The Constitutionality of *Ex Post Facto* Authorisation for Environmentally Harmful Activities in South Africa

Dissertation submitted in fulfillment of the requirements for the degree of LLM by Research

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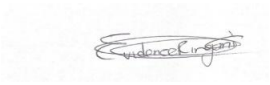
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Declaration

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……
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Dedication

I dedicate this dissertation to my deceased mother, Joyce Musiwalo Mathivha and my deceased grandmother Anna Mudalahothe Mathivha, the two beautiful women who taught me that education is the only weapon that will transform my life. Before your souls departed this world, you invested in me the ability to pray, and prayer is what made this work possible [Mark 11 verse 24]. May your beautiful souls continue to rest in perfect peace.To my younger sister, Ntsakiso Precious Hobyane, this is for you. I have led by example

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To my father, Freddy Khaizen Hlungwani, thank you for the emotional support and encouraging me to never quit. This is for you, papa.

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Abstract

Environmental activities that have been listed as harmful under the National Environmental Management Act (NEMA) must be authorised prior to commencement in South Africa. The process of authorisation (EA) requires an Environmental Impact Assessment (EIA) to be commissioned before a listed activity could commence on the environment. Failure to commission EIA and obtain EA constitutes an offence under NEMA. Despite being an offence, section 24G of NEMA permits EA to be obtained *ex post facto*, subject to payment of an administrative fine. Scholarship shows that *ex post facto* EA undermines the EIA process and the preventative, precautionary and integrated environmental management principles under section 2 of NEMA. Other writings posit that the *ex post facto* EA legitimizes the pursuit of critical projects for economic development, even if they are harmful. Considering that both the pursuit of environmental protection, which the EIA seeks to achieve, and the realization of economic development, which the *ex post facto* EA seeks to validate, are both constitutionally entrenched in South Africa, the position of *ex post facto* EA raises a tension that requires a constitutional enquiry in light of section 24 and section 33 of the Constitution.

Through doctrinal research and comparative methodology, this study interrogates ex *post facto* EA in the context of constitutionally entrenched values, such as environmental protection, sustainable and socio-economic development, and just administrative action, to establish whether the process is constitutional. It further explores good practices in other legal systems, especially, India and the United Kingdom, in relation to *ex post facto* EA. The study suggests that these legal systems employ the process of *ex-post facto* EA only in exceptional cases, to strike a balance between environmental protection and economic development. The study recommends that *ex post facto* EA should generally be prohibited in South Africa and only be granted in exceptional circumstances wherein the developers will bear the onus to prove the exceptionality of their unlawfully commenced projects to ensure that there is accountability and transparency of the process.

Key words: Constitutionality*, Ex post facto* authorisation, environmental harmful activities

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Chapter one

Introduction

1.1. Background of study

Environmental harmful activities such as the generation of emissions to air, the discharge of waste to water and the clearing of natural vegetation may pose a serious threat to the environment.[1] These activities may even result in harsh environmental impacts, such as global warming, land contamination, climate change, water and air pollution, thus posing a serious risk to the health and wellbeing of living species and natural resources.[2] Therefore, it is a legal requirement that possible impacts of certain activities that are listed as harmful must be investigated, assessed, and anticipated. This is done through the environmental impact assessment (EIA) procedure for the purposes of obtaining environmental authorisation (EA).[3]

The commissioning of EIA, when applying for EA, is necessary, to identity any possible impacts that may arise from a project, resulting in planning on how to prevent, minimize and mitigate impacts even before the commencement of such a project .[4] Harmful activities that require EA are specified in listing notices 1, 2 and 3 of the Environmental Impact Assessment Regulation Listing Notices of 2014.[5] Listing notice 1 enlists activities that have the least environmental impact and requires only a basic assessment report

[1] S.C Scrinivas, S.A Paphatis, A.S Ncomanzi, R. Tandlich and K Bradshaw 'Service Learning Based on Environmental Health Promotion Activities for Pharmacy Students and Educating Young on the Safe Disposal of Medicine and the Used Sharps (2015) 3 Journal for New Generation Science 183.
[2] Ibid.
[3] R Paschke & J Glazewski 'Ex Post Facto Authorisation in South African Environmental Assessment Legislation' (2006) Potchefstroom Electronic Law Journal 121.
[4] Ibid.
[5] Environmental Impact Assessment Regulations, 2014.

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(BA).[6] Furthermore, Listing notice 2 provides for activities that have increased environmental impact. [7] Finally, Listing Notice 3 enlists activities in relation to geographical areas that require a basic assessment process to be carried out, where the specified area of the activity is geographically susceptible to harm. For example, an activity in a protected area.[8]

The primary objective of making the commissioning of EIA and obtaining EA a prerequisite for specified or listed activities is to give effect to the protection of the environment, particularly the environmental right of everyone.[9] Furthermore, it is to ensure that there is conservation of natural resources and ecologically sustainable development, as stipulated under section 24 of the Constitution of the Republic of South Africa, 1996.[10] Therefore, section 24 of NEMA serves as a legislative measure that seeks to achieve the above-mentioned constitutional values, as stipulated in the Constitution.[11] Section 24 of NEMA states the following:[12]

> "(1) In order to give effect to the general objectives of integrated environmental management, the consequences for or impacts of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without obtaining authorisation
>
> (2) The minister or MEC with concurrence of the Minister, may identify-
>
> (a) activities which may not commence without environmental authorisation from competent authority
>
> (b) The geographical areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the environmental authority, in

[6] National Environmental Management Act: Listing Notice 1: List of Activities and Competent Authorities Identified in terms of Section 24 (2) and 24D.
[7] National Environmental Management Act: Listing Notice 2: List of Activities and Competent Authorities Identified in terms of Section 24 (2) and 24D.
[8] Reece Cronje Alberts, Francois Pieter Retief et al 'Environmental Impact Assessment (EIA) effectiveness in Protected Areas' (2021) 39 Taylor and Francis Group 292.
[9] The Constitution of the Republic of South Africa, 1996, s24.
[10] Ibid.
[11] *South African Human Rights Commission v Msunduzi Local Municipality and Others* [2021] 3 All SA 939 para 72; also see *Minister of Environmental Affairs and Another v Arcelormittal South Africa* [2020] ZASCA 40 Paras 4-6.
[12] National Environmental Management Act No. 107 of 1998.

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> which specified activities may not commence without environmental authorisation by competent authority"[13]

Section 24D of NEMA provides for 'the relevant minister or MEC to publish in the relevant Gazette a notice containing a list of activities or areas identified in terms of section 24 (2).[14] Section 24F (1) prohibits persons from commencing with an activity listed in terms of section 24 (a) or (b) unless the competent authority or the Minister responsible for mineral resources has granted environmental authorisation'[15]In terms of section 49A (a) and (b) of NEMA, contravention of section 24F (1) as stipulated above is a criminal offence.[16] Section 49B further stipulates that 'such an offence is punishable by a fine not more than R10 000 000 (Ten Million rands) or an imprisonment for not more than 10 years, or the perpetrator may even face both penalties' (fine and imprisonment).[17] Therefore, EA is important in the context of environmental protection.

Although the later sections prohibit the commencement of listed activities without first obtaining EA, section 24G of NEMA allows for the application and granting *ex post facto* EA subject to an administrative penalty wherein a person commences with any of the listed activities prior to obtaining EA.

Section 24G of NEMA stipulates that:

> (1) on application by a person who-
>
> (a) has commenced with a listed activity or specified activity without environmental authorisation in contravention of section 24 (1) F
>
> The minister, minister responsible for mineral resources or MEC concerned, as the case may be, must direct the applicant to-
>
> (i) immediately cease the activity pending a decision on the application submitted in terms of this subsection.

[13] Ibid.
[14] Ibid.
[15] National Environmental Management Act: s 24 (f).
[16]Ibid.
[17] Ibid.

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(2) The minister responsible for mineral resources or MEC concerned must consider any report or information submitted in terms of subjection (1) and thereafter may-

(a) refuse to issue environmental authorisation; or

(b) issue environmental authorisation to such person to continue, conduct or undertake the activity subject to such conditions as the Minister, minister responsible for mineral resources or MEC may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued; [18]

The above provision raises a concern about the protection of the environment, particularly because commencement without EA entails that the environment may be irreversibly damaged before the issue of *ex post facto* EA arises. The existence of *ex post facto* EA is viewed as contrary to the requirement for EIA to be commissioned before a project starts. EIA is therefore necessary to anticipate, assess, and avoid negative impact on the environment.[19]

The issue of *ex-post facto* EA has been a subject of conflicting judicial decisions even before its official introduction in NEMA. For instance, in *Silver Valley Coalition v Sybrand van der Spuy Boerderye and Others*[20] and *Hingange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others*,[21] the Courts held that *ex post facto* EA was not permitted in law.[22] However, *in Eagles Landing Body Corporate v Molelwa No and others,*[23] the Court upheld the *ex post facto* EA that was granted in the absence of any empowering provision; specifically, for a project that was already completed. As a result of these contradictory judgments, the legislature saw it fit to legislate section 24G of NEMA into law, in order to expressly provide for the application and for granting *ex post facto* EA. *Ex post facto EA* was then legislated in 2004.[24]

[18] Ibid.
[19] National Environmental Management Act 108 of 1998, s 2(2) and 24 (1).
[20] *Silver Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C) 489.
[21] *Hingange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) 40.
[22] Ibid.
[23] Eagles Landing Body Corporate v Molewa No and Others 2003 (1) SA 412 (T) 432.
[24] Gideon Erasmus, *an Analysis of Section 24G of the National Environmental Management Act* (Parliamentary Monitoring Group, 2011) < Public Law 451 (pmg.org.za)> accessed 11 June 4.

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Despite the above provision, some tension remains. For example, some authors view the process of *ex post facto EA* as deviation from the principles entrenched under section 2 (4) of NEMA; namely, being the preventative, precautionary and integrated environmental management (IEM), and the EIA procedure under section 24 (1) of NEMA.[25] Other scholars believe that the provision is necessary to give persons a chance under the law to legitimize their unlawfully commenced projects for the benefit of socio-economic development.[26]

With all the concerns raised in respect of *ex post facto* EA, it is necessary to assess whether the process is compatible with the relevant provisions of the Constitution, particularly section 24 and section 33 of the Constitution which provides for the right to just administrative action that is lawful, reasonable and procedurally fair.[27] The Constitution is the supreme law of the land and any provision which is viewed as problematic must be subjected to its values and principles, and if inconsistent, then the issue of invalidity would the arise.[28]

The practice of *ex post facto* EA for specified or listed activities is not only confined to South African environmental law jurisprudence. In the English Law, section 73A of the Town and Country Planning Act provides as follows:[29]

(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2) Subsection (1) applies to development carried out—

[25] Lauren Kohn 'The Anomaly that is section 24G of NEMA: An Impediment to Sustainable development' (2012) 19 South African Journal of Environmental Law & Policy 4-5, see also Lea September 'A Critical Analysis of the Application of Section 24G Provision of the National Environmental Management Act (NEMA) The Gauteng Province Experience' (Parliamentary Monitoring Group, 2012) 120821leaseptember_0.pdf (pmg.org.za) > accessed 11 June 2023 4-5.
[26] John Rantlo & Germarie Viljoen 'A Critical Appraisal of Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd 2019 (5) SA 275 (GP)' (2020) 3 (5) '(2020) 38 Impact Assessments and Project 445.
[27] The Constitution, of the Republic of South Africa, 1996, s33.
[28] Centre for Child Law v T S and Others 2023 (6) SA 12 (CC) Para 9; Qwelane v South African Human Rights Commission and Another 2021 (6) SA 579 (CC) para 52; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28 and *Competition Commission of South Africa v Pickfords Removals* SA (Pty) Limited 2021 (3) SA 1 (CC)para 34.
[29] Town and Country Planning Act 1990.

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(a) without planning permission;.

*(*3) Planning permission for such development may be granted so as to have effect from—

(a)the date on which the development was carried out; or

(b) if it was carried out in accordance with planning permission granted for a limited period, the end of that period.[30]

Furthermore, while there is no legislative provision that specifically empowers the granting of *ex post facto* EA in India, courts have granted *ex post facto* EA only in exceptional circumstances.[31] This study comparatively engages with the laws of these jurisdictions, to examine the application of *ex post facto* EA, for the purpose of developing good practices on the concept in South Africa.

1.2. Research Problem Statement

Issues pertaining to the protection of the environment from pollution, ecological degradation, the promotion of conservation, securing ecologically sustainable development and the promotion of justifiable economic and social development[32], are issues of just administrative action regulated by section 33 of the Constitution; and are classified as constitutional values under section 24 of the South African Constitution. *Ex post facto* EA under section 24G of NEMA is an administrative process that has been of concern in scholarship since its inception in South Africa. The concern is that this administrative process -to a certain extent- undermines the requirements for EIA and the preventative, precautionary and integrated environmental management principles under section 2(4) of NEMA which ensure that potential impacts of a development are assessed and addressed before a development can commence. These principles serve as guidelines to safeguard the environment from harm. Therefore, it is a concern that the process of *ex post facto* EA appears to undermine the efforts of these principles to protect the environment from potential as it permits commencement prior to commissioning EIA

[30] Ibid [24]
[31] Common Cause v Union of India (2017) 9 SCC 499 54.
[32] Constitution, s 24 (b)

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and obtaining EA. Furthermore, the process of *ex post facto* EA is regarded as being susceptible to abuse for lack of transparency and accountability, as project developers may commence dangerous activities without prior EA, knowing very well that they can always apply for *ex post facto* EA after commencement. As a result, ex post facto EA appears to defeat the EIA procedure, and the principles mentioned above. The only effort made by the legislature is to severally amend section 24G of NEMA to curtail the abuse but such has made no difference. In the Memorandum on the Objects of the National Environmental Management Laws, Second Amendment Bill, (2013) that sought to address the abuse through amendment of the provision, the legislature acknowledged that over the years a trend in the abuse of section 24G of environmental authorisation process has been noticed in that people tend to knowingly commence listed activity without environmental authorisation and later apply for section 24G environmental authorisation to rectify the unlawful commencement. The legislature emphasised that these challenges amongst others pose a serious danger to the credibility of the environmental impact assessment process, therefore in order to deal with the challenges, stronger provisions have been introduced.[33]

On the other hand, completely preventing *ex post facto* EA may make impossible exceptional projects that may have environmental consequences, but which are needed for economic development and advancement of socio-economic needs in South Africa. Hence, the investigation of the constitutional basis of *ex post facto* EA will assist in clarifying the tension that exists between the need for environmental protection and for exp post facto EA to advance socio-economic development. Furthermore, assessing good practices of *ex post facto EA* in India and England may assist in providing ideas on how the process of *ex post facto* EA may be refined in South Africa to ensure that it co-exists with EIA and the section 2 of NEMA principles, without much conflict and susceptibility to abuse.

[33] Memorandum on the Objects of the National Environmental Management Laws, Second Amendment Bill, (2013).

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1.3. Aim

The aim of this study is to assess whether *ex post facto* EA in terms of section 24G of NEMA is consistent with the values under section 24 and section 33 of Constitution of South Africa and further explores the good practices from other legal systems that may assist with its refinement in South Africa to cure the concerns about its conflict with EIA and the principles under section 2 of NEMA. Furthermore, to minimise its susceptibility to abuse by developers.

1.4. Objectives

In fulfillment of the above-outlined aim, the researcher sought to achieve the following objectives;

1.4.1. to evaluate the historical evolution of *ex post facto* EA in South Africa.

1.4.2. to examine the extent to which of *ex post facto* EA is consistent with section 24 of the Constitution.

1.4.3. to evaluate the extent to which *ex post facto* EA is constituent with section 33 of the Constitution.

1.4.4. to investigate good practices regarding the application of *ex post facto* EA in relevant legal systems. Outcome will be achieved through evaluation of how the Indian and English jurisprudence utalise the process of *ex post facto* EA and what lessons can be drawn from these jurisdictions to refine the practice of ex post facto EA in South Africa and minimise the concerns about its susceptibility to abuse and the conflict with EIA and section 2 of NEMA principles.

1.5. Research Questions

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McCombes stresses that research questions are essential to pinpoint exactly what researchers seek to achieve in their work.[34] McCombes further emphasises that good research questions are necessary to guide a research study.[35] The overarching research question of this study was whether *ex post facto* EA of environmental harmful activities is constitutional. To answer the main research question, the following specific questions were raised.

