 4 Objectives of phase 3

These objectives reflected the three primary questions spelt out in the TOR that the evaluation of case law and analysis of trends, gaps and lessons learned had to address. Additional evaluation questions were captured in the 2013 Provincial Evaluation Plan. It was agreed at project inception, however, that the analysis would be guided primarily by the questions formulated by the Department and only address the PEP questions to the degree that these questions fell within the scope of this Project. Both sets of questions are captured in the table below.

Table 2 Evaluation questions

DEADP EVALUATION QUESTIONS	PEP EVALUATION QUESTIONS
i. What are the trends emerging from Court challenges relevant to the Department's decision making in terms of environmental impacts assessments?	i. What is the emerging picture from the Court cases on EIAs? • What are the main issues on which the public and developers are challenging the Department? • Are the areas in terms of which the Department is challenged related to the manner in which EIA processes are implemented? • How many Court cases have been dealt with from 2009/10 to date? • How many cases have been successful and how many not successful? • How much has been spent since 2009/10 on Court cases?
ii. How can the trends be utilised to further strengthen the current environmental impact assessment review and decision making process?	ii. Does the Department's implementation of the EIA regulations contribute to the lodging of Court cases, and is the outcome of the EIA process resulting in the right area being excluded?
iii. What are the lessons learnt from other relevant judgments, challenging the Department and other decision makers, which can be further applied to approve the Department's current environmental impact assessment review and decision making framework?	iii. What is the relationship [correlation] between the implementation of the EIA processes or guidelines and the areas on which the public challenges the Department in Court?
	iv. What do we need to do to ensure the optimum results of EIA in terms of development and the environment?
	v. Which approach would work best with regard to minimising the number of Court cases the Department has to deal with?
	vi. How do we need to strengthen the EIA programme?

The key activities of this phase revolved around the review and analysis of case law and Departmental SOPs and guidelines. The Court records for class A and B cases were analysed to establish trends in review applications lodged against the Department; and the analysis of class C case judgments highlighted lessons from the review of other authorities' decisions. The methodology involved in selecting case law, classifying the cases and gathering information on the selected cases is described above (3.2). The primary sources for the review of the EIA decision making framework included the applicable legislation (NEMA and EIA Regulations) and associated Departmental guidelines, SOPs and circulars.

The analysis undertaken of both the case law and decision making framework followed a diagnostic approach. This type of approach is informed by systems thinking and is particularly suited to assessing performance and problem solving as the emphasis is on understanding how things or processes influence one another and work together as a whole. A diagnostic approach examines the linkages and interactions between the elements that comprise the whole, rather than focusing on a specific part, event or outcome. In the context of EIA decision making, the system includes, for example, the regulatory regime within which decision making takes place; administrative procedures; operational practices; information and record keeping systems; and the institutional structures involved in the decision making process. In order to evaluate the impact of EIA decisions and make recommendations for improving decision making, one needs to understand, for example, how decision are made; what guides and informs decision making; what procedures are followed; and what measures exist to ensure consistency as well as compliance with legal requirements.

The first step of the analysis was to review the applicable national and provincial legislation and the practices and procedures applied by the Department in reviewing and deciding on EIA applications. The purpose of analysing the legislation was to map the prescribed decision making process as the baseline against which to measure the EIA review and decision making framework in the Department. The practices and procedures applied by the Department, and the various guidelines, SOPs and internal policies which guide these practices and procedures make up the Departmental review and decision making framework for EIA applications. This decision making framework was reviewed to assess the extent to which it complies with the legal requirements; to identify the policy and procedural considerations and guidelines which decision makers must take into account when making decisions; and to establish whether there were any procedural or substantive gaps and shortcomings in the framework which impact on the defensibility of its decisions that should be addressed to ensure more robust and defensible decision making. The selection of internal policies, SOPs and guideline documents was discussed and approved by the Project Steering Committee. The key documents included in the review are listed below and a comprehensive list of all internal policies, SOPs, guidelines, application forms, checklists and circulars used and referred to by the Department in the EIA and planning decision making processes is appended in APPENDIX 11.

Table 3 Key SOPs and Guidelines

STANDARD OPERATING PROCEDURES	GUIDELINE DOCUMENTS
DIR ELM Basic Assessment Booklet	DEADP EIA Guideline and Information Document Series March 2013[5]:

[5] We briefly looked at the series of guidelines published by the Department in June 2005 relating to the involvement of specialists in EIA processes. However, we did not consider the 2005 guidelines in detail since the involvement of

STANDARD OPERATING PROCEDURES	GUIDELINE DOCUMENTS
DIR ELM scoping EIA booklet	Guideline on Transitional Arrangements
Environmental Appeals Booklet	Guideline on Exemption Applications
Planning SOP's, 2013	Guideline on Public Participation
SOP Compilation Manual Land Management and EIAs, October 2012	Guideline on Alternatives
	Guideline on Need and Desirability
	Guideline on Appeals
	Generic Terms of Reference for EAPs and Project Schedules
	EA&DP NEMA EIA Guideline Interpretations Listed Activities, November 2006
	EA&DP NEMA EIA Guideline Transitional Arrangements, September 2007

The next step undertaken in this phase was to review the selected class A and B cases and capture the information on each case in the case law database template. This was done in accordance with the set of parameters that had been presented and agreed to by the Project Steering Committee in phase 1. These parameters were designed to inform the analysis of trends and lessons and covered the following aspects:

- case name and number (citation)
- parties, citation and dates;
- grounds of review;
- substantive or procedural challenge;
- the Department's position (opposing or abiding);
- overall outcome (settled, decision overturned, upheld or returned to decision maker with directives);
- outcome in relation to each ground (successful, unsuccessful or undecided)
- summary of facts and specifically;
  - ✓ the nature of the development;
  - ✓ particular listed activities triggered / assessed;
  - ✓ the Department's role in the alleged defect in the decision;
- recommendations; and
- sources used in compiling the analysis (case law, interviews etc.)

In addition to the aspects listed above, the Department requested that the following information also be captured on the data sheets:

- where a Court held that the Department had executed its obligations and duties under the application legislation correctly in making the decision that had been taken under review; and
- where a judgement that had been made was wrongly decided or gave rise to bad precedent having been created.

Once the information on the individual cases had been captured, it was analysed with the view to identifying trends in successful review applications against the Department's EIA and planning decisions (class A and B cases). The analysis also included a comparative review of legal challenges against similar decisions by other decision makers to isolate

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specialists was not an issue in the cases that were the subject of the Project and since the guidelines were drafted before the 2006 EIA Regulations came into effect.

lessons to be applied to the Department's decision making (class C cases). The analysis of class A and B cases focused on identifying trends in relation to:

- decisions overruled, upheld and referred to the decision maker;
- substantive versus procedural defects;
- grounds of review invoked to challenge the Department's decisions; and
- grounds of review most successfully relied on to challenge the Department's decisions.

The findings of the review of the Departmental SOPs and guidelines and initial review of the case law, was presented to the Project Steering Committee in May 2014. The service provider also recommended at this meeting that additional opportunity should be created for engaging with decision makers and case officers. As a result a workshop, involving Departmental officials, was held on 11 July 2014. The purpose of the workshop was to:

a) give preliminary feedback on emerging trends and lessons learned from our analysis of cases (classes A, B and C) and review of EA&DP's decision making framework and resources (SOPs, guidelines, circulars and application forms);
b) engage key EA&DP officials (decision makers, case officers, legal advisors and policy advisors) on the mapping of trends in relation to the decision making framework; and
c) discuss and review the format of, and content to be included in, the final report.

The service provider developed a short discussion document that was circulated prior to the workshop to all the officials who were invited to attend. This was done in order to guide and structure the discussions and provide opportunity to get a better understanding of how decisions are made and insight into the reasoning underpinning decisions. The issues and questions were grouped into the following three main themes:

a) How does the decision maker develop a defensible argument in support of the decision?
b) What internal operating procedures are followed in the decision making process and what problems exist with regard to internal policies, SOPs, guidelines, checklists, circulars and application forms?
c) What systems exist to ensure that lessons learned through decisions taken on review are captured and applied in future decision making?

These themes were based on feedback provided by Departmental officials in progress meetings, as well as on the review of case law and analysis of review trends. The discussion document is appended in APPENDIX 6. The workshop discussions provided valuable insight and input with regard to developing practical recommendations that could be made to strengthen and improve EIA review and decision making. The comments and issues raised in the workshop were taken into account in finalising the analysis of the decision making framework and case law and, where appropriate, captured in the draft evaluation report.

Phases 4 - 6: Evaluation Report and Project Handover

Phases 4 and 5 focussed on the preparation and presentation of the Draft Evaluation Report, incorporating comments by the Department and Project Steering Committee into

the Final Evaluation Report and presenting the Final Evaluation Report to the Project Steering Committee. Phase 4 also involved the formulation of practical recommendations, based on the analyses undertaken during the previous phases and engagements with Departmental officials during the progress meetings and workshop. The TOR specified the format in which both the Draft and Final versions of the Evaluation Report had to be prepared, namely a full and abridged format. The latter contains a one page policy summary of the implications of the evaluation; a three page executive summary; and a 25 page main report.

The project handover activities (phase 6) included the delivery to the Department of:

- the Final Evaluation Report (electronic and hardcopy of the abridged and full versions);
- the case law database (including the populated data sheets, spreadsheets and copes of the case records that were gathered); and
- all other information and reports used in the evaluation.

4. PRINCIPLES OF ADMINISTRATIVE LAW WHICH GOVERN DECISION MAKING

This section of the report introduces the principles of administrative law which govern decision making by authorities. These principles serve as overarching framework for all administrative decisions, including the decisions made by the Department in reviewing EIA applications and in granting or refusing environmental authorisation for such applications.

Administrative justice is entrenched as a fundamental right in the Bill of Rights. In terms of section 33 of the Constitution, "*(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair.*" Subsection (2) states that "*(e)very person whose rights have been adversely affected by an administrative action has the right to written reasons*". This section also requires that national legislation must be enacted within three years of the date on which the Constitution became effective, to give effect to these rights. The legislation must:

a) provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;
b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
c) promote an efficient administration.

PAJA was promulgated to give effect to section 33 of the Constitution. PAJA defines "*administrative action*" to mean:

> *"any decision taken, or any failure to take a decision, by—*
> *(a) an organ of state, when —*
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
> *which adversely affects the rights of any person and which has a direct, external legal effect…"* (emphasis added)

The section then continues to list certain exemptions which will not be regarded as administrative action for purposes of PAJA.

A "*decision*" for purposes of PAJA -

> "*means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—*
>
> *(a) making, suspending, revoking or refusing to make an order, award or determination;*
> *(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*

(c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
(d) *imposing a condition or restriction;*
(e) *making a declaration, demand or requirement;*
(f) *retaining, or refusing to deliver up, an article; or*
(g) *doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly*" (emphasis added)

The environmental right in section 24 of the Constitution provides that:

"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 inclusion of an environmental right in the Bill of Rights confirms it as a fundamental justiciable human right and is a clear indication of the change in social values in respect of the environment, recognising the fundamental importance which environmental issues have now assumed.

The section further requires the development of environmental legislation to promote sustainable development. NEMA was enacted to give effect to section 24 of the Constitution and contemplates that environmental decisions should achieve a balance between environmental and socio-economic developmental considerations through sustainable development. The concept of sustainable development is defined in NEMA to mean "*the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations.*" The EIA process is one of the tools provided for in NEMA to give effect to sustainable development.

Section 24 of NEMA empowers the Minister or a competent authority (hereinafter referred to as the Department) to make a decision regarding whether environmental authorisation should be granted in accordance with the provisions of relevant sections of NEMA. The decision of whether or not environmental authorisation should be granted falls within the definition of administrative action as defined in PAJA: the Department is an organ of state exercising a public power in terms of empowering provisions which may adversely affect the rights of persons. It also clearly has a direct external effect.

The primary focus in scrutinising administrative action is to ensure the fairness of the process, not the substantive correctness of the outcome. PAJA addresses the four requirements of just administrative action as required by section 33 of the Constitution, being: lawfulness, reasonableness, procedural fairness and the provision of reasons. In order to ensure just administrative action, the following requirements must be adhered to:

a) acting in accordance with empowering legislation;

b) adequate consultation with public and private stakeholders and all interested and affected parties;
c) the decision maker must obtain all relevant information and make it available for consultative purposes;
d) the decision maker must consider all relevant factors; and
e) the decision maker must identify reasons for his decisions and maintain a record of all decisions made.

In terms of section 24(1) of NEMA the potential consequences of impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported to the Department. In reaching a decision as to whether environmental authorisation should be granted, the Department must have due and proper regard to the EIA. The EIA is therefore one of the relevant documents which must inform the decision of the Department.

Section 6 of PAJA sets out various grounds for review of an administrative decision. In challenging the validity of an administrative action the aggrieved party may rely on a number of alleged irregularities in the administrative process. These irregularities should be presented as evidence to establish that one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that one or more of the review grounds do in fact exist.[6]

Section 6 of PAJA states that a Court or tribunal has the power to judicially review an administrative action if —

"(a) the administrator who took it—
(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken—
(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;
(f) the action itself—
(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to—
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;

[6] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (2014 (1) SA 604) (CC).

(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful."

If a person succeeds in establishing one or more of these grounds during judicial review, the decision of the administrator must be declared unlawful in terms of section 172(1)(a) of the Constitution. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's requirement of a just and equitable remedy.[7]

Section 38 of the Constitution requires that in instances where a fundamental right has been breached, the remedy must not only be just and equitable but the remedy must also be appropriate. Appropriate relief is relief that effectively remedies the breach of the right. Even though courts may refuse to award a remedy once unlawfulness is found, the default position is that the principle of legality should be upheld and vindicated, and that there must be compelling reasons to override this default position.[8]

[7] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (2014 (1) SA 604) (CC).
[8] *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others (Bengwenyama-ye-Maswati Royal Council Intervening)* 2011 (3) BCLR 229 (2011 (4) SA 113) (CC).

5. EIA DECISION MAKING FRAMEWORK

5.1 Legislative context for EIA decision making

Section 24 of the Constitution requires, amongst other things, that the environment is protected through reasonable legislative and other means to secure ecologically sustainable development and use of natural resources. The Constitution also gives every person the right to administrative action that is lawful, reasonable and procedurally fair.[9] Organs of state have a duty not only to respect and protect these rights but also to promote and fulfil them (section 7(2)). In other words, organs of state must actively seek to realise these rights.

Chapter 3 of the Constitution and particularly section 41 establishes the requirement for cooperative governance between the three spheres of government including that all three spheres must inform one another of, and consult one another on, matters of common interest[10] and co-ordinate their actions and legislation with one another.[11]

NEMA seeks to give further effect to these imperatives and provides the overarching framework within which environmental decision making must take place. Key in this respect is the set of principles contained in section 2 of the Act. These principles embody the environmental right enshrined in section 24 of the Constitution and recognize that the consideration of environmental factors requires the integration of social, economic and ecological considerations into decision making. The NEMA principles apply to the actions and decisions of all organs of state that may significantly affect the environment, and:

> "*(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;*" and
> "*(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.*"[12]

Decision making, particularly in relation to environmental authorisations and other administrative decisions that grant/refuse permission to proceed with an activity that may impact the environment, play an important role in giving effect to this constitutional imperative. The extent to which development approval contributes to ecological sustainability will depend on how the decision is made, what the decision is, and what the conditions of the authorisation are. Key in this regard is the extent to which the competent authority (at all three spheres of government) applies his or her mind to the NEMA principles. Accordingly it is important that all decision makers maintain the link between the substantive goal of ecological sustainability and how the administrative decision is made.

Chapter 5 of NEMA further gives effect to the imperative embodied in section 24 of the Constitution by setting out the procedural and governance framework for environmental decision making. The approach underpinning this procedural and governance framework is one of integration and co-operative governance. Sections 23 and 24 of NEMA are of

[9] Section 33.
[10] Section 41(1)(h)(iii).
[11] Section 41(1)(h)(iv).
[12] Section 2(1)(c) and (e).

particular importance in the context of evaluating EIA decision making in the Western Cape. Section 23(2) provides that the general objective of integrated environmental management is, (among other things), to promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment. Section 24 provides specifically for the consideration, investigation, assessment and reporting of the potential consequences for or impacts on the environment of listed activities (or specified activities) to the competent authority.

The National Minister has published three lists under section 24 of NEMA; the first and third lists are the lists of basic assessment activities, which require the Applicant for authorisation to undertake a basic assessment of the activity as part of the application. The second list is the EIA activities, which require an Applicant to undertake scoping and EIA as part of the application process.[13]

The NEMA Regulations explain the application process and stipulate the contents of a basic assessment report (BAR), a scoping report and an environmental impact report (EIAR). These Regulations oblige the Applicant to appoint an Environment Assessment Practitioner (EAP) who must co-ordinate the application and facilitate a public participation process. All interested and affected parties (I&APs) must be given the opportunity to participate in the public participation process; I&APs include any organ of state with jurisdiction over any aspect of the activity to which the application relates. The Regulations further stipulate timelines within which the competent authority must process the applications. Provision is also made for the amendment of an environmental authorisation; the lodging of an appeal against the granting of, or refusal to grant, an environmental authorisation; the exemption of Applicants from certain requirements of the NEMA regulations; and the suspension of environmental authorisations.

On 29 August 2014, draft new EIA Regulations and listing notices were published for comment.[14] The proposed amendments are substantial and, if implemented, will require that all the guidelines and SOPs that the Department currently uses are reviewed and updated where necessary. Of particular relevance for this report is the proposal that an environmental authorisation may be refused on the basis of the scoping report if the scoping report "does not comply to the policy directives of government" or does not comply with the regulations with respect to the information that must be included in the scoping report (regulation 22(1)(b).

Figure 5 below provides a roadmap of the fundamental elements in the EIA decision making process. This is not intended as a detailed breakdown or flow diagramme of all the steps in the EIA process. It merely maps the key decision making milestones, or decisional referents, which will influence the success or failure of a review application in the Courts. These are namely the extent to which the correct procedures have been followed; the completeness of information before the decision maker; what is relevant to the decision; and how the decision maker draws conclusions with regard to each of the decision making criterion.

[13] The three lists are contained in Government Notices 544, 545 and 546 of 18 June 2010 published under section 24 of NEMA.
[14] GN R 733 in *Government Gazette* 37951 of 29 August 2014.

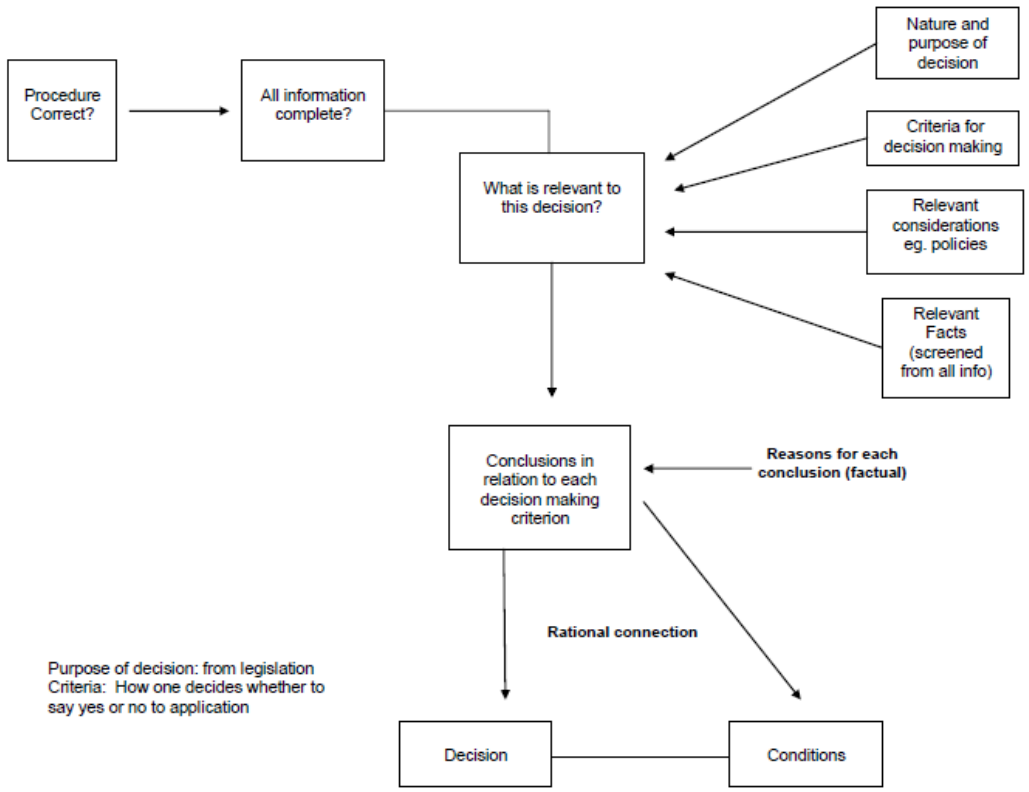

Figure 5 EIA decision making road map

Whereas the analysis of case law, which follows in section 6 of this report, highlighted the flaws and weaknesses in EIA and planning decision making in the Department with regard to each of these decision making milestones, this section of the report focuses on:

- assessing Departmental guidelines and SOPs' compliance with the legal requirements;
- identifying gaps, errors and omissions in the Departmental guidelines and SOPs; and
- highlighting, where appropriate, the implications of these gaps, errors and omissions for decision making in the Department.

The law formed the basis against which the SOPs and guidelines were compared and assessed to establish compliance with the empowering provisions in the legislation; to determine the correctness of the operational guidance provided in the SOPs and guidelines; and to identify any gaps, errors or omissions which should be addressed to ensure more robust and defensible decision making. The analysis of the Department's SOPs and guidelines was done in relation to each of the decision making milestones illustrated in the figure above. The findings are summarised below.

5.2 What is the correct procedure?

In broad terms, the Applicant in an EIA process is required to compile draft and final reports, subject them to a public participation process and then submit them to the decision maker for acceptance and then decision. The decision maker in an EIA

application is required to accept or reject the reports, consider all relevant information, consult interested and affected parties including organs of state, make a final decision on the report and notify the Applicant of its decision, giving reasons.