1.5.1. What is the historical evolution of *ex post facto* EA in terms of section 24G of NEMA?

1.5.2. To what extent is ex *post facto* EA in terms of section 24G of NEMA consistent with section 24 of the Constitution?

1.5.3. To what extent is ex *post facto* EA in terms of section 24G of NEMA consistent with section 33 of the Constitution?

1.5.4. What are good practices on *ex post facto* EA in other legal systems, such India and England?

1.6. Assumption

According to the *Oxford Dictionary***,** an assumption may be defined as a proposed statement that explains a particular idea based on facts that have no solid evidence. [36]It is "a proposition that is made on the basis of reasoning but has not been proven to be true".[37] The assumption in this study is that it is possible that the *ex post facto* EA process in terms of section 24G of NEMA may or may not be constitutional. If constitutional, a further assumption is that through the assistance of good practices from other legal systems, the practice of ex post facto EA in South Africa may be refined, to ensure that the abuse of the process is minimised and subsequently ensuring that the process co-exists with the EIA requirement and the principles set out in section 2 (4) of NEMA.

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[34] Shona MacCombes 'Writing Strong Research Questions: Criteria and Examples' (Scribbr, 2022) <Writing Strong Research Questions | Criteria & Examples (scribbr.com)> accessed 11 June 2023.

[35] Ibid.

[36] Michael Swan, *Oxford Advanced Learner's Dictionary* (Oxford University Press, 2012).

[37] Ibid.

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1.7. Scope of the Study

This study is limited to the constitutionality of *ex post facto* EA in terms of section 24G of NEMA and the profiling of good practices, with primary focus on;

1.71. whether *ex post facto* EA in terms of the provision in question is compatible to section 24 of the Constitution; and

1.72. Whether *ex post facto* EA in terms of the provision in question is consistent with section 33 of the Constitution.

1.73. Investigation of good practices regarding *ex post facto* EA in other legal systems, with particular focus on Indian and English jurisprudence.

Although the tension between *ex post facto EA*, EIA and the preventative, precautionary and Integrated environmental management principles has been previously discussed in scholarship, there has not been any extensive study conducted regarding the Constitutionality of *ex post facto EA* in terms of section 24G of NEMA, particularly subject to values under section 24 of the Constitution and the just administrative action principles under section 33 of the Constitution which provides for the right to administrative action that is lawful, reasonable and procedurally fair. The existing tension warrants *ex post facto* EA in terms of section 24G of NEMA to be weighed against above-mentioned constitutional provisions, to establish whether it encompasses constitutional guarantees such as environmental protection, socio-economic development, and administrative justice. The study is limited to assessing the constitutionality of ex post facto EA. It does not dwell into the extensive analysis of the legality of a fine calculator used to determine the administrative penalty imposed in terms of section 24G of NEMA for ex post facto EA application, which is also a burning issue in South African environmental law.

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1.8. Literature Review

A literature review may be defined as a process by which a researcher evaluates or examines what other researchers or scholars have previously written about a similar topic or concept, and, as such, it forms a significant part of every research thesis.[38]The significance of a literature review is to position each written piece of research in the context of its contribution to the subject under evaluation.[39] It further determines how each work relates to the others under review. A literature review is essential in establishing a different way to evaluate, interpret and apply a particular concept and further assists in identifying any gaps in the previous work done by other researchers.[40] On the other hand, the literature review positions the original research work in the same context with other literatures already in existence.[41]

Bore and Odeku,[42] like Pretorius[43], believe that although South Africa has a long history of environmental management, environmentally harmful activities continue to degrade the environment, causing irreparable damage to sustainable development.[44] As a result, EA, through the EIA process, has been made mandatory, to ensure that the environment is mitigated and sustained from any possible degradation caused by developmental projects /activities.[45] They further emphasised that failure to prevent degradation caused by harmful activities through EIA would amount to a contravention of section 24 of NEMA.[46] However, these scholars have not expressed any specific views on whether section 24G of NEMA, is constitutionally viable or not, taking into account that this provision permits what normally amounts to a contravention of the same section 24 of NEMA. Therefore,

[38] Hannah Snyder 'Literature Review as a research Methodology: An Overview and Guidelines '(2019) 109 Journal of Business Research 333.
[39] Ibid [37].
[40] Ibid [37].
[41] Ibid [37].
[42] Kalembo Bore and Kola Odeku 'Significance of Environmental Impact Assessment as a Precondition for Embarking on Developmental Projects in South Africa' (2022) 2 African Journal of Development Studies 241-242.
[43] Hester Magdalena Pretorius *the quality of Environmental Impact Assessment Reports in the Northwest Province, South Africa* (Boloka Institutional Repository: Northwest University 2006) 2-3.
[44] Ibid [41].
[45] Ibid [41]
[46] Ibid [41]

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this research sought to fill in the existing gap, by assessing the constitutionality of section 24G of NEMA.

Although EA is a prerequisite for one to commence with environmentally harmful activities, scholarship explains how section 24G of NEMA was introduced in law, to allow persons who unlawfully commence with listed activities without EA, to apply for *ex post facto* EA. Erasmus[47] , Jikele [48] and Basson[49] explain the contradictory events in case law that led to the implementation of *ex post facto* EA, specifically from Silver *Valley Coalition v Sybrand van der Spuy Boerderye and Others*[50] and *Hingange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others*,[51] where the Courts held that *ex post facto* EA was not permitted in law since there was no provision empowering its granting thereof.

In contrast, the Court allowed the granting of *ex post facto* EA in *Eagles Landing Body Corporate v Molelwa No and others*.[52] These inconsistent findings led to the enactment of the provision that empowers *ex post facto EA*.[53] Scholarship does not justify nor critisise the existence of the provision in question within the ambit of the Constitutional values entrenched under section 24 of the Constitution, specifically its viability to economic development and just administrative principles . This study is distinguished for its attempt to assess the process of *ex post facto* EA subject to the Constitution as the supreme law of the Republic, subsequently adding value to its existence in environmental law jurisprudence.

Rantlo and Viljoen express the view that it was necessary for ex *post facto* EA in terms of section 24G to be introduced in NEMA, as it serves to modulate illegal environmental

[47] Erasmus (n 24).
[48] Sgananda Jikelele 'Protection of the Environment through the Application of Section 24G of the National Environmental Management Act, 107 of 1998' (Research Space UKZN, 2018). <https://researchspace.ukzn.ac.za/handle/10413/19202> accessed 11 June 2023 p16-25.
[49] J.H.E Basson 'Retrospective Authorisation of Identified Activities for the Purposes of Environmental Impact Assessment' (2003) 10 South African Journal of Environmental Law and Policy 135-136.
[50] *Silver Valley* (n 18).
[51] *Hingage Investments* (n 21).
[52] *Eagles Landing* (n 23).
[53] *Eagles landing* (n 23).

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developments.[54] In so doing, these illegal developments are brought back within the bounds of law and ensure that developers have a chance at law, to rectify their wrongdoings and contribute to economic development.[55] However, these scholars do not justify the existence of *ex post facto* subject to constitutional imperatives, such as economic development. Therefore, this study extensively explores its contribution to economic development, subject to section 24 of the Constitution.

Kohn[56] expressed the idea that 'section 24G empowers authorities to give this ex post facto authorisation in the appropriate circumstances where some construction had been undertaken without the necessary authority and authorisation could never be given for the completion of the construction as in the case of Eagles Landing Body Corporate v Molewa NO and that the provision was not meant to rubber-stamp authorisation' for developers who have already left environmental degradation in their wake'.[57] It is clear that the scholar is not convinced that the purpose of *ex post facto* EA in terms of section 24G of NEMA is to give developers a chance to rectify what was initially an unlawful conduct, arguing that *ex post facto* EA process is a deviation from the EIA requirements and the principles under section 2 (4) of NEMA, which -according to the scholar- are the preventative and precautionary measures that protect the environment from degradation and ensure sustainable development.[58]

Paul describes the precautionary principle as the mandate given to administrative figures to be cautious when taking administrative decisions that affect the environment.[59] This includes identifying the nature, source and scope of possible harmful effects on the environment, as well as on the citizen's environmental rights and the potential risks of the unknown.[60]

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[54] Rantlo and Viljoen (n 26).
[55] Rantlo and Viljoen (n 26).
[56] Kohn (n 25).
[57] Kohn (n 25)
[58] Kohn (n 25).
[59] Paul GW Henderson 'Some Thoughts on Distinctive Principles of South African Environmental Law' (2001) 8 the South Asian Journal of Environmental Law and Policy 161.
[60] White Paper on Environmental Management Policy for South Africa GN 749 188894 of 15 May 1998.

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Lauren explains that the *ex post facto* EA process has some constitutional implications.[61] However, Lauren does not extensively advance the argument as to what these implications are, which leaves a gap on whether *ex post facto* EA is constitutional or not. The present research sought to fill in this gap, by assessing how the *ex post facto* EA process is compatible with the Constitution, particularly with the relevant sections, 24 and 33, of the Constitution.

There have been extensive writings on constitutional supremacy in South Africa, with emphasis on section 2 of the Constitution, which states that[62]'the Constitution is the supreme law in the Republic, any law or conduct inconsistent with it is invalid and the obligation it imposes must be fulfilled'[63]

Cohen explains that the Constitution has the power to surpass any common law, legislation, or customs.[64] However, scholarship on constitutional supremacy was not previously discussed in the context of granting of *ex post facto EA* for harmful activities. However, constitutional supremacy is applicable in assessing the legality of *ex post facto* EA in South African environmental jurisprudence, and the present study assesses such legality.

Regarding the administrative process of *ex post facto* EA, Jenny writes how section 24G of NEMA administrative fine is not effective in curbing the commencement of listed activities without prior EA. The scholar argues that section 24G of NEMA administrative fine is only enforceable when the perpetrator decides to bring an application for *ex post facto* EA and without such application, the competent authorities may not outright enforce the provision against the perpetrator.[65] The question that the researcher sought to answer in the current study was whether the administrative process applicable to the

[61] n 25 above.
[62] Mike Van Heerden 'the 1996 Constitution of the Republic of South Africa: Ultimately Supreme without a Number (2007) 26 Politeia 37, see also Lourens Du Plessis 'Constitutional Dialogue and the Dialogic Constitution' (2010) 25 Southern African Public Law 691 and Max Du Plessis 'The Legitimacy of Judicial Review in South Africa's New Dispensation: Insights from the Canadian Experience' (2000) 33 Comparative and International Law Journal of Southern Africa 228.
[63] Act No. 108 of 1996.
[64] Eshed Cohen, *Constitutional law for students* (Abrahim Abrahams, Cape Town: UCT Libraries, 2020).
[65] Jenny Halls 'Facing the Music through Environmental Administrative Penalties: Lessons to be learned from the Implementation and Impact of Section 24G?' (2022) 28 African Journal 10.

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granting of *ex post facto* EA in terms of section 24G is compatible with the underlying principles of administrative justice entrenched under section 33 of the Constitution.

Schoeman[66] and Kotze[67] maintain that there is nothing wrong with the administrative processes of *ex post facto* EA provision, as it follows EIA, to ensure that impacts are properly assessed, and where needed, minimised. This study discusses the process of *ex post facto* EA as well as the context of guarantees under section 33 of the Constitution.

Bracher describes section 33 of the Constitution as a provision that imposes a duty on the state to give effect to the right to a lawful, reasonable and procedurally fair administrative action, subject to the Promotion of Administrative Justice Act (PAJA).[68] The current study further analyses the process of *ex post facto* EA in the context of principles of just administration, particularly that the administrative bodies responsible for the granting of *ex post facto* EA are empowered to grant such EA subject to lawful, reasonable and procedurally fair process outlined under section 24G of NEMA. This has not been previously explored in literature. It is clear from the above literature survey that although *ex post facto* EA in terms section 24G of NEMA has featured in scholarship, there is insufficient scholarship on the constitutionality of the provision, particularly its compatibility with the relevant values, entrenched in sections 24 and section 33 of the Constitution.

There are writings on other legal systems with a framework on the application of *ex-post facto* EA. In India, Stellina Jolly and Siddharth Singh shared the view that the practice of what is referred to as *ex post facto* clearance is a deviation from the primary and important values of environmental law, which are sustainable development and precautionary

[66] Peggy Schoeman 'Fines and the Importance of Timeous Appeals' (2018) 18 African Journals 26.
[67] Louis J Kotze 'the Application of Just Administrative Action in South African Environmental Governance Spheres: Analysis of Some Contemporary Thoughts and Recent Jurisprudence' (2004) 2 Potchefstroom Electronic Law Journal 1.
[68] Patrick Bracher 'Constitutional Court Explains the Nature of the Right to a Fair Administrative Action' (bn Blog Network, 27 November 2017)< https://www.financialinstitutionslegalsnapshot.com/2017/11/constitutional-court-explains-the-nature-of-the-right-to-fair-administrative-action/ > accessed 11 June 2023, see also R.C Alberts, F.P Retief, T.B Fischer, C Roos and D.P Cilliers ' EIA Decision-making and Administrative Justice an Empirical Analysis' (2022) 65 Journal of Environmental Planning and Management 1915.

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principles. This practice was foreign to the Indian jurisprudence.[69] The same view was expressed by Phandananja J and Chardrachud J in the case of *Alembic Pharmaceuticals Ltd v Rohit Prajapati and Others*.[70] These judges, however, made it clear that there were exceptional circumstances where the courts upheld the granting of *ex post facto* clearance in India, despite the practice not being approved in Indian Jurisprudence.[71] Kamath describes the precautionary principle applicable in Indian environmental law as a prerequisite and that the relevant government officials dealing with environmental clearances should anticipate, prevent and safeguards the environment from pollution.[72]

Glass, Therivel and Chadwik explain that it is a requirement in English environmental Jurisprudence, that EIA be conducted before commencement of any activity that is considered to be detrimental to the environment, and that such activities must be authorised by the relevant local authorities only after EIA.[73] Sullivan J, Lloyd J and Jacob J clearly point out in *Ardagh Glass (Ltd) v Chester City Council and Others,* that the National Law of England allows the legalisation of unauthorised developments through the process of retrospective application for planning permission. However, they specify that retrospective planning permission may be granted where there are exceptional circumstances warranting such permission to be granted.[74] Furthermore, Garbet is of

[69] Stellina Jolly and Siddharth Singh 'Environmental Impact Assessment Draft Notification 2020, India: A Critique' (2021) 5 Chinese Journal of Environmental Law 13.
[70] *Alembic Pharmaceuticals Ltd v Rohit Prajapati and Others,* (2020) 4 MLJ 277 23 and Jayashree Nandi 'Post Environmental Clearance Allowed in Exceptional Cases: SC' Hindustan Times (27 March 2020) <Ex post facto environmental clearance allowed in exceptional cases: SC | Latest News India - Hindustan Times > Accessed 25 June 2023.
[71] Ibid [69].
[72] Nishka Kamath 'Ex post Facto Environmental Clearance: View of the Supreme Court '(Pleaders, 16 October 2021) < Ex post facto environment clearance - view of the Supreme Court - iPleaders> accessed 12 June 2023.
[73] John Glasson and Therivel Chadwick, *Introduction to Environmental Impact Assessment* (New York:Roulegde 2019).
[74] *Ardagh Glass (Ltd) v Chester City Council and Others* (2011) PTSR 1498 Paras 14- 18 see also Gabriella G Grimwood 'Planning Enforcement in England' (Briefing Paper 1579, 2019) p 3-4 <Planning enforcement in England (parliament.uk)> accessed 11 June 2023 , see also Christopher Cant ' Retrospective Planning Permission and Community Infrastructure Levy' (Lexology, 9 July 2017)< Retrospective planning permissions and Community Infrastructure Levy - Lexology> accessed 14 July 2023.