The EIA decision maker must in the first instance ensure that he / she complies with the procedural requirements set out in the EIA Regulations, 2010 as described above. However, particularly where the EIA Regulations or NEMA is silent, a decision maker must still apply the principles in PAJA (as amplified in the Regulations to PAJA (GNR.1022 of 31 July 2002) to the process. The principles include that in administrative action affecting any person (for example, the Applicant) the decision maker must give:

a) adequate notice of the nature and purpose of the proposed administrative action;
b) a reasonable opportunity to make representations;
c) a clear statement of the administrative action;
d) adequate notice of any right of review or internal appeal, where applicable; and
e) adequate notice of the right to request reasons in terms of section 5.[15]

In the case of administrative action affecting the public and where, as in NEMA, a notice-and-comment procedure is prescribed, the decision maker must take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them and must consider those comments.[16] Read with the constitutional requirement that organs of state must inform one another of and consult one another on matters of common interest, PAJA clearly requires that fair procedure requires that members of the public who are likely to affected must be given an opportunity to participate and that other organs of state which might be affected must be consulted.

PAJA provides that a fair procedure depends on the circumstances of each case (see for example the decisions in the *Astral Operations* and *Save the Vaal* cases). Therefore a checklist approach to procedural fairness is not possible. However, in some cases, further guidance might be useful. For example, taking a precautionary approach to public participation (in other words, ensuring that even comments that are received late are subjected to a further public participation process) can result in the environmental authorisation process being made overly lengthy, for which the Department is then criticised. Although there is a guideline on public participation, it mainly deals with the requirements of the EIA Regulations, 2010 and does not provide guidance where these are not complied with.

In the context of project level decision making, where an organ of state is the decision maker, it may only exercise those powers granted by the statute and it must ensure that all the pre-conditions for the exercise of the power have been met. If they are not, the decision will be ***ultra vires***, which means that it will exceed the powers conferred by the legislation. Consequently, the decision will be unlawful.

A statute usually specifies the preconditions that must exist prior to the exercise of the power and the procedures that must be followed when exercising the power. These preconditions and procedures are known as "jurisdictional facts".[17] They can either be substantive or procedural.

[15] Section 3(2)(b) of PAJA.
[16] Section 4(3) of PAJA.
[17] Hoexter, C. The New Constitutional and Administrative Law vol 2 (2002) Juta at p38.

Substantive jurisdictional facts are the facts or the state of affairs that must exist when a statutory power is exercised and procedural jurisdictional facts are the procedures that must be followed when exercising a power. In the case of decisions on applications for environmental authorisation, the jurisdictional facts relating to procedure will include the submission by the Applicant of either a BAR or EIAR that complies with the EIA Regulations, 2010 and the valid acceptance of the report by the decision maker.

With some exceptions (which are detailed in APPENDIX 11), the SOPs (Basic Assessment, EIA and Appeals booklets) provided to us are very detailed and generally comprehensive in respect of the procedural steps that must be taken. This is important in light of the fact that non-compliance with a material provision or condition was identified as a common review ground. However, although they mention the laws that form the broader constitutional and legislative context referred to above and appear to have taken those laws into account in developing the procedures, our view is that it would be useful if the implications could be more clearly spelled out.

The Guideline refers briefly to PAJA but only in the context of "relevant considerations". The SOPs list PAJA and the Constitution under "Relevant laws" but don't explain how they apply in a practical sense. An example of this would be to explain how to deal with the practical implications of section 6(2)(g) of PAJA: a decision which is not taken either within the prescribed period for doing so, or within a reasonable period where no time period is prescribed, is reviewable.

We therefore recommend that the SOPs are updated to include reference to the broader legislative context for decision making as it relates to the right to fair administrative action and the requirements of cooperative governance.

5.3 Is information complete?

The EIA Regulations, 2010 prescribe the contents of BARs (regulation 22), scoping reports (regulation 28), EIARs (regulation 34) or Environmental Management Plans (EMPs) (regulation 33). Compliance with these regulations must be regarded as a minimum by the decision maker who must consider whether any other information may be relevant and should therefore be submitted.

As set out above, none of the SOPs deal specifically with how to assess whether a report has been validly submitted and in particular, whether the report contains all the relevant information to allow the decision maker to make a decision based on all relevant considerations. This is discussed in more detail in the next section.

5.4 What is relevant to the decision?

As discussed above, the Constitution guarantees a right to fair administrative action and PAJA sets out what is required for fair decision making. This includes that the decision maker takes into account all relevant factors that influence the decision or "decisional referents". They include the considerations relevant to the decision itself, as well as all other legal requirements and guidelines.

The following are examples of relevant considerations for environmental decision making in the project-level context:

- the constitutional mandate to promote sustainable development (section 24 of the Constitution);
- the provisions of the empowering legislation under which the decision is taken (NEMA and the EIA Regulations, 2010);
- the NEMA principles;
- the information generated during the EIA process about the environmental impacts of the activity to which the decision relates;
- any comments provided by I&APs; and
- applicable policy, such as white papers, strategic frameworks, and guidelines.

5.5 Conclusions in relation to each decision making criterion

The clearest gap that we identified in the SOPs and Guidelines provided to us is that there is no guidance for decision makers on how to make the decisions required of them in terms of the EIA Regulations, 2010.

In the first instance, the SOPs and Guideline do not provide any guidance as to how the various reports in the process (BAR, scoping report, EIAR or EMP) must be assessed to determine whether they must be accepted or rejected in terms of the EIA Regulations, 2010 (in particular regulation 13). It may be useful to update the old 2002 checklist against which the decision maker can determine whether the report in question complies with the EIA Regulations. For example, a BAR must be rejected if it does not contain the "material information required in terms of these Regulations" or does not take into account "relevant guidelines". The SOPs would be more useful if the "material information" were spelled out. We have been provided with a document entitled *Information Document on the Guidelines, Policies and Decision Making Instruments Relevant to EIA Applications in the Western Cape*[18] which forms part of the Department's *EIA Guideline and Information Document Series*.

It is beyond the scope of this application to consider whether this document is comprehensive, our view is that in principle an Information Document that lists relevant guidelines for EIA decision making is useful and necessary to ensure compliance with section 24O of NEMA, the EIA Regulations, 2010 and the requirements of PAJA.

A related issue is that although the appeal SOP mentions the legal requirements for validity of the decision maker notice of appeal, appeal submission, answering and responding statements, in the "control column", it would be useful to have a checklist at each of the stages in the process diagramme entitled "determine whether the notice of appeal/appeal submission/responding statement/answering statement is valid" since this is the logical stage at which a decision maker should consider all the requirements for validity (date submitted, parties served, contents, etc) before accepting it.

Most significantly, there is no guidance on how to make a decision to grant or refuse an environmental authorisation. Environmental decision making is particularly complicated as

[18] October 2011.

it involves very many variables, including: the type of listed activity applied for, different locations and impacts and a law and policy context that is constantly changing.

In our view, a checklist approach to decision making is not feasible as nothing can replace the exercise of good judgement by an experienced and skilled decision maker. However, as set out in this section, it is possible to provide some information for decision makers on the steps that must be followed for sound decision making such as:

- checking compliance with the empowering legislation;
- ensuring adequate consultation with all public and private stakeholders and I&APs;
- obtaining all relevant information and making it available for consultative purposes;
- considering of all relevant factors - the so-called decisional referents; and
- identifying reasons for the decision and maintaining a record of the reasons.

Perhaps the most challenging part of this process is identifying the relevant factors and ensuring that the decision maker takes into account those factors in a way that is reasonable, giving effect to the requirements of rationality and proportionality in administrative action. In some cases the relevant factors are identified in legislation, for example, in section 2 of NEMA or, in the case of decisions on waste management licences, in section 48 of the National Environmental Management: Waste Act.

However, translating principles and objectives into a practical decision is not straightforward. Therefore, in our view there is scope for developing a decision making tool that is flexible but provides structure and guidance for the decision maker.

Although it is beyond the scope of this report to design such a tool, we envisage that the tool would consist of a kind of decision tree, with levels of questions that the decision maker must ask.

The initial question to be asked is: what are the criteria based on which the decision must be granted or refused? In the case of an environmental authorisation, this is not made explicit in the legislation but one approach is to ask whether the proposed development will contribute to ecologically sustainable development as per section 24 of the Constitution. In certain cases other criteria might be applicable, for example, where an Act provides that an application must be granted or must be refused, where certain conditions are met.

Thereafter, a set of questions must be developed that allow a decision maker to assess whether the criteria for granting the application will be met, for example, whether the development promotes each aspect of sustainable development (as identified in section 2 of NEMA and otherwise) and a weighting given to the answers.

In order to be most effective, the tool should be designed in such a way that relevant factors are identified at as early a stage in the EIA process as is possible, so that they can be properly investigated, and the interested and affected parties can have a reasonable opportunity to comment on information generated about them as required by the legislation. The tool would therefore ideally allow for relevant factors to be identified by the decision maker as early as the initial application form.

This is to some extent already occurring as the application forms currently used by the Department (especially part IV) contain a set of questions that aim to make an initial identification of what is relevant to the particular application and what requires further

study. This is particularly important if, as is proposed, the EIA Regulations are amended to allow refusal of the authorisation at the scoping stage.[19] However, the questions in the application form and later documents in the process should ideally be aligned with the decision making criteria so that the end result of the information gathering process is that the answers to the questions regarding whether the application should be granted or refused are clear.

The advantages of using a decision making tool are that if used properly, it will show the "working" of the decision maker in arriving at his or her conclusions so that reasons for the decision are already apparent and flaws or errors in the reasoning also easily detected and corrected. If a new relevant factor, such as a new guideline, needs to be considered, the decision making tool provides a structure and method for taking into account with this new information.

A potential disadvantage of a decision making tool is that it would have to be disclosed to the public and could be used as a basis for challenging the decision. However, ultimately the tool should make the Department more accountable in that the decision making process is more transparent.

Clearly a key aspect of a decision making tool is that it should streamline the process of identifying relevant factors and provide the decision maker with a comprehensive overview of the relevant considerations on which to make a decision without adding complexity to the process as a whole.

In the *Bright Sun* case[20] the Supreme Court of Appeal said regarding the use of guidelines in decision making:

> *"The adoption of policy guidelines by state organs to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision maker. As explained in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs, a Court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it."*[21]

We have made more specific comments about the SOPs in attached APPENDIX 11.

[19] See regulation 22(1)(b) in GNR 733 of 29 August 2014.

[20] MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another SCA368/04.

[21] Paragraph 19.

6. CASE ANALYSIS FINDINGS ON TRENDS EMERGING FROM COURT CHALLENGES

In preparing this section we developed a data capture form with all of the PAJA grounds of review. We identified the PAJA grounds raised in the founding and supplementary affidavits and compared these with the grounds eventually upheld by the Court. A number of the cases provided to us by the Department are still pending. In those situations we captured the grounds of review but do not express a view on whether a court would uphold any of those grounds. The pending decisions and the grounds of review raised are appended at the end of this report.

It is pertinent to note that the emphasis on isolating trends focussed on qualitative rather than quantitative aspects. In other words, on unpacking and understanding why decisions had been challenged and how such decisions had been made, as opposed to merely quantifying the number of review grounds applicable to each case, class of cases and the body of cases. Because judges need only one ground on which to decide a matter and will chose which of the grounds raised to decide the matter, statistics are not an accurate or reliable reflection of trends emerging from Court challenges or weaknesses in decision making. In other words, it would be incorrect to conclude that if ten grounds had been raised in a particular matter and one of these grounds was successfully defended, then this meant that the Department's decision making had been proved right. Similarly, if the statistics reflect that 90% of the decisions taken on review are successfully defended, it does not equate to the Department's decision making being proved 90% right. All it does show is that in respect of a single ground of review, the Department's decision making was right. Statistics will also not solve the problem of addressing flaws and errors in the decision making process.

Having considered the various cases presented to us under class A, we have found the majority of review grounds to have been raised in respect of decisions by the Department relating to EIA. In the table below we set out the grounds of review invoked to challenge the Department's decisions and indicate the number of cases in which each ground was raised. The frequency with which each of the grounds has been raised is also reflected in the graph which follows the table.

Table 4 Grounds of review raised in respect of EIA decisions

REVIEW GROUND (SECTION 6 OF PAJA)	NUMBER OF CASES
Decision maker not authorised	**6**
Unauthorised delegation of power	**0**
Bias	**5**
Mandatory and material procedure or condition prescribed by an empowering provision not complied with	**6**
Decision procedurally unfair	**5**
Decision influenced by an error of law	**2**
Reason for decision unauthorised	**2**
Ulterior motive	**0**
Irrelevant considerations taken into account	**8**
Unwarranted dictates prompted decision	**1**
Bad faith	**2**
Decision is arbitrary / capricious	**3**

REVIEW GROUND (SECTION 6 OF PAJA)	NUMBER OF CASES
Decision contravenes the law	**4**
No rational nexus with purpose for decision	**4**
No rational nexus with purpose of empowering provision	**3**
No rational nexus with info before decision maker	**4**
No rational nexus with reasons for decision	**3**
Failure to take decision	**0**
So unreasonable, no other could do the same	**4**
Otherwise unconstitutional / unlawful	**6**

The frequency with which each ground was raised is also reflected in the following graph:

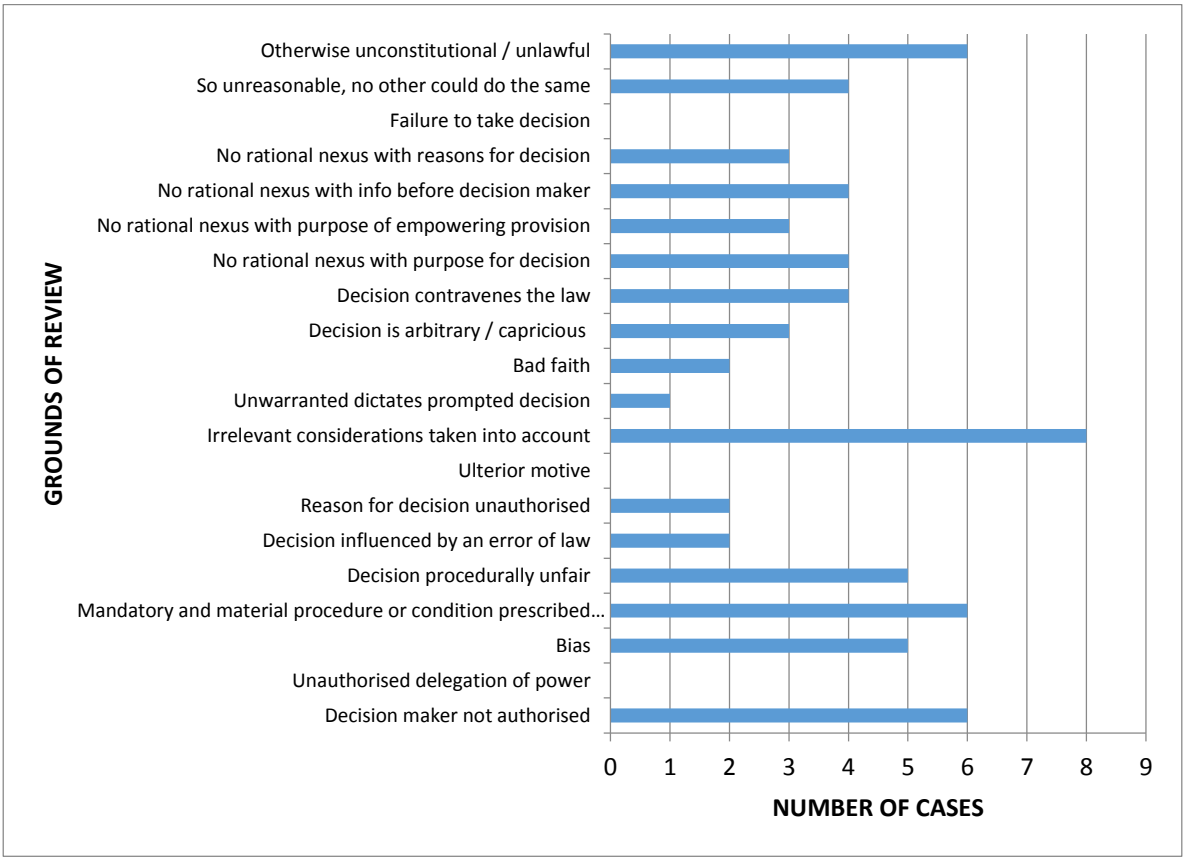

Figure 6 Frequency of review grounds raised

From the analysis of review grounds invoked in the selected cases, the extent to which the review of decisions have been influenced by legislative changes to the EIA regulatory regime, changing political priorities and external factors such as economic pressures does not appear to have been a factor. The analyses indicate a consistency in types of grounds of review invoked irrespective of a change in the regulatory regime and other external factors. It should also be mentioned that the small sample size made it difficult to identify a trend in the extent to which changes in the regulatory regime or other external factors influenced review applications.

From the class A case law it is evident that the ground of review most often relied on is that the decision maker took irrelevant considerations into account (8 cases rely on this

ground). This is closely followed by the decision maker not being authorised to make the decision (6 cases); mandatory and material procedures or conditions prescribed by an empowering provision were not complied with (6 cases); the decision maker being biased (5 cases); and, the decision reached by the decision maker was procedurally unfair (5 cases). Given that we are dealing with judicial review most of the grounds relate to procedural defects. However, the ground of review most relied upon is that irrelevant considerations were taken into account and conversely that relevant considerations were not taken into account. In other words, this is a substantive matter although it came about as a procedural defect.

Most of the class A cases given to us to consider on which judgement has been pronounced have been set aside in its entirety and referred back to the decision maker for reconsideration. We have included a graph below that clearly set out which of the grounds of review have been successfully upheld by a Court with regard to class A and B cases. The implications of the successful review grounds for the Department are explained in paragraph 6.1 to 6.5 below.

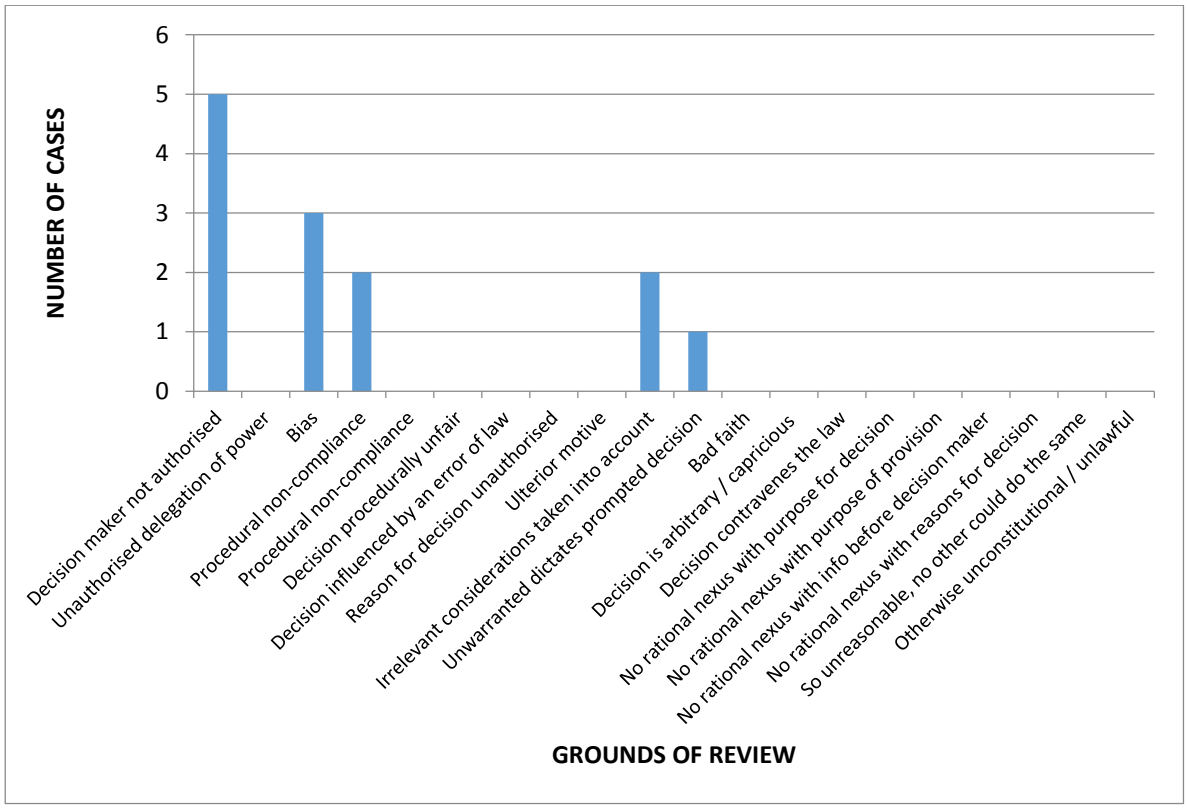

Figure 7 Successful review grounds

The next graph illustrates the ratio of decisions upheld, overturned, partially overturned, returned to the decision maker with directives and matters settled in respect of both class A and B cases. The settled matters refer to those cases in which the parties reached an agreement and accounts for 8% of the cases analysed. As we were not provided with the submissions indicating why the Department chose to settle matters we are unable to elaborate on these cases. Where decisions were upheld, this indicates that the Court agreed with the decision made by the Department insofar as the particular review ground chosen by the judge on which to decide the matter is concerned. This accounts for 15% of

the cases analysed. Where the Court did not agree with the decision made by the Department, the decision was overturned, or returned to the decision maker with directives. In the small sample of cases analysed, the majority of cases were overturned (54%) or returned to the decision maker (23%). With regard to the latter judicial decision, it indicates that the Court disagreed entirely with the decision of the decision maker and provided guidance and / or instructions on how to reach a constructive decision. The high ratio of decisions overturned and returned to the decision maker indicates that there are flaws in the Department's decisions. These are discussed in more detail in paragraph 6.1 to 6.5 below.