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the view that because one has the discretion to seek permission retrospectively, where a breach of planning law has already happened, is risky and costly for the environment. [75]

Alberts, Fischer, Retief, Arts, Roos and Cilliers pointed out that EIA, under which EA falls, originated in the English law 50 years ago, and its origin is closely linked to protecting the public and the environment. It strengthens administrative accountability, which formulates a relationship between EIA, administrative law and justice.[76] However, these scholars have not discussed the administrative processes applicable in the granting of retrospective planning permission, and there seems to be a lack of literature on the administrative processes of obtaining retrospective planning permission. The current study sought to examine how the English retrospective planning permission principles may help shape the South Africa *ex post facto* EA processes

1.9. Methodology

Methodology is an integral part of research, whereby the researchers identify the method applicable to their study. There are different types of research methodologies; namely, quantitative, qualitative, and doctrinal research methodologies.[77] Coetsee and Buys define doctrinal research as a methodology that focuses on the interpretation, assessment, and development of underlying doctrines.[78] The authors further indicate that this type of research methodology normally applies to legal research.[79]The research methodology that was applicable to this study is doctrinal research, which is desktop based, as well as comparative methodology. Doctrinal methodology seeks to explore

[75] Ben Gerbet 'Why Retrospective Planning Permission is a Risky Strategy' (Keystone Law, 14 September 2022) < Why retrospective planning permission is a Risky Strategy: Keystone Law> accessed 14 July 2023.
[76] R.C Alberts, F.P Retief, T.B Fischer, C Roos and D.P Cilliers 'EIA Decision-making and Administrative Justice an Empirical Analysis' (2022) 65 Journal of Environmental Planning and Management 1915, see also Lynton Caldwell 'Environmental Impact Analysis (EIA): Origins Evolution, and Future Directives' (1988) 8 Review of Policy Research 76.
[77] Daniel Coetsee & Pieter Buys 'a Doctrinal Research Perspective of master's degree Students in Accounting' (2018) 32 South African Journal of Higher Education' 72.
[78] Ibid.
[79] Ibid.

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primary and secondary legal sources to achieve its aims and objectives. The sources include case laws, statutes, books, Journal Articles, and internet sources.

Through the utilization of the doctrinal analysis of these sources, the researcher assessed the constitutionality of *ex post facto* EA, as provided under section 24G of NEMA. On the other hand, a comparative methodology seeks to evaluate and analyze two or more units, for the purpose of establishing areas of distinction or similarities between such units.[80]The comparative approach to research helps a researcher uncover the strengths and weaknesses of the respective units and formulate ways to cure the weakness.[81] This study also sought to compare the legal framework of *ex post facto* EA between South Africa, India and England for the purpose developing good practices beneficial in refining the practice of *ex post facto* EA in South African jurisprudence. English law has a long history with South African jurisprudence which dates to the 19th(nineteenth) Century. From the time of its adoption in South Africa by the British colonizers, English law has continuously played a significant role in the development of South African common law.[82]

As a result of this long history, the environmental procedure for obtaining EA in the English law is significantly similar to that of South Africa. Therefore, it is essential to consult English environmental jurisprudence when seeking to develop South African jurisprudence.[83] Furthermore, there is a strong connection between South Africa and India in the interpretation of the Bill of Rights by the Constitutional Court of South Africa and the Supreme Court of India. Each of these courts extracts ideas from the

[80] Seyed Mojtaba Miri and Zohreh Dehdashti 'A short Introduction to Comparative Research (Research Gate, May 2019)<https://www.researchgate.net/publication/336278925_A_Short_Introduction_to_Comparative_Research?enrichId=rgreq-f40f749990a7528a0cafd0d60f186724-XXX&enrichSource=Y292ZXJQYWdlOzMzNjI3ODkyNTtBUzo4MTA2NTUxODc3NTkxMDRAMTU3MDI4NjY2NjA0OQ%3D%3D&el=1_x_2&_esc=publicationCoverPdf >Accessed 13 April 2024.

[81] Ibid [72]; also see Hoyt Webb 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law (1998) 1:2 Journal of Constitutional Law 225.

[82] O.D Schreiner, *The Contribution of English Law to South African Law: And the Rule of Law in South Africa* (Juta and Company, 1967)

[83] see C Rautenbach 'The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear and Favour' (2015) 18 Potchefstroom Electronic Law Journal 1546; also see John Rantlo & Germarié Viljoen 'A critical appraisal of *Uzani Environmental Advocacy CC v BP Southern Africa* (Pty) Ltd 2019 (5) SA 275 (GP)' 443.

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jurisprudence of the other.[84] Therefore, this study sought to assess whether the procedure applicable to the granting of ex post facto EA in Indian is similar to the Procedure in South Africa and, if not, establish whether there are useful lessons to learn from Indian jurisprudence, which may assist to refine the practice of *ex post facto* EA in South Africa. However, the study experienced limitations regarding doctrinal methodology in that there are limited recent publications on section 24G of NEMA. Regarding comparative methodology it is challenging to find extensive primary sources of foreign legal systems on the topic, particularly journal articles due to access restrictions.

1.10. Definition of Key Concepts

1.10.1. ***Ex post facto*** is a Latin phrase that refers to something being done 'after the facts. In simple Terms, *ex post facto* EA refers to approval of an act/ activity or project that has already started.[85] In simple terms it refers to actions or legislation that are applied retrospectively.

1.10.2. **Environmental Authorisation** is an 'approval by a competent authority to proceed with an 'activity or project that has been identified as harmful in terms of the law'.[86] A competent authority being the minister or MEC of a relevant environmental department where authorisation is sought.

1.10.3. **Listed activities** are activities that have been identified as harmful in terms of section 24(2) and section 24D of NEMA, which were further published in the

[84] C Rautenbach 'The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear and Favour' 1553; also see Radley Henrico 'Judicial Review in South Africa and India: Advancing Constitutionalism or Undue Activism' 43 Nelson Mandela Law Journal 798-799.
[85] n 3 above.
[86] Bramley Jemain Lemine 'Developing a strategy for efficient environmental authorisation of activities affecting wetlands in South Africa: towards a wise-use approach' (2020) 41 Obiter 159.

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gazette listing Notices 1,2 and 3 as having the potential of harming the environment and thus require EA in terms of section 24 of NEMA.[87]

1.10.4. **Environmental Impact Assessment** entails the process of identifying, assessing, and reporting environmental impacts caused by listed activities and consists of assessment reports. [88]

1.10.5. **Constitutionality** refers to the state of being aligned with the Constitutional principles and values

1.11. Chapter Frameworks

To achieve the purpose for which this research study was conducted, the researcher has divided this thesis into six chapters.

1.11.1. Chapter One: Introduction

This chapter outlines the background of study in respect of *ex post facto* EA process under section 24G of NEMA. This chapter also draws attention to the concerns raised about the provision in question. The chapter further outlines the following sections: problem statement, research questions, research methodology, hypothesis of study, justification of work and the scope of research. It further incorporates a literature review, limitations of study and the timeframe within which the study is submitted.

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[87] National Environmental Management Act 107 of 1998; Environmental Impact Assessment Regulations of 2014.
[88] *Ibid.*
[89] *Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 16 165 (CC) para 36; also see Gauteng *Provincial Legislature v Kilian and 29 Others* 2001 (2) SA 68 (SCA) para 165.

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1.11.2. Chapter Two- The Historical evolution of ex post facto EA

This chapter extensively lays down the historical evolution of EA and *ex post facto* EA. In this chapter the researcher discusses the events that led to the introduction of *ex post facto* EA in the National Environmental Management Act and briefly the challenges raised regarding *ex post facto* EA.

1.11.3. Chapter Three- Examination of ex post facto EA in the context environmental protection

In this chapter the researcher tests *ex post facto* EA against the constitutionally entrenched environmental values, such as environmental right, prevention of pollution, conservation, ecologically sustainable and socio-economic development found under section 24 of the Constitution. This exercise is necessary for assessing whether *ex post facto* EA is compatible with the Constitution as the supreme law.

1.11.4. Chapter Four- the examination of ex post facto in the context of administrative justice

The study further assesses whether the *ex post facto* EA process under section 24G of NEMA aligns with the principles of just administrative action required by section 33 of the Constitution, which is subsequently given effect by the Promotion of Administrative Justice Act 3 of 2000.

1.11.5. Chapter Five: Ex post Facto EA, with focus on comparable legal systems

This chapter presents a comparative study involving South African, Indian and English Jurisprudence, regarding the practice of granting *ex post facto* EA and how the findings in Indian and English legal system may be crucial in refining the process in South Africa.

1.11.6. Chapter six: Conclusions and Recommendations

This section incorporates the conclusion of the research, drawing attention to the significant parts of the research study and providing recommendations.

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1.12. Limitations of the Study

Limitations of a study may be defined as the setbacks faced by a researcher during the process of conducting research. For Instance, while it would have added some value to interview relevant departments responsible for EA processes, this was not done. This was because the researcher was not fully funded by the National Research Foundation (NRF) for the project, as it only covered tuition fees, food and accommodation and no travel allowances, However, the approach is not detrimental to the research because there are existing literatures which already show the trend in that regard. Finally, the approach of the study, which was to examine the constitutionality of *ex post* environmental authorization, can be achieved through doctrinal analysis of literature and jurisprudence on the theme.

1.13. Ethical Considerations

Ethical considerations are a collection of principles that direct research methods and require the researcher to comply with the code, which regulates professional and personal conduct when gathering research data from individuals. The University of Venda possesses its own established ethical principles that the researchers of the institution must adhere to when conducting their research study. It is an ethical requirement of the Institution that the personal information of the individuals who take part in the research study must be kept confidential and they should only participate in the study with their consent. It is worth noting that the current study did not require human participation, as the researcher used the doctrinal method of research, as per the research methodology above. The researcher utilized desktop-based information, such as journal articles, case laws, legislations and commentaries, and strictly pay attention to principles of plagiarism. Taking that into consideration, through this approach, the researcher ensured that every source of information in this research was properly referenced and acknowledged.

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1.14. Study Justification

The current research assessed whether *ex post facto* EA is constitutionally viable. Despite its apparent incompatibility with EIA and principles of preventative, precautionary and integrated environmental management, it is necessary that the legality of this provision be assessed subject to the Constitution, as the supreme law of the land. The current study clarifies the tension and addresses the existing issue by justifying the existence of *ex post facto* EA in the context of guarantees, such as economic development, environmental development and administrative justice. Furthermore, it comparatively assesses whether the practice of *ex post facto* EA is a common practice in other foreign legal systems, and how their utility may shape the practice of *ex post facto* EA in South African environmental jurisprudence. The analysis of this study enhanced the practice of environmental law, by assisting courts and relevant administrative bodies, to strike a fair balance between the protection of the environment through upholding the underlying principles of environmental management, as well as the promotion of economic development through the granting of *ex post facto* EA for certain projects.

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Chapter Two

Historical evolution of *ex post facto* EA

2. Introduction

This chapter sketches the historical evolution of *ex post facto* EA in terms of section 24G of NEMA. It starts by outlining the objectives of EA in environmental jurisprudence. The chapter assesses the history of the EA processes from international law perspective and the inception in South African jurisprudence prior the incorporation of section 24G in NEMA. The chapter further analyses the trend in case law that led to the establishment of *the ex post facto* EA process, its incorporation and the challenges it brings in South Africa and finds that the challenges regarding the abuse of ex post facto EA have been sufficiently addressed by the numerous amendments to section 24G of NEMA.

2.1. Historical foundation of EIA and EA

EIA forms an integral part of EA. The process of obtaining EA requires the commissioning of EIA, first, before making a consideration whether to approve or disapprove an application for EA.[90] EIA has been defined under the United Nations Environment Program (UNEP) as an instrument utilized to consider the social and environmental impacts of a proposed project before it is authorized..[91] This means that it is a process by which the potential impacts of a proposed project are assessed, evaluated, anticipated and considered by a competent authority for approval before a project commences.[92] The EIA procedure is characterized by strict requirements, such as the compiling of EIA

[90] Christopher Ibeh and Bryony Walmsley 'The Role of Impact Assessment in Achieving the Sustainable Development Goals in Africa' (International Association for Impact Assessment (IAIA), 18-12 May 2021) < https://doi.org/10.17868/77131> (accessed 17 March 2024).

[91] Hussein Abaza, Ron Bisset and Barry Sadler, *Environmental Impact Assessmente and St rategic Environmental Assessment: Towards an Integrated Approach (United Nations Program, 2004);* also see Thabang Maphanga, Karabo Shale, Babalwa Gqomfa & Vincent Mduduzi Zungu 'The state of Public Participation in the EIA Process and its Role in South Africa: A case of Xolobeni' (2023) 105 South African Geographical Journal 278.

[92] Ibid [83].

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reports describing the potential impacts in detail, consultations with relevant stakeholders and public participation by interested and affected parties.[93] These are important steps of the assessment for EA considerations.

The need for EIA to be carried out for certain proposed projects emerged in the United States of America (USA) between the 1960s and 1970s. During this period, environmental issues globally became apparent because of adverse economic growth and transformation. People were increasingly utilising natural resources to sustain livelihoods, including cutting down trees to produce furniture and building dwellings/ shelters.[94] Transformation of life included the use of energy by burning coal to generate electricity, which resulted in emissions being generated into the air, causing air pollution.[95]

With transformation of lives and economic growth, came significant projects, characterised by the building of power stations, large industrial developments and large holiday resorts by the seaside.[96] The cause for concern was that these projects were being implemented without any idea of the adverse impacts caused to the environment.[97] In 1969, the USA became the first country to implement regulations and policies that would govern environmental activities, to secure environmental protection and sustainable development in the midst of economic growth.[98]

As a result of the realisation of rising environmental issues, followed by public outcry and activism, the USA enacted the National Environmental Policy Act of 1969 (NEPA).[99] For the first time in history, section 102 of NEPA made EIA mandatory for activities that have

[93]Environmental Impact Assessment Regulations 2014: regulations 19.
[94] Richard K. Morgan 'Environmental Impact Assessment: The State of the Art' (2012) 30 Taylor and Francis Group 5.
[95] Christopher [n 90].
[96] Christopher [n 90].
[97] Justin Kalima 'EIA in Southern Africa: Time for Regional Regulations' (2005) 12 South African Journal of Environmental Law and Policy 56; also see Lynton Caldwell 'Environmental Impact Analysis (EIA): Origins, Evolutions and Future Directions' (1998) 6 Taylor and Francis Group 75.
[98] Ibid.
[99] Melanie Murcott ' The Role of Environmental Justice in Socio-economic Rights Litigation' (2015) The South African Law Journal 880; also see Jim Kershner 'NEPA, the National Environmental Policy Act' (History Link.org, 27 August 2011) < www.historylink.org/File/9903> , Boslaugh, Sarah E. 'National Environmental Policy Act' (*Encyclopedia Britannica,* 7 April 2024*),*<https://www.britannica.com/topic/National-Environmental-Policy-Act > Accessed 17 April 2024 and National Environmental Policy Act, 1969.

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the potential to cause irreparable harm to the environment.[100] The primary aim of implementing NEPA was to achieve sustainable development, by ensuring that generations act as custodians of the environment, for the benefit of future generations.[101] This was a progressive effort to prevent and conserve the environment from being adversely destroyed.[102]

The implementation of NEPA inspired more efforts to conserve the environment at a global level, as it was followed by the United Nations Conference on the Environment, which was held in Stockholm in 1972.[103] At the conference, it was acknowledged that environmental issues, caused by developments and exploitation of natural resources addressed in the NEPA, were not confined to the USA but were a global concern deserving of attention.[104] EIA is now a popular and universal solution to environmental consequences which may be caused by large-scale projects.[105] European states made EIA mandatory in the 1980s.[106] Within a short period of time, many other countries started adopting the EIA procedure as a tool to conserve the environment.[107]

2.2. EIA and EA application through International Environmental Law

During the 1972 Stockholm Conference, the Stockholm Declaration of the United Nations Conference on the human environment was adopted, which prioritized environmental challenges.[108] The Declaration led to discussions between the industrial and developing

[100] John Glasson, Riki Therivel*, Introduction to Environmental Impact Assessment* (Routledge Taylor and Francis Group ,2019)
[101] Stephan Jay, Carys Jones, Paul Slinn and Christopher Woods 'Environmental Impact Assessment Retrospect and Prospect' (2007) 27 Environmental Impact Assessment Review Journal 288- 289; also see Justin Kalim (n 96).
[102] Justin (n 97).
[103] 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) and the Rio Declaration on the Environment and Development, 1992' (United Nations, 2012) ; also see Resolution E/RES/ 1346(XLV); Resolution A/RES/2398(XXIII) Representation of China in the United Nations <https://www.un.org/en/conferences/environment/stocholm 1972> (accessed 9 March 2024).
[104]Ibid [95].
[105]Christopher [n 90].
[106] Christopher [n 90].
[107] Justin [n 97].
[108] Stockholm Declaration, 1972.