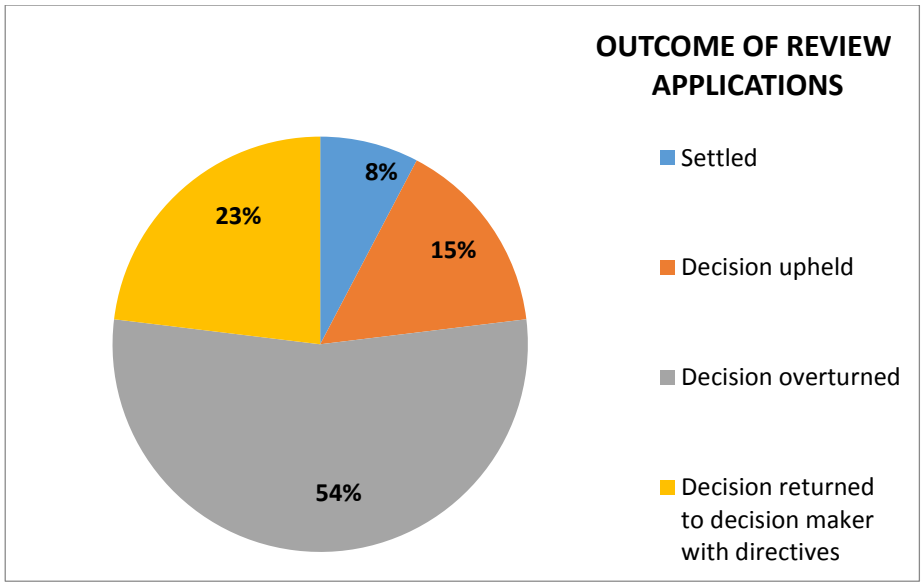

Figure 8 Outcome of review applications

In the last graph we indicated the number of grounds of review invoked in the pending cases and further show both the total numbers per ground of review as well as compare how many of the grounds raised for class A versus class B cases.

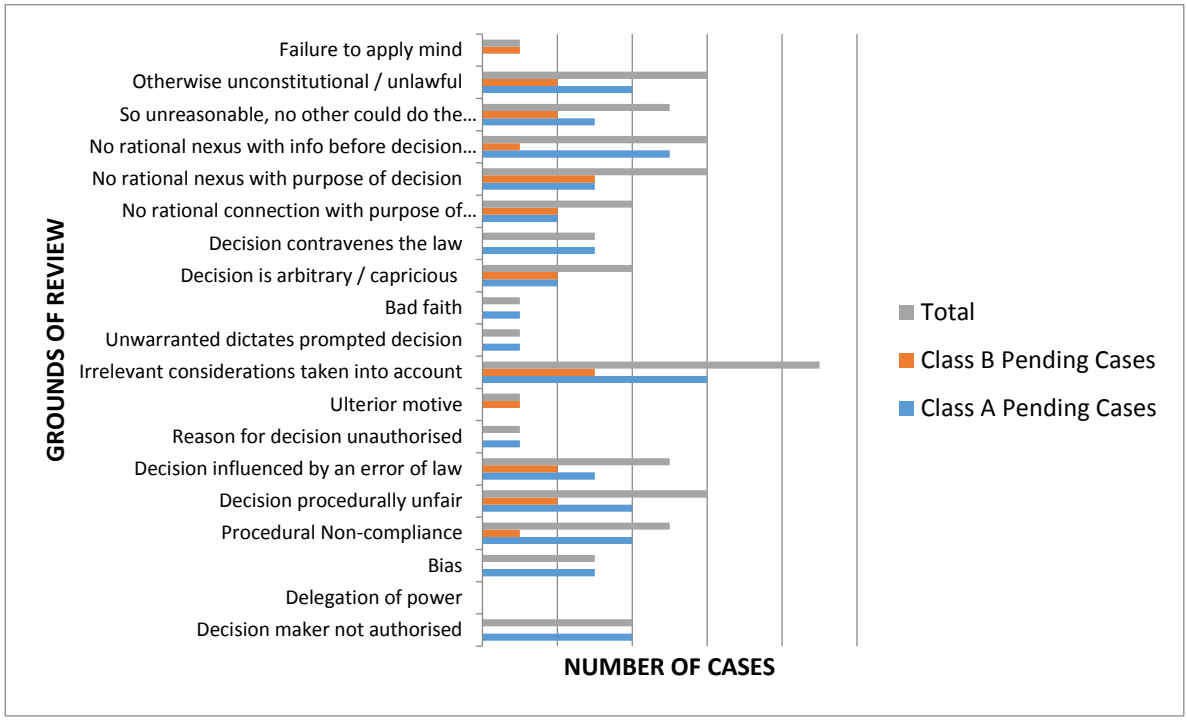

Figure 9 Pending cases

Under this section we deal with the relevant facts of the three categories of cases, consider the grounds of review held by the Court and, where possible, identify emerging trends from these cases. We do not refer to all the cases where a specific ground of review was raised as courts generally do not decide a case on all of the grounds raised. Rather, we focussed on the grounds that were upheld and, more importantly, the reasons for doing so. The reasoning adopted in the cases have been summarised below. Our findings and recommendations are set-out in section 7 below, unless we specifically state otherwise. For the purposes of this report, the grounds of review have been grouped into the following themes:

- **Requirement of authority**, which includes the decision maker not being authorised and acting beyond the powers of the empowering provision;
- **Procedural fairness**, which includes changed circumstances, failing to take relevant considerations into account, taking irrelevant considerations into account, hearing the other side and bias;
- **Reasonableness**, which includes reasons;
- **Effects of government inaction**, which includes the failure to take decisions and the dereliction of constitutional and statutory obligations; and
- **Disjointed decision making**, which is linked to administrative justice in general but relates to an efficient administration that results in certainty in decision making.

6.1 The requirement of authority

An official, including the MEC, may only exercise a power or perform a function as conferred upon them in terms of an empowering provision and in line with the

considerations to be taken into account in exercising that power. Decisions must be rationally related to the purpose for which the power was given.

Appointment of authority

The Minister acts beyond his powers where the Minister grants approval for matters which fall outside of his Department's constitutional competence. Those decisions are reviewable and fall to be set aside.

In *Provincial Minister of Local Government, Environmental Affairs and Development Planning v Habitat Council and Others*[22] the Minister considered appeals in terms of section 44 of the Land Use Planning Ordinance, 15 of 1985 (LUPO) and granted planning approval for the proposed developments. The Applicants successfully obtained an order declaring section 44 of LUPO inconsistent with the Constitution and invalid insofar as it allowed the Minister to determine municipal planning applications as this falls within the Constitutional competence of Municipalities.

In *Brashville Properties 51 (Pty) Ltd v Colmant and Others*[23] the MEC rezoned Farm 1353, situated in Franschhoek, to allow the extension of the existing guesthouse, subject to conditions. Brashville applied to the Municipality for an amendment to the MEC's conditions of approval in terms of LUPO. The Municipality granted approval even though only the MEC could do so at that time. Brashville commenced construction in line with its amended approval. The Municipality issued a cease works order to Brashville as it had failed to obtain building plan approval. At this point it became clear that the Municipality was not the competent authority to issue the amended approval but that the MEC was. Brashville submitted a fresh application for rezoning and amendment of the relevant conditions of approval to the Department. The Department refused both applications but informed the Municipality to instruct Brashville to apply for a contravention levy in terms of section 40 of LUPO.

The SCA held that in terms of LUPO the power to impose and deal with rectification lies squarely within the discretion of the Municipality. Such power should neither be exercised with any influence from a superior body such as the Department, nor should the superior body dictate how the discretion is to be exercised. By simply following the instruction of the Department, the officials of the municipality did not apply their minds in deciding whether or not payment of the contravention levy was appropriate in the circumstances. The decisions to invite Brashville to pay a contravention levy, and, to re-approve, re-issue and approve building plans were reviewed and set aside.

Acting beyond powers granted

In *SLC Property Group (Pty) Ltd and Another v Minister of Environmental Affairs and Economic Development (Western Cape) and Another*[24] *("SLC Property")* the Minister granted an environmental authorisation to SLC Property. Two weeks after this authorisation was received, a second environmental authorisation was sent to SLC

[22] 2014.
[23] [2014] ZASCA 61

[24] (5542/2007) [2007] ZAWCHC 58; [2008] 1 All SA 627 (C).

Property. The second environmental authorisation contained a condition requiring the construction of low-cost housing. The Court was critical of the Department's ineptitude and of its answer to SLC Property that, insofar as it wanted the condition clarified, it should have asked the Department for reasons. The Court stated that the Department's ineptitude should not oblige an Applicant to incur further costs and delay by asking for clarification of conditions.

SLC Property successfully challenged the validity of the second authorisation and the housing condition. The Court held that only conditions which are rationally related to the purpose for which powers under the Environment Conservation Act 73 of 1989 ("the ECA") were given may be attached to the environmental authorisation. The implementation of a housing policy was beyond the powers of the decision maker in a decision for environmental authorisation made under the ECA. Furthermore, the condition was also not based on or derived from information placed before the Minister. The Court made it clear that the condition must pertain to the impact of the then identified activities (now listed activities in terms of NEMA) on the environment.

In *Hangklip / Kleinmond Federation of Ratepayers Associations v Minister for Environmental Planning and Economic Development: Western Cape and Others*[25] *("Arabella")* the Director refused to grant the developer (Arabella) environmental authorisation in terms of the ECA. Arabella appealed this initial refusal to the Minister who upheld the appeal and granted the environmental authorisation. The Applicant, an association of ratepayers, brought an application for judicial review of the environmental authorisation granted by the Minister. The Applicant challenged the Minister's decision on 15 grounds. They were successful on two review grounds (i.e. acting beyond powers granted and bias), the remaining 13 grounds were not considered. The Applicant succeeded in proving that the Minister had acted beyond the powers of the ECA by imposing a housing condition in the environmental authorisation. This condition was held to be beyond the powers of the Minister as only conditions which are related to the impact of the listed activity which had been triggered were capable of being imposed.

6.2 Procedural fairness

Procedural fairness is not restricted merely to a fair hearing (the right of both sides to be heard) and an unbiased decision maker but is wider.

Changed circumstances

When a decision maker or the Minister considers a matter it is important to note the dates when the EIA application was made and when the reports were compiled and whether the circumstances relating to the proposed development have changed significantly since then.

This is so as economic development, social development and environmental protection are the three pillars of sustainable development. In deciding whether or not to grant environmental authorisation the competent authority takes these pillars into account (from the information in the EIA reports) and decides whether the proposed development is

[25] (4009/2008) [2009] ZAWCHC 151.

acceptable (i.e. sustainable). In order to do so, the information provided to the competent authority must be relevant.

In *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others*[26] an Association sought to review and set aside the MEC's decision to grant environmental authorisation in terms of the ECA for the proposed redevelopment of the unique Sea Point Pavilion site into an up-market 52 bedroom retail centre. The Court found that the MEC, among other things, considered outdated information when making the decision. The MEC's reliance on outdated and erroneous information meant that the MEC was unable to balance properly the socio-economic consequences of the development against the environmental consequences.

Failure to take relevant information into account

In *Lezmin 2588 CC v The Provincial Ministers for Local Government, Environmental Affairs and Development Planning, Western Cape and Another*[27] the Minister's decision to dismiss an appeal to have a property rezoned and subdivided, was set aside. The review succeeded on the grounds that relevant considerations had not been taken into account and therefore the decision was procedurally unfair.

The Applicant submitted an application to the City for rezoning and subdivision. The City failed to make a decision within the prescribed time period provided in LUPO's regulations. The Applicant subsequently appealed to the Minister. The Minister treated the LUPO appeal as an application in which he was not restricted by any of the findings of the City or the documentation served before it, including the EIA reports.

The Court held that the reasons (and reasoning process) given by the Minister to justify why the EIA reports were not considered, were insufficient. It held that procedural fairness is not restricted merely to a fair hearing (*audi alteram partem*) and an unbiased decision maker but is wider. Where the decision maker fails to take documentation into account that would materially influence his or her decision, that failure cannot be condoned based on the argument of the decision makers discretion. The decision maker must consider relevant information when making the decision.

In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment* the Constitutional Court had to decide whether to set aside the decision by the Department of Environment, Mpumalanga province to grant the Inama Family Trust environmental authorisation in terms of section 22(1) of the ECA to construct a filling station on a property in White River, Mpumalanga. At issue was whether the environmental authorities had failed to consider relevant facts, namely the need and desirability for another filling station, in the environmental context before granting the authorisation.

The Applicant's argument was that the risk of overtrading was real and that this was an economic factor that should have been taken into account when the question of sustainable development was being considered by the decision maker. The Court held that environmental authorities are under a duty to consider need and desirability. This duty differs from any subsequent duty that local town planning authorities may have to consider

[26] 2011 (3) SA 55 (WCC).
[27] ZAWCHC 2010.

need and desirability. However, these considerations are not synonymous. The Province's assumption that the duty under the Ordinance to consider need and desirability imposed the same obligation as is required by the duty under NEMA to consider the social, economic and environmental impacts of a proposed development was therefore wrong.

In *Seafront for All* the Court found that the MEC had considered outdated information when making the decision, had failed to consider alternatives, especially the no-go alternative, and relied on an expert report co-authored by a party which had an undisclosed financial interest in the environmental authorisation being granted. The MEC's reliance on outdated and erroneous information meant that the MEC was unable to balance the socio-economic consequences of the development against the environmental consequences. The MEC's decision was set aside.

In *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*[28] the Court considered whether the MEC's decision ought to be set aside if he was materially influenced by considerations of a 'municipal planning' nature when granting or refusing an application to amend a Regional Structure Plan made in terms of the 1991 Physical Planning Act or section 29(3) of the Development Facilitation Act. The Court stated that the nature and power exercised by the MEC when granting or refusing an application and the considerations to take into account are determined with reference to the empowering legislation.[29] The 1991 Physical Planning Act imposed no restrictions on the matters which the relevant authority may take into account in formulating the Regional Structure Plan.

The Court also considered whether the considerations which the MEC took into account were matters of 'municipal planning' or 'provincial planning'.[30] The Court drew a distinction 'between the function entrusted to an authority and the considerations the authority may take into account in performing its function'.[31] The Court pointed out that in the *Gauteng Development Tribunal* matter it was the function (i.e. the granting of rezoning and subdivision approvals) that was investigated and held to be a 'municipal planning' function. This was why it was held to have been constitutionally impermissible for the Development Facilitation Act to allocate the performance of that function to provincial Tribunals.

The Court noted that this may result in 'some of the considerations which a municipality takes into account in performing its municipal planning function of deciding rezoning and subdivision applications will be the same or similar to considerations taken into account by the relevant authority in performing the provincial planning function of approving or amending a Regional Structure Plan'.[32] The Court noted further that the Constitution distributes legislative and executive competence among the various levels of government. The subjects on which these various levels of government may legislate and the executive functions they may perform are the subject of the distribution, not the reasons and considerations they may take into account.[33] Accordingly, the considerations taken into account by different organs of state may overlap. The relevant factors and information are driven by the empowering legislation and the reasons and considerations they may take account may overlap.

[28] [ZAWCHC 16; 2012 (3) SA 441 (WCC) (5 March 2012)
[29] Para 90.
[30] Para 110.
[31] Para 113.
[32] Para 115.
[33] Para 115.

This is further illustrated in *Le Sueur & Another vs Ethekwini Municipality & Others*[34] where the Court had to consider whether the resolution by Ethekwini Municipality to adopt the amendment of the Ethekwini Town Planning Scheme to introduce the Durban Municipality Open Space Systems ("D-MOSS") is unconstitutional and had to be set aside. The Applicant's argued that the Municipality had acted beyond its powers as it does not have the authority to legislate in the environment sphere because this is the exclusive domain of the National and Provincial Government. The Court held that it was satisfied that the Municipality has proved that prior to the advent of the Constitution, 'municipal planning' involved the power to regulate land use while taking into account, among other things, the need to protect the natural environment. Furthermore, that the term 'municipal planning' has the same meaning in the Constitution. Accordingly, the Court held that it was impossible to separate environmental and conservation concerns in town planning practice from a 'municipal planning' perspective.[35]

Hearing the other side

In *Astral Operations v The Minister of Local Government Environmental Affairs Development Planning* the Minister in terms of the Environment Conservation Act 73 of 1989 (ECA) upheld an appeal against the decision by the Director: Integrated Environmental Management (Region B) in the Department to authorise listed activities associated with a new landfill site at Atlantis and rather permit these activities at the Kalbaskraal site.

The Applicants brought a review application on the basis that the Minister's decision to grant environmental authorisation for the land fill site at Kalbaskraal was *ultra vires* his powers and accordingly is not capable of being remitted. The Minister took into account new information which had been placed before him during the appeal process but did not provide the Applicants, who were registered interested and affected parties, with an opportunity to make representations in respect of this new information. The Minister's decision was set aside on the basis that the Minister had failed to provide the Applicants with a proper opportunity to make representations and was therefore procedurally unfair.

In *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* the Supreme Court of Appeal considered whether an Association ought to have been provided with an opportunity to be heard when the director considered a mining right under the now repealed Minerals Act 50 of 1991. The director was of the view that such objections would be premature at that stage: since the issuing of a mining licence had no tangible, physical effect on the environment and no rights are infringed; that only when the environmental management programme is approved can mining commence; only then is there a possibility that rights may be infringed; and, only then is there a case for a hearing.

The Court held that the granting of a mining licence sets in motion a chain of events which, in the ordinary course of events, leads to the commencement of mining operations. Accordingly, where a preliminary decision can have serious consequences it is settled law that the *audi* rule applies to the consideration of the preliminary decision, unless it is expressly excluded.

[34] [2013] ZAKZPHC 6 (30 January 2013).
[35] Add Para 33

However, in *Hout Bay v The Minister of Local Government* the Court considered the authorisations granted in terms of the Less Formal Township Establishment Act 113 of 1991 and Land Use Planning Ordinance 85 of 1985 (LUPO) in respect of the development of a township in Hout Bay known as Imizamo Yethu and whether it should be set aside as the City and not the Minister, had the constitutional mandate to determine development parameters for the township and the process was technically defective.

The Court held that it is not just and equitable to stop an entire development on the basis of what may be technical defects in the process, as interested and affected parties had commented on and objected on the land use planning application, and that public interest, pragmatism and practicality dictate otherwise. The application was accordingly dismissed.

In *Lezmin* the Court also considered when it is appropriate to rely on summaries. The general rule is that the decision maker is required to hear the case of the interested party in that parties' own words not, as it were, the words of a broad summation of facts. The exception to this general principle that the decision maker is required to read all original documentation is narrowly circumscribed in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C)*. The decision maker should be fully informed of the submissions made on behalf of interested parties and he or she should properly consider them. However, in some circumstances, it may suffice for the decision maker to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the decision maker. What is required, as a minimum, is that the summary will contain a *'fair synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to decision'*.

The above exception is succinctly set out in *Ehlers and Another v MEC: Department of Environmental Affairs & Development Planning [2008] 1 ALL SA 576 (C)* para [25] to [31]. The Court stated that a decision maker does not have to consider each and every representation made to him in its full and original form, rather than an accurate summary thereof. Provided that:

- the person who prepared the summary did so for the purpose of enabling the decision maker to apply his mind properly to the evidence and submission in question; and
- the decision maker understood and considered the summaries as such.

Bias

The test for bias is whether there is a reasonable apprehension of bias on the part of the decision maker. It is whether a reasonable person in the position of the litigant or an observer, would reasonably apprehend that the decision maker has not brought or will not bring an impartial mind to bear.

In the *Arabella* matter the then Premier met with a lobbying group who were appealing the initial refusal of the environmental authorisation. The Premier advised the group on how to achieve a positive result in the appeal, the group followed the Premier's recommendations and the MEC granted the authorisation with one of the conditions being in line with the recommendations made by the Premier. The Court had to decide whether the action group were lobbying for political support and whether this conduct, read with the relevant factors,

were sufficient to create in the mind of the reasonable and informed observer a reasonable apprehension of bias on the part of the MEC.

The Court noted that a reasonable observer would reasonably apprehend that the MEC might have been influenced by the Premier: as the MEC was a member of the Premier's cabinet and was serving at the latter's pleasure; the Premier had granted a private audience to and held discussions regarding the subject matter of the pending appeal with some of the appellants (members of the group) against the decision; the Premier had advised the appellants that the development could secure the necessary environmental authorisation if the socio-economic benefits were maximised and had indicated how this could be done; that an agreement on the socio-economic benefits as identified by the Premier had been forwarded to the Premier and the MEC by the developer and the appellants with the request that it be incorporated into a favourable environmental authorisation; and, in due course, the MEC disregarded her Department's recommendations and one of the main reasons for doing so was the MEC's reliance on the socio-economic benefits as identified earlier by the Premier.

6.3 Reasonableness

Reasonable administrative action is made up of rationality and proportionality. Rationality means that a decision must be supported by the evidence and information before the competent authority and the reasons given for it. The decision must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. Proportionality is to avoid an imbalance between the adverse and beneficial effects of an action. Its essential elements are balance, necessity and suitability.

In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & the Chief Director: Marine and Coastal Management and Scenematic Fourteen* the Constitutional Court gave content to what 'reasonableness' means in terms of s33 of the Constitution and s6(2)(h) of PAJA. In both *Scenematic Fourteen* and *Bato Star* the Applicants failed to have the fishing quota allocation process with regards to rights allocated by the national Department of Environmental Affairs to previously disadvantaged persons, set aside. Section 6(2)(h) of PAJA states that decisions must 'not be so unreasonable that no reasonable person could have reached it'. The Chief Director's decision was upheld and found to be reasonable. The Court commended the national Department for allocating fishing rights in an objective, rational and practical manner.

The judgment provides various factors which decision makers should consider in order to make reasonable decisions. Factors relevant to determining whether a decision is reasonable or not include:

- the nature of the decision
- the identity and expertise of the decision maker,
- the range of factors relevant to the decision,
- the reasons given for the decision,
- the nature of the competing interests involved and the
- impact of the decision on the lives and well-being of those affected.

Decisions should be reasonable in terms of:

- the goal for which the power is given to the decision maker;
- the facts; and
- the reasons given for the decision.

If a decision made by the Department is reviewed based on s6(2)(h) of PAJA for a lack of reasonableness, the decision maker will be able to provide evidence that a defensible, reasonable decision was in fact made due to the consideration and balancing of the abovementioned factors.

Reasons

In *Lezmin* the Court explained what "reasons" mean. It does not refer to the facts and circumstances which form the factual foundation for the decision. The decision maker is required to explain his decision in such a way which will enable the aggrieved party to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." This requires that the decision maker set out:

- his understanding of the relevant law;
- any findings of fact on which his conditions depend (especially if those facts have been in dispute); and
- the reasoning process which led him to those conclusions.

He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.

6.4 Effects of government inaction

Inaction on the part of government may take the form of a failure to make a decision or the dereliction of constitutional and statutory obligations that have been granted to an organ of state in terms of the Constitution, an empowering Act or delegated to an organ of state.