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states on the nexus between economic growth, air pollution and the wellbeing of humans.[109] The Declaration does not expressly refer to EIA, but includes in its action plan the need for measures to support the assessment and management of activities that are carried out at an international and national level.[110] Principle 14 of the Declaration of states that 'rational planning constitutes an essential tool for reconciling any conflict between the need for development and the need to protect and improve the environment'[111] In addition, Article 15 provides for planning to be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all'.[112]

More conferences were held after that one, and conventions were adopted to address environmental problems. The United Nations Conference on the Environment and Development (UNCED) was held in Rio de Janeiro in 1992. Other instruments emanated from this conference, such as the United Nations Framework Convention on Climate change (UNFCCC),[113] Kyoto Protocol, [114] Paris Agreement.[115] Agenda 21,[116]the Forest Principles,[117] and Convention on Biological Diversity (CBD).[118] Article 4 (1) (F) of the UNFCCC recognizes EIA as one of the significant measures to minimize the effects of climate change. It reads as follows:

> [All] Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:
>
> (f) take climate change considerations into account in their relevant social economic and environmental policies and actions and employ appropriate methods for example; impact assessments formulated and determined nationally with a view to minimizing adverse effects

[109] Ibid [100].
[110] Report of the United Nations Conference on the Human environment, Stockholm 1972.
[111] Declaration of the United Nations Conference on the Human Environment, 1972.
[112] The Stockholm Declaration [104].
[113] United Nations Framework Convention on Climate Change 1992.
[114] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1998
[115]Paris Agreement 2016.
[116] Agenda 1992.
[117] The Forest Principles 1992.
[118] Convention on Biological Diversity 1992.

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> on the economy on public health and on the quality of the environment of projects or measures undertaken by them to mitigate or adapt to climate change[119]

To advance the implementation of the UNFCCC, the Kyoto Protocol was adopted in 1997.[120] It was later followed by the Paris agreement in 2015.[121] Article 2 (1) of the Paris agreement stipulates that the instrument seeks to implement the aims and objectives of the UNFCCC.[122] Both the Kyoto Protocol and the Paris agreement bind signatory states to commit to reducing greenhouse gas emissions in light of the targets agreed upon.[123]

Agenda 21, Statement on Forest Principles and the Convention on Biological Diversity (CBD) make provisions for EIA at an international level. Agenda 21 is a treaty that is not binding but seeks to achieve sustainable development through an integration of environmental issues into decision-making processes.[124] Chapter 23 of the Agenda indicates that -to achieve sustainable development- there is a need for people, organisations or entities to take part in EIA processes through public participation.[125] It emphasizes that it is important for people or organisations affected by certain environmental activities to have access to information concerning the impact that is likely to be caused, as well as information on the measures that will be taken to protect the environment from degradation. This participation is made possible by the EIA procedure.[126] The Statement on Forest Principles is also a non-binding treaty that focuses on the global conservation of lost tropical forests. The treaty compels states to monitor and evaluate the impact of developments on their respective forests and ensures that

[119] UNFCCC (n 103).
[120] Kyoto Protocol, 1997.
[121] Paris Agreement, 2015.
[122] Ibid [113].
[123] Aneja R, Mor S, Madan S, & Ghimire M. (2023) 'Kyoto Protocol and Paris Agreement: Transition from Bindings to Pledges – A Review. *Millennial Asia' (*2023) 133 The Economic Journal 1182.
[124] 'Agenda 21: Programme of Action for Sustainable Development' (1999) 3 Botanic Garden Conservation International 48; also see Timothy Doyle ' Sustainable Development and Agenda 21: The Secular Bible of Global Free Markets and Pluralist Democracy' (1998) 4 Third World Quarterly (TWQ)774, Maurice F Strong ' Agenda 21: Sustaining the Spirit of Rio' (1995) 139 Proceedings of the American Philosophical Society 233-234 and Richard K. Norton 'Agenda 21 and Its Discontents: Is Sustainable Development a Global Imperative or Globalizing Conspiracy?' (2014) 46 The Urban Lawyer 325-326.
[125] United Nations Conference on Environment & Development 14 June 1992: AGENDA 21.
[126] Ibid [117].

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they prevent or minimize such impacts or damage to the environment.[127] The monitoring process is thus implemented at a national level through the EIA procedure.

The CBD was adopted to promote conservation and sustainable use of natural resources. [128] Article 14 of the CBD imposes an obligation on every signatory to adopt the requirements of EIA for every proposed developmental project that has the potential to causing adverse and irreparable harm to natural resources and the environment. The essence of EIA, according to the provision, is to prevent, evaluate and minimize harm, while also allowing for public participation.[129]

2.3. Application of International Environmental Law on EIA and EA in South Africa

In the matter between *Law Society of South Africa and Others v the President of South Africa*,[130] Mogoeng CJ stated that the South African democracy is founded on international law and, as such, Constitutional dispensation recognises international law.[131] International law also plays a significant role in the interpretation of South African law and by far contributes to the practice of good governance.[132] Section 232 defines "customary international law as law in the Republic of South Africa, except where it conflicts with the Constitution or legislation'.[133] Furthermore, section 233 of the Constitution imposes an obligation on courts to 'interpret legislation or law in light of international law and to avoid alternative interpretations that would be inconsistent with international law'.[134]Section 39 (1) (b) of the Constitution requires the Bill of rights to be interpreted subject to considerations of international law.[135]However, the Court in

[127] Report of the United Nations Conference on Environment and Development, 1992.
[128] Convention on Biological Diversity, 1992.
[129] Ibid [124].
[130] 2019 3 SA 30 CC para 4.
[131] Ibid [126].
[132] Ibid [122.
[133]Constitution, s 232.
[134] Constitution, s 233, also see *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) para 83.
[135] Constitution, s 39 (1)(b); also see *Zuma v the Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of States and Others*, 2021(11) BCLR 1263 (CC) para-106

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Glenister v President of the Republic of South Africa emphasised that in order for international agreements to be binding on South African jurisprudence, the agreements must be adopted in domestic jurisprudence by the national legislation, as entrenched in section 231(4) of the Constitution.[136]

The same sentiments were expressed by Kampepe J in *Zuma v the Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, including organs of States and Others*,[137] where it was acknowledged that international law plays a significant role in domestic law. However, Kampepe expressed the view that international treaties do not automatically become effective in domestic law unless they are ratified and signed into law by the state.

In the same judgment, Jafta J -to a certain extent- differed with Kampepe J. The former expressed the view that despite international treaties not automatically being effective at a national level, without being ratified and signed by the state, they remain binding and effective at an international level. Where the national courts interpret the Constitution in a manner that violates international law, South Africa may be held liable at the international level, regardless of having complied with the Constitution.[138] This demonstrates how international law forms an integral part of South African law. The EIA procedure is founded on international environmental law, particularly in the international instruments discussed above. NEMA stipulates that 'Global and International obligations concerning the environment must be considered and enforced in accordance with the national interest'.[139]Therefore NEMA acknowledges international environmental obligations.

Although some of the instruments do not expressly refer to EIA, their relevance has been recognized in EIA procedure at the domestic level. For instance, in the matter between *Earthlife Africa Johannesburg v Minister of Environmental Affairs,*[140] EA was challenged

[136] 2011 3 SA 347 (CC) para 88.
[137] 2021(11) BCLR 1263 (CC) para 108.
[138] Ibid para 187.
[139] Section 2 (4) (n) of Act 107 0f 1998.
[140] [2017] 2 All SA 519 (GP).

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for having been granted without taking into consideration the impact of the establishment of a coal power station on climate change. The Court pointed as follows:

> [S]outh Africa's international obligations similarly anticipate and permit the development of a new coal-fire power station in the immediate term. South Africa has signed and ratified the UN Framework Convention on Climate Change, acceded to the Kyoto Protocol and signed the Paris agreement.[141]

The Court further made it clear that 'various international agreements on climate change are relevant to the proper interpretation of section 24O (1) of NEMA. Article 3 (3) of the UN Framework Convention enacts a precautionary principle requiring all state parties to take precautionary measures to anticipate, prevent, or minimize causes of climate change'.[142]

The Court held that Minister of the Department of Environmental Affairs had the duty to fully evaluate the impacts of climate change in compliance with international norms or standards of the climate change instruments as well as section 24 O of NEMA,[143] which require that all relevant factors that may cause degradation to the environment must be considered when assessing applications for EA.[144]

South Africa adopted the EIA Procedure from international law in the 1970s. However, the procedure was not immediately utilized due to the absence of EIA Regulations .[145] In the 1980s, the requirement for EIA and EA started gaining momentum in South Africa; specifically, in 1984, following the initiative taken by the Council for the environment to formulate a committee that would propose the implementation of integrated environmental management (IEM) by the year 1989.[146] EIA forms an integral part of the

[141] *Earth Life* (n 128) para 35.
[142] *Earth Life* (n 128) para 83.
[143] *Earth Life* (n128) para 124.
[144] National Environmental Management Act No.108 1998.
[145] Thabang Maphanga, Karabo Shale, Babalwa Gqomfa & Vincent Mduduzi Zungu 'The state of Public Participation in the EIA Process and its Role in South Africa: A case of Xolobeni' 280.
[146] Bruce Peckhamn 'Environmental Impact Assessment in South African Law '(1997) 4 SA South African Journal of Environmental Law and Policy 119-120; also see Jeremy Ridl '"IEM": Lip-service and licence?' (1994) 1 SA South African Journal of Environmental Law and Policy 64; also see and Michael Kidd, *Environmental Law: A South African Guide* (Juta, 1997).

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IEM procedure.[147] Immediately after this proposal was made, the Environmental Conservation Act (ECA) was enacted into law.[148] This legislation made EIA a mandatory requirement for all activities identified by the Minister of Environmental Affairs as potentially harmful. In 1997, the EIA regulations were proclaimed into law for the first time, and they identified certain activities that would require EIA to be conducted and EA to be obtained prior to commencement with such listed activities.[149]

2.4. Domestic legislation on EIA and EA

The recognition of EIA under ECA was further fueled by the adoption of the Constitution and the embodiment of the environmental right in the Bill of Rights.[150] In the matter *Director: Mineral Development Gauteng Region and Another v Save the Vaal Environment and Others,* it was pointed out that 'by virtue of inclusion of section 24 in the Constitution, the previously ignored environmental considerations have now been given prominence in the Constitution'.[151]

ECA made provisions for EIA and EA under sections 21, 22, 23, 26 and section 29. In terms of section 21(1) of the said Act, the Minister of Environment Affairs and Tourism was empowered to publish regulations which set out activities that have been identified as substantially detrimental to the environment and require EIA and EA.[152]

In terms of section 22 (1) of the Act no person was permitted to undertake an activity identified in terms of section 21(1) of ECA above without authorisation.[153]The authorisation

[147] Richard Hill 'Integrated Environmental Management System in the Implementation of Projects' (2000) 96 South African Journal of Science 50.
[148] Act No. 73 of 1989: R 1182, R 1183, and R 1184 GG 18261 of 5 September 1997.
[149] Ibid.
[150] Environmental Conservation Act No 73 of 1989.
[151] 1999 (2) SA 709 (SCA) 715 para 20. Also see BP *Sourthern Africa Pty Limited v MEC for Agriculture, Conservation environment and Land Affair* [2004] ZA GPH para 143.
[152] Ibid, also GN R1184 of 199, HTF *Developers Pty Ltd v Minister of Environmental Affairs and Tourism* and Others [2006] ZAGPHC 132 para 20.
[153] Environmental Conservation Act, s22.

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referred to in subsection (1) could 'only be issued subject to considerations of reports concerning the impact of the activity in question and of alternative activities on the environment, which is be compiled and submitted by such persons and in a manner as may be prescribed by the competent authority.[154] Thereafter the minister or a local authority or officer referred to in subsection (1) may at his or its discretion refuse to grant the authorisation for the activity or an alternative activity in question on such conditions if any, as he may deem necessary.[155] Section 29 (4) of ECA stipulated that "any person who contravenes the provision under section 22 (1) or fails to obtain authorisation shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000 or imprisonment' [156]

After the adoption of the Constitution, regulations 1182, 1183 and 1184 were published in terms of section 21 (1) of ECA.[157] The regulations provided for listing notices containing activities that have the potential to cause harm to the environment and consequently require EA.[158] They further provided guidelines for the commissioning of EIA.[159]

Although ECA gave effective recognition of the requirements for EIA and the granting of EA, it was silent on how competent authorities should deal with applications made by developers who have already commenced with listed activities without prior commissioning of EIA.[160] It remained unclear whether the competent authorities could consider and approve applications for *ex post facto* EA or refuse to deal with such applications due to lack of a provision that permitted or prohibited *ex post facto* EA.[161] The lack of a legislative provision expressly permitting or prohibiting *ex post facto* EA was problematic in the practice of environmental law, specifically because the courts were faced with a dilemma of having no legislative support when reviewing decisions of

[154] Ibid.
[155] Ibid,
[156] Ibid.
[157]Government Notices 1182-R1184 of 5 September 1997; also see Tumai Murombo 'Beyond Public Participation: The Disjuncture Between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 18 Potchefstroom Electronic Journal 12.
[158] Ibid.
[159] *HTF Developers Pty Ltd v Minister of Environmental Affairs,* para 21.
[160] Erasmus (n 21) 4; also, Jikelele 'Protection of the Environment through the Application of Section 24G of the National Environmental Management act, 107 of 1998' 9.
[161] Ibid.

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competent authorities on matters regarding the applications of *ex post facto* EA.[162] It can safely be inferred that prior to the introduction of section 24G of NEMA, competent authorities discretionally granted *ex post facto* EA, without being empowered by any provision. Furthermore, their decisions to do so were reviewable by the courts of law. The lack of a provision that either permitted or prohibited *ex post facto* EA led to conflicting judgments being delivered by Courts. The said judgments will be discussed later in this study.

Under constitutional dispensation, ECA had to be repealed by the National Environmental Management Act (NEMA),[163] which was enacted in 1998 with the sole purpose of giving effect to section 24 of the Constitution.[164] The enactment of NEMA was recommended by section 24 of Constitution, to regulate the protection and management of the environment. Its purpose was to achieve sustainable and socio-economic development for present and future generations. [165] Certain provisions pertaining to the EIA procedure and the granting of EA entrenched under ECA were slightly modified and incorporated in NEMA.[166]

Although NEMA was enacted in 1998, certain provisions of NEMA were not yet in force at the time of its inception and, as such, EA processes remained governed by ECA and its EIA regulations until the year 2006.[167] This was because the NEMA EIA regulations had not yet published by the Minister, as required by sections 24(2) (a) and 24D of the Act.[168] The regulations specifically identify activities that may cause irreparable harm to the environment and lists those that require the commissioning of EIA and the securing of EA before commencement with the activities.[169] The listing notices are published by the relevant Minister or MEC on the government gazette. Provisions pertaining to EA processes, which were contained in the ECA, are now incorporated under section 24 of

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[162] Ibid.
[163] Act No. 107 of 1998.
[164] Constitution 1996: s 24.
[165] R Paschke and Galazewki '*Ex Post Facto* authorisation in south african environmental assessment legislation: a critical review' 32.
[166] Erasmus (n 21).
[167] EIA Regulations (n 142).
[168] Gazatte Notice R385 in *GG* 28753 of 21 April 2006 (EIA regulations) in terms of s 24 of the National Environmental Management Act; Beyond Public Participation: Tumai Murombo 'The Disjuncture Between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' 2.
[169] The National Environmental Management Act, 1998, s 24 (2) (a) to (d).