Failure to take decisions

In *SLC Longlands* the Applicant sought a punitive order as to costs on the scale as between attorney and client on the basis that: the delegated official took 18 months to make a decision and the MEC took nine months; two appeal decisions with new and different conditions were provided; the conditions were in excess of the powers conferred upon the MEC under the ECA; and, some of the conditions were so ineptly worded that compliance was rendered virtually impossible.

The Court noted that the ineptitude in the MEC's Department is cause for concern but came to the conclusion, "not without some doubt, that a punitive order as to costs is not justified."

Dereliction of constitutional and statutory obligations

In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*[36] the Constitutional Court made an adverse cost order against an organ of state who had failed to investigate allegations of fronting relating to a tender and abided the Court's decision leaving the parties who submitted tenders to deal with the matter.

Hidro-tech accused Viking Pony of fronting and requested that the City of Cape Town (CCT) investigate the matter as required by the Procurement Act. CCT did not take adequate action. Hidro-tech approached the Court for an order directing CCT to investigate the matter. On appeal to the Constitutional Court Viking Pony asked for costs against CCT because it simply abided in both the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court held that the CCTs dereliction of its constitutional and statutory obligations were largely responsible for the protracted and expensive litigation and punished it with costs.

Interwaste (Pty) Limited and Others v Coetzee and Others[37] is an unsuccessful application for an interdict to prevent the unlawful operation of a waste disposal site. It is not an administrative review. Neighbouring property owners submitted complaints to the national Department of Environmental Affairs regarding dust, foul odours, the unlawful commencement of NEMA listed activities, and security of the site. The neighbours approached the Court for an interdict to stop the unlawful landfill site from operating.

In a judgement that has been widely criticised the Court held that section 24G of NEMA acts as a moratorium against any action being taken against the Applicant pending finalisation of the rectification order. The Court was critical of persons seeking to have environmental laws enforced as a "person should not take it upon himself to play policeman and seek to enforce laws which fall squarely within the domain of the environmental authorities who are after all directly responsible for the enforcement of the environmental legislation."

This case reflects badly on environmental authorities in Gauteng in that they failed to enforce permit conditions and unlawful operation of a landfill despite knowing about the dumping of medical waste on site, created confusion though permit conditions and took 5 years to consider an application.

6.5 Disjointed decision making process

There is a risk of improper dissemination or handover of information on pending applications for authorization, from one decision maker to the next that may result in deviations from previous decisions taken on such applications by incumbent officials. For example, in *Lagoon Bay Lifestyles (Pty) Ltd v The Minister of Local Government* there was a lack of consistency in the successive Ministers' decisions and this may impact negatively on the Department's decision making process.

[36] [2010] ZACC 21; 2011 (1) SA 327 (CC) ; 2011 (2) BCLR 207 (CC) (23 November 2010).
[37] (2013) JOL 30686 (GSJ).

In *Retail Motor Industry Organization v Minister of Water and Environmental Affairs* the national Minister of Environment published an integrated industry waste tyre management plan entitled the Recycling and Economic Development Institute (REDISA). The appellants challenged the validity of the approval of the plan in an application for judicial review.

The Minister then withdrew the plan and published an amended version minus the offending items. Appellants contended that she was not entitled to withdraw the plan unilaterally once she had approved it as she was *functus officio* (i.e. the national Minister had already exercised her power and cannot do so again in relation to that matter).

The Court considered the Minister's power under the Waste Act and held that the Minister's decision to withdraw and submit the plans did not violate the principle of public participation as the plans were essentially similar, therefore a second consultative process would be futile. Furthermore, *functus officio* principle does not apply to subordinate legislation, there this principle was unassailable. The Minister's decision was therefore upheld.

7. LESSONS LEARNED FROM THE FINDINGS AND RECOMMENDATIONS

In this section we consider the lessons learnt in considering the different case classes and make recommendations as to how the Department can ensure that its decisions are defensible and less likely to be set aside on judicial review. As mentioned at the outset, this may not result in the number of review applications brought against the Department being reduced but should result in the number of successful reviews against the Department being reduced.

7.1 Lessons and recommendations to strengthen operating procedures and systems

The identification of lessons learned from the existing internal operating procedures and systems and formulation of recommendations to strengthen these procedures and systems was guided by the following considerations:

a) How should the decision maker ensure that operating procedures and systems comply with the legal requirements?
b) What measures are needed to address weaknesses and gaps in the current operating procedures and systems and ensure that lessons learned through decisions taken on review are captured and applied in future decision making?

Strengthening knowledge management systems

The discussions at progress meeting presentations and in the 11 July workshop exposed a weakness in the Department's knowledge management systems. One of the observations was that the Department's record keeping system did not facilitate quick and accurate preparation of Rule 53 Records (this is the record that indicates all of the information that the MEC took into account when making the decision and is called for in terms of High Court review proceedings). The failure to attach all of the information considered by the MEC may result in the decision being set aside on review if there is no indication in the Record or decision that the MEC took that information into account. A robust record-keeping process could very easily remedy this potential area for reviews.

Another observation was that even though all information was available from a central source, directorates within the department who were responsible for the initial decision remained unaware of the outcome and reasons for an appeal decision which may be contrary to their decision. Furthermore, not all directorates are made aware of judgements which may affect their decision making processes which may result in the decision maker repeating mistakes that a Court may have confirmed as a valid review ground.

The **recommendation** that is made in light of the above is that the Department must strengthen and formalise feedback loops in its knowledge management system to ensure that information is captured properly, that the information required by decision makers are made available to those decision makers and that this is properly reflected in its records, that whenever a decision is upheld or set aside on appeal by the MEC that the initial decision maker is informed of that decision and of the reasons for finding differently, and, that where a decision has been set aside on judicial review that the reasons for that

decision be communicated to the appeals directorate, the initial decision maker and the Department to avoid the same mistakes being repeated. The Department should at the very least develop a protocol to ensure that new developments are up-to-date and accessible on the central drive and another related mechanism should be implemented to ensure that all relevant directorates are identified and made aware of new information affecting them. This may require an SOP for data capturing and circulation.

Improving the formulation of conditions of authorisation

During engagement with officials and decision makers it became apparent that there was uncertainty among decision makers and case officers with regard to the nature and extent of conditions that the Department may include in an approved environmental authorisation. Conditions are an essential control mechanism to minimise the environmental harm and deal with the concerns raised by interested and affected parties at the commencement and for the lifetime of the authorised project. However, the Department may not impose conditions that do not relate specifically to the matter at hand irrespective of its good intentions.

The *SLC Longlands* matter confirmed that the MEC's powers to impose conditions are limited by authority and context. The Department may not impose conditions that go beyond its powers. This includes, as in the *SLC Longlands* matter, where the purpose for the condition is beyond the scope of the empowering legislation as well as being contrary to the principles of administrative justice. The *SLC Longlands* matter was decided under the ECA but the position under NEMA is unlikely to differ substantially. The principle therefore remains relevant under NEMA.

The Department must further ensure that conditions are rational within the context of the application. In *SLC Longlands* the MEC approved onerous conditions relating to low cost housing whilst simultaneously rejecting the part of the development which funds the construction of the low cost housing. Self-defeating conditions provide contrarians with an opportunity to argue that the conditions are irrational or that the decision maker did not apply its mind when imposing them.

We **recommend** that the template committee ensures that conditions imposed in an environmental authorisation are clear and enforceable and written in such a way that they link to an identified activity and impact. Conditions must identify who must act, what action must be taken and the period within which the action must be taken. The test is who, what and by when. The condition is unenforceable if any one part is absent without further clarification.

Addressing gaps and weaknesses in SOPs

The SOPs we reviewed were fairly comprehensive as to the basic procedure to be followed in EIA applications (with some minor inaccuracies). It is very important that good procedural SOPs are in place because non-compliance with procedural aspects of empowering legislation is relatively simple to establish as a review ground.

However, we **recommend** that the SOPs should make more practical reference to the wider legislative context in which the EIA Regulations must be implemented including the

right to fair administrative action, the duty to promote sustainable development and the requirements of cooperative governance. In situations like those which arose in the *Astral Operations* and *Save the Vaal* cases, officials may benefit from guidance on how to make a decision on whether to consult with interested and affected parties at a particular stage, particularly where the empowering legislation is silent or unclear. They might also provide practical guidance on how to avoid creating grounds for review of an application on the basis of the failure to take a decision within the prescribed period or within a reasonable period, where applicable. Although the latter ground of review was not a feature of the cases reviewed for the Project, it is relatively easy to establish as a review ground and is relatively easy for the Department to avoid.

The existing SOPs should also include information that assists officials in making the assessments and decisions that form part of the EIA process, for example: how to assess whether an EAP is independent or not, how to decide whether to accept or reject a BAR, scoping report or EIAR and how to assess whether an appeal has been validly submitted and must therefore be considered by the appeal authority.

We also strongly recommend the development of a guideline or SOP on environmental decision making that will assist in the making of decisions that are sound and defensible and therefore less vulnerable to review.

As set out above, one of the key elements of fair decision making is that all relevant information is considered by the decision maker. It is not possible to provide an exhaustive list of this information as it will obviously depend on the circumstance of each application. However, it is possible and, we submit, useful to specify some of the kinds of information that should be considered such as guidelines relevant to applications in general (which must be considered in terms of section 24O) or even in more specific kinds of applications.

The NEMA principles and the duty to promote sustainable development are also relevant considerations in applications for environmental authorisation. A decision making guideline could also improve decision making by providing advice on the consistent interpretation and application of the NEMA principles and how this should be recorded in the environmental authorisation as reasons for the decision, and the determination and application of sustainability criteria.[38]

7.2 Lessons & recommendations on improving decision making

The following questions guided the identification of lessons learned from the case law and formulation of recommendations to improve decision making:

a) How can the trends be utilised to further strengthen the current environmental impact assessment review and decision making process?
b) What are the lessons learnt from other relevant judgments, challenging the Department and other decision makers, which can be further applied to approve the Department's current environmental impact assessment review and decision making framework?

[38] Such as suggested by Paul Hardcastle *et al*, 2010 and Gerber *et al*, 2010 in his paper on "Sustainability Criteria for Planning and EIA in South Africa". They propose such a guideline to ensure that the planning and EIA processes are objectives-led and don't become merely a compliance exercise to ensure that legislated procedural steps have been followed.

7.2.1 Grounds of review

Making administrative decisions more defensible require the systematic elimination of reviewable defects in the decision making process. As mentioned, the statistical data relating to grounds of review are somewhat skewed on account of the small selection of cases, the fact that many cases are pending and that the Courts do not always decide on all the grounds raised on review. It is accordingly more appropriate to start with those grounds which are the easiest to prove as the Courts would usually decide a matter on one of these easier grounds.

However, it is incorrect to assume that elimination of the grounds on which EIA decisions are statistically overturned the most, will make decisions more defensible. The reason for this is that Courts often decide cases on one or two of a number of review grounds raised, which means that there are still a number of potentially fatal review grounds which the Courts have not considered. Similarly, to assess the grounds which Applicants tend to rely on in their affidavits are also not a credible indication of the review grounds to start with as Applicants often list as many review grounds as possible, regardless of the prospect of success.