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NEMA.[170] Section 24 (1) of NEMA requires that possible impacts of activities that are listed or specified as harmful must be anticipated, investigated, and evaluated. In addition, EA must be sought from the relevant minister or MEC, prior to activities commencing on the environment.[171] This implies that any developer who wishes to commence with any activity that has been listed has the obligation to comply with section 24 of NEMA, by commissioning an EIA subject to the procedure outlined under section 24 of NEMA.[172]

The process of commissioning EIA to obtain EA commences with the developer identifying the nature of the activity that requires authorization and the relevant listing notice under which such activity is classified by the Minister. If a proposed project is capable of being managed, or its impacts are foreseeable, such a project is classified under the Listing Notice 1 of the National Environmental Management; EIA Listing Notices or under Category A of Notice 409 of 2009; National Environmental Management (NEM): Waste Act of 2008 and as such a basic assessment (BA) process will be required.[173] However, if a project is likely to have a significant environmental impact, with the likeliness of causing extreme environmental pollution and destruction, and such cannot be easily foreseeable, the said project falls under the Listing Notice 2 of the EIA Listing Notices or Category B of Notice 409 of 2009 of NEMA: Waste Act. As such, the project would require Scoping and Environmental Impact Reporting (S&EIR) process subject to the requirements outlined under section 24 of NEMA.[174] Furthermore, if a project is due to take place at an area that is geographically susceptible to harm; for example, an activity in a protected area, such activity falls under Listing Notice 3 of the EIA Listing notices. [175]

The EIA process requires an applicant, either for a Basic Assessment (BA) or scoping and environmental impact reporting (S & EIR), to lodge an application in the relevant

[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] National Environmental Management Act: Listing Notice 1: List of Activities and Competent Authorities Identified in terms of Section 24(2) and 24D.

[174] National Environmental Management Act: Listing Notice 2: List of Activities and Competent Authorities Identified in terms of Section 24 (2) and 24D; Also see the Environmental Impact Assessment Regulations, 2014.
[175] Reece Cronje Alberts, Francois Pieter Retief et al 'Environmental Impact Assessment (EIA) effectiveness in Protected Areas' (2021) 39 Taylor and Francis Group 292

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government department, notify all interested and affected parties (I&APs) of the intention to commission EIA and subsequently obtain EA for a particular activity. [176]This is to ensure that I&APs submit their comments in respect to the BA or the S& EIR within a period specified in the EIA regulations. Therefore, an Environmental Assessment Practitioner (EAP) must have and keep a register of all I&APs, taking into consideration all their objections and presentations through the public participation process.[177]

In respect of S&EIR process for an activity falling under the Listing Notice 2, a comprehensive environmental assessment of such an activity is required. Furthermore, a scoping report must be compiled, detailing all the important issues and information to be considered in decision- making by a competent authority, including, inter alia, the identified potential impacts of the project, risks and the methodology that will be utilized in assessing potential impacts. A scoping report must be accompanied by a plan of study, which consists of guidelines on how EIA should be conducted and managed.[178] The EIA process must also outline how the environmental impacts will be mitigated and monitored throughout the developmental project. This is detailed in the Environmental Management Plan Report (EMPR) and must then be contained in the EIR for further consideration by a competent authority.[179]

2.5. EA through case law prior ex post facto EA

Although ECA made the commissioning of EIA a requirement for obtaining EA prior to the commencement of the listed activities, it did not specify how competent authorities were to resolve issues of commencement without commissioning EIA.[180] In other words, there was a gap in law; specifically, on whether *ex post facto* EA could be granted where there

[176] Environmental Impact Assessment Regulations 2014 (n 166).
[177]Environmental Impact Assessment Regulations 2014 (n 166).
[178] Environmental Impact Assessment Regulations 2014 (n166).
[179] Reece Cronje Alberts, Francois Pieter Retief et al 'Environmental Impact Assessment (EIA) effectiveness in Protected Areas' 294.
[180] Erasmus 'An Analysis of Section 24G of the National Environmental Management Act' 4; also, Jikelele 'Protection of the Environment through the Application of Section 24G of the National Environmental Management act, 107 of 1998' 9.

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is no express empowerment or disempowerment provision. As a result of this gap, controversial judgments were delivered regarding *ex post facto* EA.

In the case of *Silvermine Valley Coalition v Sybrand Van de Spuy Boer*, Ms Scroude[181] (the applicant) made a formal request in writing to Synbrand (the respondent) on several occasions, requesting the respondent to conduct EIA, for obtaining EA and to comply with sections 21, 22 of ECA, as well as section 24 of NEMA regarding the planting of vineyard and the construction of a dam on a land that is identified as gravel land.[182] The respondent informed the applicant that activities pertaining to the planting of vineyards had already commenced; as a result, the respondent was entitled to proceed with the activities without EA. The applicant then made an application to Court for an order directing the respondent to conduct an independent EIA to obtain EA.[183]

The legal dispute was whether the Court could compel the respondent, who had already commenced with a listed activity, to conduct EIA and apply for EA *ex post facto* under ECA?[184]

The Court first highlighted the following:[185]

> Activities in respect of planting vineyards and Construction of a dam were identified by the Minister in terms of section 21(1) of ECA and its regulations as constituting alteration of landscape and substitution of land use, as the construction of a dam would entail the disturbance of the normal flow of a river, and as such required environmental authorisation.[186]

According to the Court, section 22 of ECA understandably emphasised that the EIA process had been structured to ensure that EA is officially granted 'prior' to commencement with any listed activity.[187] As a result, EA granted after commencement and where the vineyard is completed, serves no purpose[188].

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[181] *Silvermine Valley Coalition v Sybrand Van de Spuy Boer* 2002 (1) SA 578 (C) para 480.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] *Silvermine Valley,* para 492.
[186] Ibid.
[187] *Silvermine Valley Coliation* para 489.
[188] Ibid.

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The Court went on to point out that the 'illegality of the activity determines its legal solution and, in this instance, the legal solution applicable '**may'** be a prohibitory interdict if the person continues with the illegal activity or a mandatory interdict, directing the person to cease with the illegal listed activity'.[189]

The Court in this matter bluntly disputed that EA could be granted *ex post facto* and was of the view that if EA could be granted *ex post facto*, then the purpose of EIA under section 22 of ECA is defeated.[190] However, the use of the phrase "**may**" from the above quotation, gives an impression that although the Court believed that *ex post facto* EA was not empowered in law, it was still not entirely sure at that time which remedy was applicable, where a person has commenced with a listed activity without EA. It appears the Court was not convinced that the prohibitory interdict was in fact the correct remedy, where there is no empowering provision stipulating whether the applicant must be directed to cease the activity.[191] The burning question before the Court was, what happens to a developmental project that is already underway? This question was not clearly answered, except where the Court drew the inference that the remedy of 'prohibitory interdict' would follow the failure to comply with section 22 of ECA.[192]

The Court held that section 22 of ECA cannot be construed to mean that the respondent must apply for EA and conduct EIA. This should be done after the activity for which EA is a prerequisite has already commenced. Considering that the Court was not in a position to engage with the merits of the case, the Court refused to grant an order compelling the respondent to commission an EIA as such exercise was to serve no purpose. The Court further denied ordering a prohibitory interdict; as such, alternative remedy was not outlined as the relief sought by the applicant in the notice of motion. As a result, no order was granted against the respondents to cease with the unlawfully commenced activity.[193] The judgment of the *Silvermine* case was acknowledged in passing by the Court in

[189] *Silvermine Valley, para* 488.
[190] ibid.
[191] Ibid.
[192] Ibid.
[193] *Silvermine Valley Coliation*, para 489

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Hingange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others, where it stated the following:[194]

> The applicant thereafter brought an application, seeking an order directing the respondent to commission a full environmental impact assessment under the regulations issued under s. 21 of the Environmental Conservation Act 73 of 1989 ("ECA"), alternatively, in terms of the provisions of s. 24 of NEMA. After having analysed the legislative framework in issue in that case, Davis J concluded that an environmental impact assessment fitted into a scheme set up to ensure that official approval is granted before certain land can be put to a specific use. [195]

It is clear from the *Silvermine* case that although the Court is doubtful which remedy is applicable in the event where people seek EA after having commenced with listed activities, the Court did not, believe that the granting of *ex post facto* EA was actually supported by legislation. Therefore, empowering the granting thereof would be *ultra vires* unlawful and contrary to law, and the exact sentiments were expressed in *Hingange Investments.*[196]

In *Eagles Landing Body Corporate v Molewa No and Others,* the applicant was a body corporate of the Tradewinds, located in the Hartebeespoot. The applicant made an application to the Court concerning the construction of earthworks adjacent to the riverbank of the Hartbeespoort dam by a developer of a golfing estate, without prior EA.[197] Prior to making the said application, the applicant submitted a complaint to DACE in respect of such earthworks. In accordance with the duty of care under section 28 of NEMA, DACE directed the developer to pause the activities and commission an EIA process for the purpose of obtaining EA in accordance with the ECA Regulations.[198] The developer complied with the directives and EA was granted by the competent authority in terms of section 22 of ECA. [199]The applicant, however, remained unsatisfied with the decision of the competent authority; specifically for granting EA where the offending

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[194] *Hingange Investment* paras 30-31.
[195]Ibid.
[196] *Silvermine Valley Coliation*,para 40.
[197] *Eagles landing,* paras 2-6.
[198] Section 28(4) of the National Environmental Management Act; also see *Eagles Landing* para 5.
[199] Ibid.

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activities had already commenced. The Applicant sought to review and set aside the decision of the competent authority.[200]

The legal dispute was whether the granting of *ex post facto EA* by the competent authority contravened the principle of legality, or *ultra vires*, contrary to section 22 of ECA, which requires EA to be sought before any activity commences on the environment.[201] The Court expressed concern as to whether the declaratory order sought, declaring the decision of the competent authority ultra vires, would not only be academic, as the earthworks for which EA was needed had already been constructed and completed.[202] The Court indicated that the declaratory order would serve no purpose for the Applicant in the practical sense.[203]

The Court dismissed the application, although the decision to grant *ex post facto* EA by the competent authority was not empowered by any legislative provision and was made outside the scope of law (*ultra vires)* and even contrary to section 22 of ECA.[204] Instead, the Court upheld the decision by competent authority to grant *ex post facto* EA. The ruling of the court was made on the basis that the earthworks had already been completed and setting aside the EA sought *ex post facto* would have no effect and remained an academic exercise, as the Court would not possibly order for the demolishing of the earthworks. [205]

The decision of the Court not to set aside the *ex post facto* EA in Eagles Landing case is somewhat contradictory to the reasoning or the opinion of the Court in respect of the same issue, where it acknowledged that part of the Peninsula was already in existence when authorisation was granted, and indicated that for this reason ,the authorisation was unlawful in that it fell afoul of the provisions of s22 of ECA. The court indicated the interpretation by counsel for the respondent that authorisation for any identified activity must precede the undertaking of the activity and that the legislation did not permit ex post

[200] Ibid.
[201] *Eagles Landing* para 6.
[202] *Eagles Landing para* 60.
[203]Ibid.
[204] *Eagles Landing* para 108.
[205] *Eagles Landing,* para 62 -76.

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facto was correct, however the Court held that it was unable to unable to uphold his application due to the facts or merits of the case[206]

Due to the merits the Court reached a completely different decision from its acknowledgment that ECA did not make provision for *ex post facto* EA. The Court, instead, upheld the granting of *ex post facto* EA and made justification as follows:

> [I]f the applicant's contentions were to be upheld, it would mean that in every case where some construction had been undertaken without the necessary authority [.....] authorisation could never be given for the completion of the construction; the developer would first be obliged to remove what he had constructed and only thereafter apply for authorisation before commencing de novo with the construction. […]. The proper approach in such circumstances would be to regard the completion of the construction as the 'proposed' activity and, provided that the authorisation thereof was otherwise valid, that would comply with the spirit and objectives of the legislation[207]

The preceding passage suggests that the Court appreciates that *ex post facto* EA could not normally be granted under ECA. Therefore, the Court's decision not to set aside the *ex post facto* EA was not driven by the fact that the Court believed the EA was supposed to have been granted in the first place. It was only because the applicant's case was initially flawed, according to the several points in *limine,* raised by the respondents. The points included an argument that the applicant's request for a declaratory order stating that the *post facto EA* granted by the competent authority is unlawful would be an academic exercise.[208]

The Court was particularly concerned that the project to which EA was granted outside the scope of section 22 of ECA had already been completed,[209] and the challenge faced by the Court was, what would happen in the instance that the declaratory order was granted, stating that the project was unlawfully commenced, and the EA was set aside? What exactly would flow from this decision, as the Court could not possibly order that the developments of the project be demolished and the Respondents rehabilitate the

[206] *Eagles Landing* para 98.
[207] *Eagles Landing* para 101.
[208] *Eagles landing* Para 59.
[209] Ibid.

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environment and then make an application for EA from scratch.[210] The Court may have refused to set aside the *ex post facto* EA in this case, specifically, because of the uniqueness of its merits. It was not necessarily because the EA had been lawfully granted.[211]

Despite the Court having dealt with this matter based on the uniqueness of its facts, the Court's findings in this case raised some eyebrows in law. [212]As a result, the *Eagles Landing* precedent was subject to criticism for creating even more controversy on whether *ex post facto* EA could possibly be granted under the law.[213] The decision of the competent authority in *Eagles Landing* was contrary to the rules of just administrative action under section 33 of the Constitution.[214]These rules, as per the Promotion of Administrative Justice Act 3 of 2000 (PAJA), require that every administrative decision-making process must be legislatively empowered.[215] Therefore, any administrative decision that is made without any reference to authority or law is against the rule of law; in common law terms, such decisions are *ultra vires* or contrary to law.[216]

In *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*, the Court emphasized that it is a trite principle of 'our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this

[210] *Eagles Landing,* para 62- 4.
[211]Ibid.
[212] *Eagles Landing* para 101-102; also see Sgananda Jikelele 'Protection of the Environment Through the Application of Section 24G of the National Environmental Management Act, 107 of 1998' 28.
[213] Kohn 'The Anomaly that is section 24G of NEMA: An Impediment to Sustainable development' 4-6 ; also see September 'A Critical Analysis of the Application of Section 24G Provision of the National Environmental Management Act (NEMA) The Gauteng Province Experience' 10.
[214] Section 6 (2) (i) of the Promotion of Administrative Justice Act 3 of 2000; also see The Court in *Eagles Landing Body Corporate* [para 80- 81] acknowledged the rules of administrative justice by stating 'that the doctrine of legality, an occurrence of the rule of law, forms a crucial part of our jurisprudence and applies to the exercise of a public power. The Court quoted para 17 of the *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) where it was pointed out that 'what would have been ultra vires under the common law by reason of a functionary's exceeding a statutory power was invalid under the Constitution according to the doctrine of legality' nonetheless the Court reached a different decision in respect of ex post facto being granted contrary to section 22 of ECA.
[215] Ibid.
[216]ibid.

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sense, then, the principle of legality is implied within the terms of the interim Constitution.'[217]

Although the Cape Peninsula was already completed and could not be demolished, the Court was not empowered by law to uphold an *ex post facto* EA that was granted outside the scope of law. This had the effect of creating a flawed impression to developers that they were entitled to apply for *ex post facto* EA on the basis of the Court's ruling, in Eagles *landing Body Corporate,* in instances where they commenced listed activities without prior EA approval.

The controversy in the *Eagle Landing* also included the issue of whether the competent authority could compel the commissioning of EIA by invoking the provisions of section 28 (4) of NEMA, the duty of care. The competent authority in this case had issued a directive in terms of section 28 (4) of NEMA for the developer to cease the activities and commission an EIA, in order to obtain EA, which was subsequently granted.[218] It appears as though the directives under section 28 (4) of NEMA duty of care were misplaced to compel EIA and enabled the granting of *ex post facto* EA.[219] However, the question under such circumstances would be whether the duty of care and the directives which may be issued in terms of subsection 4 of this provision could justify the granting of EA retrospectively or after the effect.

The Court did not go as far as addressing this issue. However, this question was answered in *Hingange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd*,[220] where the first respondent carried out a tannery business of transforming cured raw hides and skins into mineral-tanned bovine. The process is said to result in chemical waste products and gases that have a foul and very disturbing smell.[221] The applicant argued that the gases emitted from the Respondent's premises were dangerous to the health and wellbeing of the nearby residents and contravened section 24 of the Constitution. However, the

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[217] 1999(1) SA 374 (CC) para 58; also see *Pharmaceutical Manufacturers Association In re Ex parte President of the Republic South Africa* 2000 (2) SA 774(CC) para 17; *President of the Republic of South Africa v SARFU* 2000 (1) (CC) para 148; *Minister of Public Works v Kyalami Ridge Environmental Association* 2000 (3) SA 1151 (CC) para 34.
[218] *Eagles Landing,* paras 86 and 90.
[219] Ibid.
[220] *Hingange Investments* 3.
[221] *Hingange Investments* 3.