Practically speaking, the easiest grounds to prove are procedural grounds. Procedural defects in the decision making process tend to be more cut-and-dried than merit based arguments. These grounds include:

- non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision;
- the decision maker was not authorised to make the decision by the empowering provision;
- the decision maker acted under a delegation of power which was not authorised by the empowering provision;
- the action concerned consists of a failure to take a decision;
- the action is unconstitutional or unlawful; and
- unreasonable delay in taking the decision

Focusing on the grounds which are the easiest to prove is the most rational place to start in making EIA decisions more defensible. It is also the easiest defect to fix as it is usually a simple yes or no answer.

Our **recommendation** is that the Department should start by developing checks to strengthen its procedural compliance first and follow by improving the decision making process qualitatively.

The following principles will assist the department when making decisions so that those decisions are less likely to be set aside on review:

- act within the empowering provisions of NEMA (or relevant law) and in terms of a proper delegation of authority;
- treat everyone fairly;
- ensure compliance with all mandatory and material procedures or conditions for exercising the power;

- apply your mind to all relevant considerations for the decision (these considerations would have been determined from the relevant facts and law applicable to the proposed project); and
- ensure that the decision is rationally related to the:
    - purpose to be achieved by the decision
    - the empowering provision
    - the information provided, and
    - the reasons provided for the decision.

We now turn to consider each of the requirements discussed under section 6 and focus on the lessons learnt and recommendations to avoid similar review grounds being successfully decided in the future.

7.2.2 The requirement of authority

This deals with the appointment of an authority and acting beyond the powers granted by an authority.

Appointment of authority

The Department, if it has not done so already, must critically consider its role in relation to municipalities and ensure that it is tested against the constitutional competencies of the different spheres of government. It is likely that these concerns may have been addressed in the recently assented to but yet to come in force provincial Land Use Planning Act. However, as seen in the *Brashville* matter there may still be instances where the Department is fettering the discretion of municipalities or intruding on areas of their competence. A proper assessment of the respective constitutional powers between provincial and municipal organs of state may result in costly litigation being avoided.

Acting beyond powers granted

Careful consideration is required when attaching conditions to an environmental authorisation. A competent authority does not have the power to impose conditions in an environmental authorisation that are not related to a specific listed activity. Differently put, where conditions are included as part of an environmental authorisation those conditions must be linked directly to the environmental impacts of the listed activity. Furthermore, where conditions that are not directly linked to the listed activities are included, it could be argued that irrelevant considerations were taken into account and that the authorisation must be set aside on that basis.

The competent authority must determine if the conditions relate to the listed activity and, if it does not, but the conditions are still included then the competent authority must determine whether there are other factors that make those conditions relevant. The Court may conclude that irrelevant considerations were taken into account where the conditions imposed relate to the second enquiry, are too far removed from the listed activity and materially influenced the decision. This is also dealt with under the heading procedural fairness discussed further below.

7.2.3 Procedural fairness

This relates to the process that was followed and ultimately turns on whether one party was treated differently in relation to the other and that that difference of treatment resulted in a favourable outcome for one of them. This would include where circumstances have changed significantly and the decision maker failed to take those considerations into account, only hearing one party's version and failing to hear the other party, and the decision maker was bias.

Relevant considerations

Under section 6 above changed circumstances were discussed separately from the failure to take relevant considerations into account. This was done to make the point that changed circumstances in an area or property subject to an application for environmental authorisation (as in the *Seafront for All* matter) may also be a ground of review. The failure to take changed circumstances into account expressed in terms of a review ground is a failure to consider relevant considerations. An indication of changed circumstances may be the lengthy time period between the application and the decision.

The flipside of the failure to consider relevant considerations is that irrelevant considerations were taken into account. This may be where the Department fails to react to changing circumstances, like new and repealed guidelines or where the passing of time may result in information before the decision maker being irrelevant. The Courts have understandably not laid down a test to determine when circumstances have changed sufficiently to warrant a reconsideration of the information before the decision maker.

The Department must adopt a precautionary approach and assess whether the information is still valid, relevant and complete before handing it over to the decision maker in every instance. The competent authority must take information, particularly if it may affect the outcome of the decision, into account. It does not have discretion on whether or not to do so. Furthermore, that information may even be from an entirely different process (for example EIA process) when considering land use planning matters.

The Department must ensure that its record-keeping process is up to date so all relevant information can be made available to the competent authority.

Opportunity to make representations

Whenever new information is included in the EIA process or any other process for that matter, interested and affected parties must be provided with an opportunity to comment on that information more so when they are likely to be affected by the decision. The competent authority must ensure that interested and affected parties are provided with an adequate opportunity to make representations on the information that it is taking into account when making its decision.

Interested and affected parties may also make representations on preliminary decisions where those decisions may have serious consequences for the interests that those parties

are trying to protect. A competent authority must consider whether its preliminary decision would have serious consequences on the interests of those parties and, if so, it is likely that those interested and affected parties would have to be consulted.

Bias

The competent authority when making a decision should be aware that an apprehension of bias could be created, not only by its own conduct, but also as a result of the conduct of its "superior". The test as mentioned is whether there is a reasonable apprehension of bias on the part of the decision maker.

Furthermore, even though comment from interested and affected parties may have been obtained on the new material and that an appeal hearing was held at which all parties were present that this would not dispel the reasonable apprehension of bias.

Where a competent authority is required to perform an adjudicative administrative act it must do so free from political influence exercised by a party to the appeal through the decision maker's political superior.

7.2.4 Reasonableness

Reasonableness is one of the more difficult grounds to prove as the Courts are reluctant to set aside a decision on this basis especially where it is a matter that requires a particular expertise and balancing of competing interests. As mentioned under section 6 above, reasonable administrative action is made up of rationality and proportionality. Rationality means that a decision must be supported by the evidence and information before the competent authority, the reasons given for it and must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. Proportionality relates to balance, necessity and suitability.

Decision-makers must consider the factors set out below when making a decision in order to ensure that their decision is reasonable. These factors include:

- the nature of the decision;
- the identity and expertise of the decision maker;
- the range of factors relevant to the decision;
- the reasons given for the decision;
- the nature of the competing interests involved; and
- the impact of the decision on the lives and well-being of those affected.

Decisions should be reasonable in terms of:

- the purpose for which the power is given to the decision maker;
- the facts; and
- the reasons given for the decision.

If a decision made by the Department is reviewed based on section 6(2)(h) of PAJA for a lack of reasonableness, the decision maker will be able to provide evidence that a

defensible, reasonable decision was in fact made due to the consideration and balancing of the abovementioned factors.

Reasons

In *Lezmin* the Court explained what "reasons" mean. It does not refer to the facts and circumstances which form the factual foundation for the decision. The decision maker is required to explain his decision in such a way which will enable the aggrieved party to say, in effect: "*Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging*."

The decision maker must set out:

- his / her understanding of the relevant law;
- any findings of fact on which his / her conditions depend (especially if those facts have been in dispute); and
- the reasoning process which led him / her to those conclusions.

The decision maker should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.

In the Supreme Court of Appeal Decision, the explanatory nature of reasons, as mentioned above, was explained. The Court linked the idea of adequacy with the affected persons' appreciation of why the decision went against them. The *Phambili Fisheries* matter provides guidelines for officials with regard to reasons. Two main propositions emerged:

- the first being that adequate reasons should be specific, be written in clear language and be of a length and detail appropriate to the circumstances; and
- the second proposition is that reasons should consist of more than mere conclusions and that they should refer to the relevant facts and law as well as the reasoning process that led to those conclusions.

Relevant facts in relation to the first proposition include:

- the nature and importance of the decision;
- the complexity of the decision;
- the time available to the decision-maker;
- the factual context of the administrative action;
- the nature of the proceedings leading up to the action;
- the nature of the functionary taking the action;
- the nature of the right, that is adversely affected;
- whether the matter involves an application for a benefit or the deprivation of a right;
- administrative efficiency;
- the purpose for which reasons are intended;
- the stage at which the reasons are given; and
- whether further remedies are available to contest the decision.

The second proposition is that reasons should be more than just the conclusion. This is best illustrated by considering what would be regarded as inadequate reasons. These would be where:

- a person is informed of the result without any explanation as to how the result was arrived at;
- a person was informed of the factors that were considered but were not informed as to how he or she fared in relation to those factors and why he or she was considered to be less suitable;
- further reasons are cryptic and unspecific; and
- the reasons are just conclusions without offering any hint of the facts as used in the process leading to those conclusions.

The test formulated by the Supreme Court of Appeal as to the adequacy of reasons is 'whether the respondent has sufficiently been furnished with the actual reasons to enable it to formulate its objection thereto'. The Constitutional Court in *Koyabe v Minister for Home Affairs*[39] confirmed that reasons will be adequate if the complainant can make out a reasonably substantial case for a ministerial review or an appeal. Furthermore, while the reasons must be sufficient, reasons need not 'be specified in minute detail, nor is it necessary to show that every relevant fact weighed in the ultimate finding'.[40]

7.2.5 Effects of government inaction

In this section we consider the failure by government to take decisions and the dereliction of constitutional and statutory obligations.

Failure to take decisions

Our **recommendation** if that the Department must ensure that the process in relation to deciding environmental authorisations is streamlined so that decisions are made timeously, that communicating environmental authorisations to Applicants is streamlined to avoid different authorisations being issued to the same Applicant and that the conditions imposed are practical and capable of fulfilment.

Dereliction of constitutional and statutory obligations

In the *Interwaste* matter the Gauteng environmental authorities failed to enforce permit conditions in respect of an unlawfully operated landfill despite knowing about the dumping of medical waste on site, created confusion though permit conditions and took 5 years to consider an application. The authorities must respond promptly to infringements of the law.

The Department must ensure that it fulfils its constitutional and statutory obligations and that, in appropriate circumstances, to avoid adverse costs orders being ordered against it even though it is not a party to the proceedings, to at least provide an explanatory affidavit

[39] 2010 (4) SA 327(CC) para 62.
[40] Para 63

setting out its version of the facts particularly if doing so would result in the avoidance of protracted and expensive litigation.

7.2.6 Disjointed decision making process

The Department is advised to ensure that there are adequate hand over procedures whenever there is a change in administration, so as to rebut any allegations of disjointed information dissemination, which may affect the decision making process and could result in a claim for damages against the Department.

DATED at CAPE TOWN on this 10th day of October 2014.

I COETZEE AND G DANIELS

APPENDIX 1 TERMS OF REFERENCE

APPENDIX 2 INCEPTION REPORT

APPENDIX 3 BI-MONTHLY PROGRESS REPORTS

APPENDIX 4 ACTION MINUTES OF PROGRESS MEETINGS

APPENDIX 5 PROJECT WORK PLAN

APPENDIX 6 DISCUSSION DOCUMENT FOR 11 JULY WORKSHOP

APPENDIX 7 DATA CAPTURE FORM FOR EIA DECISIONS

APPENDIX 8 CLASS A CASE SUMMARIES

APPENDIX 9 CLASS B CASE SUMMARIES

APPENDIX 10 CLASS C CASE SUMMARIES

APPENDIX 11 EADP EIA AND PLANNING SOPS AND GUIDELINES LIST AND REVIEW SUMMARY SHEETS

APPENDIX 12 REFERENCES

QUINOT, Geo, 2008, *Administrative Law Cases & Materials*, Juta Law, Cape Town

WESTERN CAPE GOVERNMENT: DEPARTMENT OF THE PREMIER, March 2013, *Provincial Evaluation Plan 2013/14 – 2015/16*

HOEXTER Cora, January 2007, *Administrative Law in South Africa*, Juta & Company,