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relevant government bodies failed to halt the pollution, despite the complaints by the nearby residents.[222]

The legal issues in this case were not particularly based on whether *ex post facto* EA should be approved; rather, this case was particularly concerned with the failure of the relevant competent authorities to exercise the duty of care in dealing with the pollution caused by the first respondent.[223] However, the Court made some important remarks in distinguishing EIA regulations in terms of the then section 22 of ECA and the duty of care. The Court pointed out that 'the EIA commissioned in terms of section 28 of NEMA is different from an impact assessment that is commissioned in terms of section 22 of ECA because the section 28 impact assessment is necessary to prevent the continuation or reoccurrence of pollution and not necessarily for obtaining ex post facto EA in terms of section 22 of ECA'.[224].

Section 28 (1) of NEMA imposes a duty on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuning or recurring or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment"[225]

The duty of care provision is distinguished from the obligation to commission EIA and obtain EA under section 24 of NEMA.[226] The difference is that section 28 is a general rule that governs environmental protection and management. Therefore, it generally applies to any activity that may cause notable pollution or degradation to the environment and, as such, is not limited to any identified or specified activities.[227] The provisions are distinguished in this sense. The duty of care as a general rule of environmental protection

[222] Hingange Investments, 22-23.
[223] *Hingange Investments, 19.*
[224] *Hingange Investments, 31.*
[225] National Environmental Management Act: s 28 (1).
[226]*Hingange Investments, 30.*
[227] Friedrich Soltau'the national Environmental Management Act and Liability for Environmental Damage ' (1999) 6 South African Journal of Environmental Law and Policy 43.

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and management is also applicable to cases concerning the grating of EA.[228] This means that the developers/ project implementers and the relevant competent authorities have the duty of care when dealing with activities that may cause a detrimental impact to the environment.

For example, when a developer or project implementer wishes to commence with a development project, it is a prerequisite that such developer should discharge the duty of care for the environment and be aware whether such development project is a listed activity, and if so, proceed to apply for EA in terms of the relevant provisions. Where a listed activity is authorised by a competent authority (e.g. waste management license is granted), this means the harm that may ensue from an activity concerning waste cannot be completely avoided, but the duty of care requires that such harm is at least minimised and mitigated. The duty of care and the process of EA co-exist in the protection, consideration, and management of the environment.[229]

From the preceding discussion, it is evident that there was a controversy created by the lack of a provision on what would be the appropriate relief where a person who has commenced with a listed activity applies for *ex post facto* EA during the course or after completion of the activity. If such *ex-post facto* EA was granted and a review was brought before court, could the court, prior to the introduction of section 24G of NEMA, set it aside or uphold the EA when there was no express legislative provision empowering or depowering the granting of such EA *ex post facto*?

2.6. The process of ex post facto EA under section 24G of NEMA

As a result of the controversy in case law, the legislature introduced section 24G in the NEMA as a provision that would regulate the application and granting of *ex post facto EA,* to enable developers who commence with listed activities without prior EA to apply for EA *ex post facto* and that such EA be granted or refused within the bounds and scope of the

[228] Ibid.
[229] Gideon Erasmus (n22).

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law.[230] Section 24G of NEMA sets out how the competent authority should deal with applications for *ex post facto* EA, as follows: [231]

(2) The Minister, Minister responsible for mineral resources or MEC concerned must consider any report or information submitted in terms of subsection (1) and thereafter may-

(a) refuse to issue an environmental authorisation; or

(b) issue an environmental authorisation to such person to continue, conduct or undertake the activity subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued; or

(c) direct the applicant to provide further information or take further steps prior to making a decision provided for in paragraph (a) or (b).[232]

The process, in terms of section 24G of NEMA, starts with a developer who has contravened section 24F (1) of the Act, completing a standard form called 'Section 24G Application Form for the consequences of unlawful commencement or continuation of a listed activity'.[233] The essence of this form is to help the relevant competent authorities during considerations about the application, particularly in the establishment of the quantum in respect of the payable administrative fee.[234] Amongst the guidelines contained in section 24G of the NEMA application, is the need for providing information pertaining to the social and socio-economic impacts of the project, together with the environmental impacts.

The completed form is submitted to the relevant Minister or MEC for *ex post facto* EA, in terms of section 24G(1), together with the EIA reports compiled by an Environmental

[230] Konh 'the anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' 2.
[231] National Environmental Management Act, 1998.
[232] Ibid.
[233] Section 24G Application Form for the consequences of unlawful commencement or continuation of a listed activity/ies in terms of the: National Environmental Management Act No. 108 of 1998 and the National Environmental Management: Waste Act No.59 of 2008 <https://sahris.sahra.org.za/sites/default/files/additionaldocs/S24G%20Application%20Form_Gauteng_2021%20-%20Copy%20%281%29.pdf> Accessed 05 November 2023.
[234] Ibid.

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Assessment Practitioner (EAP).[235] With recent amendments, such application may be brought by a successor in the title to a land where the activities were unlawfully commenced.[236] The MEC or relevant minister must in terms of section 24G (1) (aa) direct the unlawfully commenced activity to cease and request that the applicant conduct a full environmental assessment report for consideration by the MEC or the Minister.[237] Various factors must be addressed by the applicant in the report.

The applicant must show that the environmental impacts already caused and to be caused by the activities are evaluated, assessed and investigated.[238] The EIA report consists of many considerations, including the 'nature, time frame and extent of the impacts, the geographical, biological, social, economic and cultural aspects' .[239] The report must also indicate how the applicant plans to 'mitigate the impacts already caused to the environment and demonstrate how future impacts will be mitigated'.[240]

In addition to outlining the impacts of the activity already caused to the environment,[241] an applicant is also required to describe the biodiversity surrounding the area where the pending activity is taking place as well as the socio-economic impacts and whether there has been any contamination caused to the environment.[242] Furthermore, the applicant has to comply with any directives issued by the relevant authorities in terms of section 24G (5).[243] Compliance with directives is one of the aspects that play a crucial role during the decision-making process by the relevant competent authorities on whether or not to grant the *ex post facto* EA sought by the applicant.[244]

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[235] National Environmental Management Act, s 24G (1); also see Louis J Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 64.
[236] National Environmental Management Act: s 24G (1) (c); also see National Environmental Management Laws Amendment Act No.2 of 2022 (NEMLA):s 5 (c).
[237] Ibid.
[238] National Environmental Management Act: s 24G (1) (aa) (B).
[239] National Environmental Management Act: s 24G (1) (aa) (A).
[240] National Environmental Management Act: s 24G (1) (aa) (H) (CC).
[241] Peggy Schoeman 'Fines and the Importance of Timeous Appeals' 26; also see *Magaliesburg* case para 49.
[242] Ibid.
[243] National Environmental Management Act: s 24G (5).
[244] Ibid.

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The applicant must further conduct the public participation process for a period of 30 days, in accordance with section 24G (aa) (G) of NEMA.[245] All interested and affected parties are given a chance to raise concerns about the continuation of the unlawfully commenced listed activities and how they will be affected if an *ex post facto* EA is granted. [246]When an environmental impact assessment is commissioned, all the comments by interested and affected parties, as well as a detailed description of how the comments were taken into consideration, must be contained in the EIA report.[247] The issues raised through the comments form a crucial consideration in the decision-making by a competent authority on whether or not to grant the *ex post facto* EA.[248]

Furthermore, section 24G (2) (a) to (c) states that 'the relevant competent authority may choose to either grant *ex post facto* EA, refuse to grant the EA or request additional information from the applicant/s before considering to grant or refuse the EA'[249] If the competent authority refuses to grant EA, 'the competent authority will direct the applicant/s to rehabilitate the environment to its original state'.[250] The rehabilitation of the environment takes place in accordance with the instructions or direction of the relevant competent authority and within the time so prescribed by any of these competent authorities.[251]

Section 24G (4) requires that the applicant must pay an administrative fee. The administrative fine payable was previously R5 000 000 (Five Million Rand), but it has since increased to a maximum of R10 000 000 (Ten Million Rand).[252] Practically, an administrative fee is paid prior to the application for *ex post facto* EA being considered by the competent authority.[253] However, this is not clearly expressed in the Act. The payment of an administrative fee in terms of this provision is not a licence to obtain EA *ex post*

[245] National Environmental Management Act: s 24G (1) (aa) (H) (DD); also see the General Guide to the Environmental Impact Assessment Regulations of 2006 4.
[246] Ibid.
[247] General Guide to Environmental Impact Assessment of 2006, 16.
[248] Ibid.
[249] National Environmental Management Act: 1998.
[250] National Environmental Management Act: s24G (3).
[251] Ibid.
[252] National Environmental Management Laws Amendment Act of 2022 (NEMLA24) GG 46602 of June 2022.
[253] General Guide to the Environmental Impact Assessment Regulations of 2006, para 5.15.

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facto or a guarantee that EA will be granted; rather, the polluter must pay for the principle of environmental protection and management requires that a person who causes harm to the environment must be liable for the administrative costs of rehabilitating the environment. In the case of *ex post facto* EA being granted, the applicant bears the duty to mitigate the harm or impacts caused to the environment.[254]

The applicant for *exp post facto* EA who pays an administrative fine, may still face criminal prosecution in terms of section 24G (6). He/she may also face a further fine or even imprisonment of up to 10 years.[255] Section 24G (6) to (7) of NEMA clearly states that the submission of an application for *ex post facto* EA does not mean that the applicant is automatically exempted from criminal investigation by the environmental mineral and petroleum inspectors or by the South African Police Service.[256] Pending criminal investigations for unlawfully commencing with listed activities, in violation of section 24F (1) of NEMA, the Minister or MEC, may delay a decision to grant EA, until the National Prosecuting Authority (NPA) is done with prosecution or until such time that the applicant is acquitted or found guilty of the criminal offence under section 24F (1) of NEMA.[257] The administrative fine imposed in terms of section 24G for unlawful commencement with listed activities without EA, is different from a fine imposed as a result of a criminal prosecution in terms of section 24 (F).[258] The administrative fine imposed in terms of section 24G (4) of NEMA is actually imposed by the relevant competent authority or administrator, while the criminal penalty fine may be imposed by a court of law during prosecution, depending on the outcome of the conviction.[259] A court may impose a fine or imprisonment.

When a person who unlawfully commences with listed activities makes an application for *ex post facto* EA and pays an administrative fine, such a person automatically admits to

[254] Ibid.
[255] Ibid; also see Gideon Erasmus 'Critical Analysis of Section 2G of the National Environmental Management Act'
[256] National Environmental Management Act, 1998.
[257] Madoda Koti 'Misconception on Section 24G of NEMA' 28, also see National Environmental Management Act: s 24G (7) (a) and (b).
[258] Erasmus 'An analysis of section 24G of the National Environmental Management Act '10-11
[259] General Guide for Environmental Impact Assessment 2006, 18.

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contravening the provision of section 24F (1) of NEMA.[260] In unfortunate circumstances, such a person may -despite having paid an administrative fee- still be subjected to further criminal punishment, provided that such a person fails to comply with directive conditions under section 24G (2) (b) , (c) and section 24G (3) (a) of NEMA.[261] An example could be where the applicant provides falsified reports or further information is requested by the relevant competent authority in terms of section 24G (2) (c) or fails to comply with conditions imposed in terms of section 24G(3) in respect of the rehabilitation of the environment.

2.7. Concerns about ex post facto EA

The introduction of *ex post facto* EA created even more controversy and concerns. *Ex post facto* EA in terms of section 24G of NEMA is critisised in scholarship as a provision that does not have any reasonable objectives. The argument is that the memorandum of amendment that first introduced the provision did not give any sensible explanation for its incorporation into law.[262] On the another hand, scholarship indicates that -although it was not expressed in the memorandum of amendment what the independent objectives of *ex post facto* EA are- the intention of the legislature was to implement a legal framework under which activities that are unlawfully initiated may be brought back within the bounds of law, and that *ex post facto* EA was introduced to curb the conflict created by the controversial case laws, wherein issues of whether *ex post facto* EA may be granted for activities that have unlawfully commenced without EA were unsatisfactorily dealt with.[263]

It appears from scholarship critics that the establishment of *ex post facto* EA in terms of section 24G of NEMA may have resolved the conflict in case law, as discussed above. However, the provision is still considered to be undermining the need to commission EIA prior to commencement of listed activities, as required under section 24 (1). It is also believed the provision further undermines the preventative, precautionary and integrated

[260] National Environmental Management Act, 1998, s24G.
[261] Ibid, also see Erasmus 'An analysis of section 24G of the National Environmental Management Act '10-11 (n 21).
[262] Paschke & Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: A critical review' 146.
[263] Se See Kohn 'the Anomaly that is Section 24G of NEMA: An impediment to sustainable development' 2; also see Eagles Landing, paras 96-7.

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environmental management principles or measures entrenched under section 2 of NEMA.[264] The essence of EIA (and its principles) is that it impacts potentially harmful activities that must be prevented, anticipated and remedied before any listed activity may commence.[265] Therefore, e*x post facto* EA is viewed as a process that defeats the requirement for careful consideration of impacts. Another issue raised in scholarship about *ex post facto* EA is that the provision is susceptible to abuse, as developers may intentionally commence with the listed activities and endeavor to remedy the unlawful commencement by applying for *ex post facto* EA in terms of section 24G of NEMA.

The provision also received a backlash for its failure to impose an obligation on the competent authorities to direct *ex post facto* EA applicants to discontinue the unlawfully commenced activity, pending the considerations of the applications for *ex post facto* EA.[266] Previously, a competent authority could discretionarily allow the unlawfully commenced activity to continue, even when the Impact assessment reports and other assessments were still under considerations by such competent authority.[267] However, this issue has since been resolved following the recent amendment of section 24G in terms of the National Environmental Management Law Amendment Act (NEMLAA) and same will be discussed later in this chapter.[268] What remains a concern about the utility of *ex post facto* EA is that the provision defeats the purpose of EIA and section 2 of NEMA principles, as it obstructs the smooth flow of the EIA process necessary to achieve environmental protection and sustainable development.[269]

Contrary to popular belief, Erasmus[270] and Jikelele[271] view *ex post facto* EA in terms of section 24G from a different lens. They believe that the provision is not intended to prevent developers from being held liable in terms of section 24F of NEMA, and that the objective of granting of *ex post facto* EA in terms of section 24G of NEMA is to give

[264] Kohn 'the anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development 2.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] National Environmental Management Law Amendment Act 2 OF 2022 (NEMLAA).
[269] Ibid.
[270] Erasmus 'An Analysis of Section 24G of the National Environmental Management Act 4
[271] Ibid; also see Jikelele 'Protection of the Environment Through the Application of Section 24G of the National Environmental Management Act, 107 of 1998' 43 (n 21).

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developers who have contravened the law a chance to act accountably and in a manner that is environmentally friendly when rectifying their unlawful acts.[272]Therefore, the tension regarding the utility of *ex post facto* EA exists between the need for environmental protection, on the one hand, through the EIA procedure, and economic development, on the other hand, through *ex post facto* granting of EA, arguably raising the key values of section 24 of the Constitution. This will be extensively discussed later in this study.

To address the tension regarding the utility of *ex post facto* EA, the provision has been subjected to several amendments. The first amendment of the provision after its introduction in the Act happened in 2011. It was specifically introduced to address the concerns regarding the abuse of the process. The Department of Environmental Affairs indicated that it had noticed the tendency of companies saving up money for an *ex post facto* EA administrative fine and intentionally commencing with listed activities without EA knowing they would apply for *ex post facto* EA.[273] At the time, the administrative fine payable for contravening section 24F (1) of NEMA was R100 000 (Hundred Thousand Rands). However, as a result of abuse, the Department decided to increase the administrative fine from 100 000 (One Hundred Thousand) to R5 000 000 (Five Million Rand).[274]

A second amendment was also made, to address the abuse of the process. When *ex post facto* EA was incorporated in the NEMA, it was titled the 'rectification of unlawful commencement or continuation of listed activity'. This title was later changed to 'consequences of unlawful commencement of listed activity[275]'. This amendment was made in terms of the Memorandum on the Object of the National Environmental Management Laws Second Amendment Bill of 2013.[276] The reason given for the amendment of the title according to the memorandum was that over the years there have

[272] Ibid.
[273] Explanatory Summary of the National Environmental Management Laws Amendment Bill 2011, GN 914 GG 34891 of December 2011.
[274] Ibid.
[275] Memorandum on the Objects of the National Environmental Management Laws, Second Amendment Bill, (2013).
[276] Ibid.

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been repeated abuse of section 24G of environmental authorisation process.[277] Many people knowingly commence listed activities without environmental authorisation and later apply for section 24G environmental authorisation to rectify the unlawful commencement. These challenges amongst others pose a danger to the credibility of the environmental impact assessment process, therefore in order to deal with the challenges, stronger provisions have been introduced[278]

The legislature acknowledges the shortcomings of the *ex post facto* EA, but only on the basis that people tend to abuse the process. One may battle to understand how a change in the title of the provision minimizes abuse or resolves the issues in respect of the abuse of *ex post facto* EA. However, an inference may be made that the intention of the legislature to remove the word 'rectification' was because the word created the impression that persons had the freewill to commence with listed activities and later 'rectify' them, by applying for *ex post facto* EA. Lauren suggested that the title 'rectification of unlawful commencement with listed activity' was problematic at first sight because it gave people the impression that they could always rectify their unlawful conduct, and Sgananda added that 'the body of the whole provision does not even refer to the word 'rectification 'in its context.[279]

Section 24G of NEMA was again recently amended under the National Environmental Management Laws Amendment Act of 2022 (NEMLA24). The amendment was made following persistent criticism of the *ex post facto* EA process, specifically that persons continue to commence with listed activities without EA, trusting that they will apply for EA, retrospectively, in terms of section 24G of NEMA.[280] For that reason, the Department of Environmental Affairs decided to increase the maximum administrative fine from R5 000 000 (Five Million Rands) up to R10 000 000 (Ten Million Rands).[281]

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[277] Memorandum on the Objects of the National Environmental Management Laws, Second Amendment Bill, (2013).
[278] Ibid.
[279] Lauren Kohn 'The Anomaly that is Section 24G of NEMA: an Impediment to Sustainable Development' 2 Sgananda Jikelele 'Protection of the Environment through the Application of Section 24G of the National Environmental Management Act, 107 of 1998' 10 (n 44).
[280] National Environmental Management Laws Amendment Act of 2022 (NEMLA24) GG 46602 of June 2022.
[281] Ibid.

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The amendment of the administrative fine is accompanied by the mandatory duty of the minister to direct the developer who applies for *ex post facto* EA to immediately cease with the activity pending a decision whether to grant or not grant *ex post facto* EA, unless the cession would result in irreparable harm to the environment.[282] Even before this amendment came into force, the Court welcomed it. This is shown in the case of the *City of Ekurhuleni Metropolitan v New Star Technology CC and Another*, where it was pointed out that 'meanwhile and until the application for ex post facto EA is granted, the respondent may not continue to carry on uninterruptedly with the illegal activity because it is prohibited by legislation, in order to preserve the environment'.[283] This mandatory requirement was necessary to address one of the concerns raised regarding competent authorities having a wide discretion to decide whether a developer who commenced with a listed activity should be directed to continue or discontinue the activity, pending the consideration of the application for *ex post facto* EA.[284]

Another change brought by NEMLAA is regarding who has the right to make an application in terms of section 24G.[285]Previously, the provision of section 24G of NEMA expressly required that only a person who had commenced with a listed activity could apply for *ex post facto* EA.[286] However, it was not clear as to whether 'person who has commenced' was only confined to a developer who had commenced with a listed activity, the owner of the land where the activity had commenced or whether it included successors in title or any person who was in use of the land and had the right to develop the land but was not the owner (in control of land). The amendment clarifies that by extending the right or power to make an application in terms of section 24G of NEMA to successors in title as well as persons who are in control of the land where the listed activity

[282] Ibid.
[283] 2023 (3) SA 579 (GJ) para 30.
[284] ibid.
[285] National Environmental Management Laws Amendment Act of 2022 (NEMLA24) GG 46602 of June 2022; also see National Environmental Management Act 1998, s 24G (1) (c).
[286] National Environmental Management, 1998, s 24G (1) (a) (from 2013-2023) available at <https://cer.org.za/virtual-library/legislation/national/environmental-framework/national-environmental-management-act-1998 > accessed 28 November 2023.

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unlawfully commences.[287] Despite the preceding amendments, the tension regarding the utility of ex post facto EA persists in environmental law.

2.8. Conclusion

It is evident from the current study that the EIA procedure for obtaining EA has evolved over the years from the time of inception in international law. The evolution of the procedure was to ensure that the possible impacts of every project that could be harmful to the environment are thoroughly assessed, evaluated and anticipated, before such project commenced in the environment. This is a national and an international progressive measure meant to protect and conserve the environment. However, despite having this measure, there are cases in South Africa where developers commence with listed projects without commissioning EIA, and thereafter, apply for EA *ex post facto*. Previously, a lack of a provision that permitted or prevented the granting of e*x post facto* EA has led to controversial and conflicting judgments, some of which are discussed in the present study, particularly on the issue of whether a developer could be compelled to commission EA and obtain EA after commencement. *Ex post facto* EA was introduced to remedy the said controversy. However, its introduction in law remains difficult in scholarship. This is particularly because it conflicts with EIA and the principles set out under section 2 of NEMA, as well as its susceptibility to abuse by project implementers.

[287] Ibid [277].

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Chapter Three

Ex post facto EA and the protection of the environment

3. Introduction

The previous chapter outlined the evolution of *ex post facto* EA. The current chapter examines *ex post facto* EA in the context of constitutionally entrenched values, such as environmental protection, sustainable development and socioeconomic development[288]. The chapter will start by discussing the conflict between *ex post facto* EA and EIA requirements, focusing on the preventative, precautionary and Integrated environmental management principles, under section 2 (4) of NEMA. These principles are collectively referred to as 'sustainable development' principles.[289] They provide guidance towards achieving environmental sustainability required by section 24 of the Constitution and are tools used during impact assessment of harmful activities.[290] The chapter will then proceed to examine ex post facto EA in light of the constitutionally entrenched values as specified above to assess its compatibility to section 24 of the Constitution.

3.1. The conflict between ex post facto EA and EIA key principles

One of the concerns raised in scholarship, as discussed in the previous chapter, is that *ex post facto* EA process under section 24G of NEMA disregards the sustainable development principles under Section 2 of NEMA. [291] These principles mandate the application of 'risk-averse and cautious proposition' in decision-making processes that affect the environment, [292] and that, 'negative impacts on the environment and on people's environmental rights be anticipated and prevented. Where they cannot be

[288] The Constitution, s 24.
[289] Jean Claude, N Ashukem 'Re-thinking Ex post Facto Environmental Authorisation in South Africa: Insight from 2022 NEMA Amendment' (2024) De Jure Law Journal 93.
[290] Bramley Jemain Lemine 'The Efficiency of Section 2 (4) (l) of the National Environmental Management Act in the Context of Cooperative Environmental Management' (2021) 42 Obiter 163.
[291] Kohn 'The anomaly that is section 24G of NEMA: An impediment to sustainable development' 5.
[292]National Environmental Management Act: s 2(4)(a)(vii).

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prevented, (they must) at least be minimised and remedied'.[293] It further requires, the 'integration of environmental management, acknowledging that all elements of the environment are linked and interrelated, and the effects of decisions on all aspects of the environment and all people in the environment must be taken into account, to ensure the best practicable environmental option'.[294]

The first sustainable development principle to be discussed is the 'risk averse and caution proposition". This is a precautionary principle under section 2 (4)(a)(vii) of NEMA.[295] It compels administrative authorities to make careful considerations before making environmental decisions. Considerations include assessing and anticipating the potential harm that may arise from environmental activity and exploring whether there are any alternative ways to avoid or minimise the possible harm.[296]

In the case of *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority & others,*[297] the Court explained that '*whenever* there is a threat of irreversible damage to a resource, the absence of scientific certainty does not warrant postponement of preventative measures that protect the environment from degradation'. [298] This principle gives prominence to public participation process in decision-making to safeguard public concerns regarding environmentally harmful activities.[299] The precautionary principle is believed to strengthen policies and regulations that protect the health of persons and the environment in compromising situations, one being upholding people's constitutional right to a healthy environment [300] It is worth highlighting that the *ex post facto* EA process, under section of 24G of NEMA, embodies the public participation process.[301]

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[293] National Environmental Management Act: s 2(4)(a) (viii).
[294]National Environmental Management Act: s 2(4) (b).
[295] National Environmental Management Act, s 2(4) (vii)
[296] James Cameron Juli Abouchar 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) XIV Boston College International & Comparative Law Review 2; also see Kimmo Jalava, Ismo Polonen , Pe-kka Hokkanen and Markku Kuitunen 'The precautionary principle and management of uncertainties in EIAs – analysis of wasteincineration cases in Finland' (2013) 31 Taylor and Francis 281.
[297] [2013] 4 All SA 624 (GSJ) paras 45- 48
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] NEMA, s 24G (1) (c) (aa) (G)

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The precautionary principle is intertwined with the preventative principle enshrined under section 2 (4) (a) (viii) of NEMA, in that taking precautions is necessary, to enable the prevention of negative impacts on the environment and on people's environmental rights.[302]The preventative principle requires the relevant administrative authorities and developers to employ measures that seek to avoid negative consequences from impacting the environment.[303] It is a principle that is based on anticipation of impacts and application of due diligence through spatial scoping to protect the environment from harm.[304]

Although the preventative and precautionary principles are intertwined, they are somewhat distinctive in that the preventative principle deals with tangible or imminent risks, while the precautionary principle deals with scientific uncertainty.[305] This means that through the preventative principle, administrative authorities have to intercede where the imminent threats to the environment are tangible, while in terms of the precautionary principle, administrative authorities are always ready to deal with suspected risks, even though there is no evidence that such risks will arise.[306] In short, a precautionary principle is different from a preventative principle in the element of uncertainty.[307] In other words, the risk does not have to be imminent; rather, mitigating measures need to be in place even if the risk is just suspected. [308]

The EIA process involves information-gathering, research and analysing of information, to enable the researcher to make environmentally friendly decisions.[309] It is a regulatory system that comprises of measures used to establish a clear image of risks surrounding

[302] n 284 above.
[303] National Environmental Management Act, 1998, s 23 (2) (b).
[304] Leslie-Anne Duvic-Paoli , *The Prevention Principle in International Environmental Law (Cambridge University Press, 2018*).
[305] James Cameron Juli Abouchar 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' 3: also see Nicolas Sadeleer , *Principles of Prevention and precaution in International Law : Two Heads of the Coin* 185.
[306] Ibid.
[307] Ibid.
[308] David P. Lawrence, *Environmental impact assessment. In: Practical solutions to recurrent problems* (Wiley & Sons Inc, 2003).
[309] Ravetz J, 'The post-normal science of precaution' (2004) 36 Futures 347-357.

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a proposed developmental activity.[310] Both the preventative and precautionary principles are guiding principles essential in the EIA process, pending an application for EA.[311] They provide guidance on the assessment of potentially harmful activities which are susceptible to the environment and ensure that these activities are procedurally authorized to protect the environment from harm during human and developmental activities. [312] Through the application of these principles in the EIA process, uncertainties and potential risks are identified and addressed before commencing with development activities and during the subsistence of such activities.

Therefore, if an application for EA is not filed and no EIA is commissioned before a listed activity commences on the environment, it means that these guiding principles are not seriously considered as necessary for protecting the environment. Yet, their guidance in EIA is essential for the protection of environmental rights and the preservation of environmental values under section 24 of the Constitution. This section will be discussed later in the current study. Failure to commission an EIA process prior to commencement with an activity is equivalent to a deviation from these principles and may be viewed as a potential threat to constitutional values embodied under section 24 of the Constitution. Kohn describes the EIA commissioned in terms of section 24G of NEMA, as a "make-up EIA,"[313] used to obtain EA after the activity has commenced. According to the scholar, the so-called "make-up EIA" undermines environmental regulations, as it is conducted after the negative impacts have already occurred on the environment and they can no longer be precautioned or prevented, as required by section 2 of the NEMA principles.[314] Hence, there is an argument that *ex post facto EA* under section 24G of NEMA does not embody the preventative and precautionary principles.[315]

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[310] Ibid, Duncan Ronlyn, 'Problematic practice in integrated impact assessment: the role of consultants and predictive computer models in burying uncertainty' (2008) 1 Impact Assessment and Project Appraisal 53-66; also see Duncan Ronlyn , 'Opening new institutional spaces for grappling with uncertainty: a constructivist perspective' (2013) 38 Environmental Impact Assessment Review 151-154.
[311] De Sadeleer N, *Environmental principles. From political slogans to legal rules* (Oxford University Press, 2002)
[312] Melanie Murcott, *Transformative Environmental Constitutionalism* (Brill Jinhoff, 2022).
[313] Lauren Kohn 'The Anomaly that is Section 24G of NEMA: an Impediment to Sustainable Development" 6.
[314] Ibid.
[315] Ibid.

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Although the prevention and precautionary principles are essential to provide guidance in the EIA process, these principles should not be perceived as hard and fast rules of achieving sustainable development in the EIA process. Rather, there are other factors that must be considered, together with the principles, especially when it comes to the EIA commissioned *ex post facto* in terms of section 24G of NEMA. The Court in *Minister of Public Works and others v Kyalami Ridge Environmental Association and Others,*[316] clarified that 'section 2 of NEMA is not a provision that creates rights and obligations, but it outlines the principles expressed at times in abstract than in concrete terms'[317]

The Court further pointed out that these principles ought to be considered by the relevant departments of state in the preparation of environmental impact reports required for the granting of authorisation for certain prescribed activities that may not be undertaken in terms of the Management Act without the sanction of a Minister or an MEC. They must be balanced against other relevant considerations, including the state's obligation to fulfil its constitutional obligations in respect of social and economic rights.[318]

In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries*[319] in respect of the precautionary principle, the Court expressed that 'it is a principle that is essential for mitigation purposes and does not serve as an objection or zero tolerance for developmental interests'.[320]

In the case of *Computer Investors Group Inc and Another v Minister of Finance,*[321] the Court indicated that in instances where a public body has a discretion in term of a statutory provision, such a body may lay down a general principle for its general guidance, however such principles must not be treated as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits.[322] In

[316] *Minister of Public works and others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC).
[317] *Minister of Public works* para 69.
[318] Ibid.
[319] 2018 (4) ALL SA 889 (WCC) para 104.
[320] Ibid
[321] 1979 (1) SA 879 (T) 898C-E; also see Bato Star Fishing para 55.
[322] Ibid.

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considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter but will have prejudged the case without having regard to its merits.[323]

The preceding cases indicate that the principles are not intended to be a provision that creates an absolute right and obligation against developmental needs.[324] Instead, they are intended to be guiding principles and, as such, when making environmental decisions, administrative authorities have the discretion to consider other factors and deal with each case based on its own merits.[325] If carefully considered, these principles make room for developmental considerations, particularly economic and social development. The wording of section 2 (4) (a) (viii) of NEMA on preventative principles suggest "exceptional events," where harm may not be prevented. The wording indicates that 'where harm cannot be prevented', it should at least be mitigated or remedied.[326]

Ex post facto EA under section 24G of NEMA is a process that allows administrative authorities to deal with each application for *ex post facto* EA based on individual merits, taking into consideration all factors involved in the case. To a certain extent the process under section 24G of NEMA incorporates mitigation of harm.[327] The EIA under section 24G of NEMA that is of concern in scholarship is a process that seeks to mitigate the impacts that have already been caused by commencement of activity without EA.[328] It covers the negative impacts already suffered by the environment, establishes whether such impacts can be remedied, as well as how the developer plans to address or mitigate such impacts.[329] It further covers the impacts that may arise from the continuation of the

[323] Ibid.
[324] *Minister of Public Works para 69.*
[325] *Minister of Public of Works* (n 313).
[326] National Environmental Management Act Section 2 (4) (a) (viii).
[327] Provindrin Moodley 'Examining the Scope and Application of Section 24G of the National Environmental Management Act 107 of 1998 (NEMA) (2020) <https://researchspace.ukzn.ac.za/handle/10413/20283> accessed on 16 October 2024.
[328] National Environmental Management Act, s 24G (1)(c) (aa) B).
[329] NEMA: s 24G (1) (c) (aa) (C) and (D).

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activity and the measures in place to prevent such impacts provided *ex post facto* EA is approved.[330]

In *Magaliesburg Protection Association v MEC of Agriculture*,[331] the Court described the distinction between pre-commencement EIA and EIA commissioned in terms of section 24G of NEMA, by stating the following*:*

> In the first instance it might be possible to avoid any disturbance of the environment and proper surveys could be conducted to determine the precise impact of intended development. In the second instance one is regrettably left with an already disturbed environment which then requires thought to be given to whether any further degradation might occur, coupled with how much actual disturbance of the environment has already occurred. In pre-building approvals demolition considerations are not likely to occur. As stated before, s 24G does not postulate a total prohibition on building in ecologically sensitive areas.[332]

Through mitigation measures, the *ex post facto* EA process is capable of advancing environmental protection, particularly through the aspect of sustainable development principles, that states that, "if harm cannot be avoided or prevented, it should at least be mitigated or remedied.[333] The study advances the argument that if mitigation of negative impacts is possible in a development that was commenced without EA, but which has economic or social benefits, it appears that the granting of *ex post facto* EA is justified. On the contrary, if mitigation is not possible, a disapproval of *ex post facto EA* is justified, whichever outweighs the other.

The last sustainable development principle to be discussed is the integrated environmental management principle under section 2(4) (b) of NEMA.[334] This principle originates from international environmental policies as well as frameworks on environmental assessments and management instruments.[335] It concedes that 'it is important for environmental impact management to be integrated into all economic

[330]Ibid.
[331] *Magaliesberg Protection Association v MEC of Agriculture* (563/2012) [2013] ZASCA
[332] Magaliesberg 28.
[333] National Environmental Management Act: s 2 (4) (a) (viii).
[334] National Environment Management Act: s 2(4)(b).
[335] *Fuel Retailers,* paras 51-55.

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developmental projects and activities.[336] This principle is the primary basis for chapter 5 of NEMA, captioned 'Integrated Environmental Management' (IEM),[337] a chapter that includes both the EA under section 24(1) and *ex post facto* EA under section 24G of the Act.[338]

Section 23 of NEMA stipulates that the primary objective of chapter 5 is to integrate EIA and section 2 principles into development and ensure that there is sustainable development.[339] In terms of section 23 (2) the provision seeks to give effect to the integration of the fundamental principles of environmental management as entrenched in section 2 of the Act in decision making processes that may have serious impact on the environment. Furthermore, to ensure that the effect of the activities on the environment receive adequate consideration before actions are taken in connection with them[340]

In the case of *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others,*[341] the Court made remarks about the integration of EIA into developments by indicating that 'the purpose of integrated environmental management in Chapter 5 of NEMA plainly apply to mining and any related activities. These include the integration of the 2 principles into all decisions that may significantly affect the environment, identifying and evaluating actual and potential impacts on the environment and options for mitigation of activities; and ensuring that the effects of activities on the environment are adequately considered before actions are taken'.[342]

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[336] Paul G W Henderson 'Some Thoughts on Distinctive Principles of South African Environmental Law' (2001) 8 South African Journal of Environmental Law and Policy 150

[337] National Environmental Management Act 107 of 1998. See also *BP Southern Africa Pty Limited v MEC for Agriculture Conservation Environment and Land Affairs* [2004] ZAGPH 29-31.

[338] Ed Couzens 'NEMA:a Step Closer to Coherence?' (1999) 6 South African Journal of Environmental Law and Policy 17.

[339] Lea September 'A Critical Analysis of the Application of Section 24G Provision of the National Environmental Management Act (NEMA) The Gauteng Province Experience' 8 ; see also Lauren Kohn 'The Anomaly that is section 24G of NEMA: An Impediment to Sustainable development' (2012) 4-6.

[340] National Environmental Management Act, 108 of 1998, s 23 (1).

[341] [2021] ZCA 13.

[342] Ibid [para 46].

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As ex *post facto* EA forms part of Chapter 5, its processes ought to achieve the objective of Chapter 5, which is to integrate EIA and section 2 principles into development projects.[343] Moodley believes that -because section 24G of NEMA falls under chapter 5- the *ex post facto* EA process incorporates the Environmental Management Programme (EMPr), wherein mitigation and remedial measures are employed in the assessment of impacts arising from the activities unlawfully commenced without EA.[344] The scholar is of the view that this process would include operations, decommissioning and rehabilitation.[345] The EMPr further provides environmental management measures in every aspect of the developmental activity that was commenced without EA.[346]

In respect of EMPr, section 24 N (2(a) of NEMA states that 'the information on any proposed management, mitigation, protection, or remedial measures must be undertaken to address the negative impact identified in the assessment report'. [347] Mitigation and remedial measures are applied to remedy the negative impacts that have already occurred.[348] Section 24G of NEMA incorporates a process that takes this EMPr requirement into consideration in the assessment of the impacts, to protect the environment. [349] Whether the *ex post facto* EA is approved or not, the procedure set out under section 24G of NEMA enables developers to mitigate the negative impacts they cause to the environment, by commencing with the listed activities without EA. This is done within the ambit of the law.

Jikelele[350] has suggested that environmental authorities may be able to use the sustainable development principles stipulated in section 2 of NEMA to come to a determination on whether or not inter alia it would be in the interest of the environment to

[343] Provindrin Moodley 'Examining the Scope and Application of Section 24G of the National Environmental Management Act 107 of 1998 (NEMA)' 9.
[344] Provindrin Moodley 'Examining the Scope and Application of Section 24G of the National Environmental Management Act 107 of 1998 (NEMA)' 19; also see National Environmental Management Act, s 24G (1) (c) (bb)
[345] Ibid.
[346] Ibid.
[347] National Environmental Management Act: s 24N (2)(a).
[348] ibid.
[349] National Environmental Management Act: s 24G (1) (c) (CC) (n328).
[350] Jikelele Protection of the Environment Through the Application of Section 24G of the National Environmental Management ACT, 107 OF 1998' 48

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allow such unlawfully undertaking activity to proceed. This alone should dipel the concerns that section 24G is contrary to the principles espoused in section 2 of NEMA [351]

Jikelele further explained that the application process for *ex post facto* EA affords competent authorities an opportunity to observe the existing impacts caused by an unauthorized project and whether such impacts could possibly be mitigated or not.[352] In a pending application for *ex post facto* EA, the impacts of an activity are already apparent to an administrative authority on the EIA report, for consideration.[353] This study concurs with Jikeleke and further expresses the view that during *ex post facto* EA process, administrative authorities are better positioned to assess whether the impacts caused by an activity outweigh the need for that activity to continue, or vice versa.

Another insightful point raised by Jikelele is that -under certain circumstances- it could be detrimental to the environment if *ex post facto* EA in terms of section 24G of NEMA was non-existent. This is particularly because there are instances where it is impossible to rehabilitate the environment to its natural state, and what would be in the best interest of the environment in that instance would be for the development to receive *ex post facto* EA for continuation, with mitigation measure employed.[354] To elaborate on Jikelele's point, an instance like that would be where the developmental structure is already halfway through a project or even having completed the project. Without the existence of section 24G of NEMA, it appears practically challenging to decide what exactly would be the environmentally friendly remedy under such circumstances, as in the case involving *Eagles Landing Body Corporate,* discussed in Chapter 2 of the current study.[355]The *Ex post facto* EA process under section 24G of NEMA is a necessary tool to resolve such issues.

[351]Ibid.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] *Eagles Landing 98*-99.

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3.2. Constitutional interpretation of Ex post facto EA

A further argument in Scholarship is that the conflict between *ex post facto* EA process, section 2 of NEMA principles and the EIA process is a possible violation of the environmental right and values under section 24 of the Constitution.[356] The principle of constitutional supremacy stipulates that no legislative provision should contravene the Constitution,[357] and that legislation must give effect to the Bill of Rights.[358] Therefore, the current study proceeds to examine whether *ex post facto EA* violates the constitutionally enshrined environmental right and its values.

The issue of whether *ex post facto* EA, in terms of section 24G of NEMA is constitutionally valid or not, cannot be inferred from alleged conflict with the sustainable development principles, under section 2 and the EIA requirements under section 24 (1) of NEMA. A unilateral approach to interpretation of the provision must be applied by the courts, to determine its validity.[359] Unfortunately, despite concerns in scholarship that section 24G of NEMA is a provision that is against EIA and section 2 principles, the constitutional validity of the provision has not been established in practice, and its violation of the constitution remains an academic subject. That said, there is insufficient case law dealing with the concept of *ex post facto* EA in South Africa.

In ascertaining the validity of *ex post facto* EA, the current study applies the trite principles of interpretation, used in some of South Africa's case laws. For example, in *Chisuse and others v Director-General Department of Home Affairs and Another, Kampepe* J specified the 'holistic guideline of interpreting the provision of a legislation where it conflicts with another'. 'The interpretation must take into consideration the historical background of the

[356] Jean-Claude Ashukem 'Re-thinking ex post facto Environmental Authorisation in South Africa:Insight from 2022 NEMA Amendment' 93.
[357] Constitution:s 2.
[358] Constitution of 1996: s 7(2).
[359] *KwaZulu Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal* 2013 4 SA 262 (CC) para 128 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 17-26: also see: *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 96.

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provision, the purpose of the provision, its context and most importantly must be interpreted consistently with the Constitution, to ascertain its constitutional validity.[360]

The point of departure in interpreting section 24G of NEMA provision is to examine the historical background and the purpose of its existence in light of the Bill of Rights in the Constitution.[361] As previously discussed, some authors indicate that the introduction of section 24G of NEMA into law was not reasonably justified.[362] The view that *ex post facto* EA was introduced without justification cannot be true. This is because *ex post facto* EA was introduced to resolve inconsistencies in how authorities handled listed activities that were commenced unlawfully, without EA.[363] According to Kidd and Retief,[364] there was 'gross non-compliance with the EA requirement under ECA, and there were no clearly stated remedial provisions to address the non-compliance'. Hence, the need to introduce section 24G of NEMA, to fill in the gap.[365] Erasmus correctly stated that although there was no doubt in law that commencement with listed activities without EA was illegal, there were still uncertainties as to what is the enforceable response against such unlawfully commenced activities.[366] The inconsistencies were made apparent by some controversial judgments, such as *Silvermine* and *Eagle Landin Body Corporate,* discussed in chapter 2 of the current study. In the absence of a provision empowering or disempowering the granting of *ex post facto* EA, it could have been foreseen by the legislature that more

[360] *Chisuse and Others v Director-General Department of Home Affairs and Another* [2020] ZACC 20 para 47; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28 ; also see Dadoo *Ltd v Krugersdorp Municipal Council* 1920 AD 530 543 , *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2023 (5) SA 112 (SCA), *Natal Joint Municipal Pension Fund v Endumeni Municipality*2012 (4) SA 593 (SCA) para 18, and Bishop and Brickhill 'In The Beginning Was The Word': The Role of Text in the Interpretation of Statutes" (2012) 129 South African Law Journal 697-698.

[361] Clive Brian Jaars 'Constitutional Interpretation of Statutes in the Republic of South Africa (Research Gate, 16 January 2021) <https://afribary.com/books/consitutional-interpretation-report > Accessed 16 October 2024 .

[362] Paschke & Glazewski, Ex Post Facto Authorisation in South African Environmental Assessment Legislation: a Critical Review 146'. Kohn, 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' 2.

[363] M Jikelele Protection of the Environment Through the Application of Section 24G of the National Environmental Management ACT, 107 OF 1998' 4, Memorandum on the Objects of the National Environmental Management Second Amendment Bill: Clause 2.

[364]M Kidd & F Retief, Environmental *assessment' in HA Strydom & ND King* (Fuggle & Rabie's environmental management in South Africa, 2009) 296.

[365] M Kidd*, Environmental Law* (Juta and Company, 2011) 246.

[366] Erasmus, 'An Analysis of Section 24G of the National Environmental Management Act' 8.

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controversial judgments would follow; hence, the enactment of section 24G of NEMA, to fill in the lacunae.

From the judgment of *Eagles Landing*, a view can be expressed that Section 24G of NEMA was introduced with the primary purpose to provide a solution to exceptional cases where an activity that has been commenced without EIA and EA cannot be justifiably dismissed, instead of bringing it within the ambit of law. However, of concern is that there are no definitive terms in the legislation nor case law on what would constitute exceptional circumstances warranting the granting of *ex post facto*. Hence, the process is susceptible to abuse. In *Eagle landing*, the exceptional event was that the development had already been completed, and the Court was not empowered to order for such development to be demolished.[367]

Furthermore, section 24G of NEMA is a provision that creates a framework within which developers who commence with listed activities without EA are held accountable in addressing the already existing environmental impacts that were supposed to have been considered during the EIA process. [368] Such developers are expected to account for the negative impacts through mitigation steps taken in terms of section 24G of NEMA, regardless of whether *ex post facto* EA is granted or not, developers have the legislative obligation to remedy the harm caused to the environment. If ex post facto EA is denied, developers have the obligation to rehabilitate the environment subject to measures imposed by administrative authorities.[369]

To determine the constitutional validity of *ex post facto* EA, a constitutional approach to interpretation should be applied to section 24G of NEMA, to test whether it is constitutionally justified or serves any constitutional purpose.[370] The constitutional interpretation of a provision seeks to ascertain whether the provision can be interpreted in a manner that conforms with the values and principles enshrined in the

[367] *Eagle Landing Bondy Corporate* 99-104
[368] King ND, Strydom HA & Retief FP, Fuggle *& Rabie's Environmental Management for South Africa* (2018, 1260.
[369] Ibid.
[370] Botha Christo, Statutory *Interpretation: An Introduction for students* (Juta and Company, 2016)

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Constitution.[371]Section 39(2) of the Constitution imposes an obligation on courts that 'when interpreting legislation, the interpretation must give effect to the "spirit, purport, and objects of the Bill of Rights".[372] When the constitutionality of legislation is in doubt, courts are obliged to examine the objects and purport of an Act, and to read the provisions of the legislation, so far as is possible, in a manner that is consistent with the Constitution."[373]

In *De Beer N.O. v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening),*[374] the Court made it clear that it is a well recognised principle of 'constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained'.[375]

Additionally, in *Bato Star Fishing*[376] the Court explained that 'the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'. [377]

The issue now is whether Section 24G of NEMA can be construed in a manner that advances any values enshrined under section 24 of the Constitution.

Section 24 of the Constitution provides that 'everyone has the right to an environment that is not harmful to their health or wellbeing; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation Promote Conservation

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[371] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O,* (1) SA 545 (CC) para 22.
[372]Ibid.
[373] Ibid.
[374] 2002 (1) SA 429 (CC)
[375] Ibid para 24.
[376] ; 2004 (4) SA 490 (CC).
[377] *Bato Star Fishing* para 72.

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secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development '[378]

The above provision is threefold. Firstly, it provides for the right to a healthy environment under subsection (a). Secondly, it stipulates that the right be protected through (i) prevention of pollution, ecological degradation and (ii) promotion of conservation, and lastly, for the state to advance (iii) ecologically sustainable and socio-economic development.[379]

3.2.1. Environmental right

The protection of the fundamental right to a healthy environment is the core reason for the existence of the underlying environmental regulations, such as section 24 of NEMA regarding EIA and EA.[380] The values under section 24 (b) of the Constitution serve as accessories to the right observed. Therefore, the right to a healthy environment is intertwined with the need for the government to take legislative steps to implement environmental protective measures that prevent pollution, conserve the environment and ensure that there is sustainable development and socioeconomic development. In the case of the *Human Rights Commission v Kwa-Dukuza Municipality*, the Court stated that 'it is apparent that a healthy environment is connected to issues of pollution, ecological degradation and conservation.[381] Therefore, this means that the right cannot be separated from these needs.

[378] Ibid; also see Kotze'the Application of just Administrative Action in the South African Environm1ental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 60.
[379] De Waal Currie and Erasmus, *Bill of Rights Handbook* (Juta and Company (Pty) Ltd, 2013) 403-05, CM van der Bank 'Environmental Protection in South Africa: Human Rights Approach' (2014) 5 Mediterranean Journal of Social Sciences 2059.
[380] Friedrich Soltau, 'The National Environmental Management Act and Liability for Environmental Damage' (1999) 6 The South African Asian Journal of Environmental Law and Policy 32.
[381] [2021] 3 All SA 939 (KZP) Para 97.

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In *Minister of Environmental Affairs and Another v ArcelorMittal South Africa Limited,*[382] the Court affirmed that;

> [T]he preamble to NEMA, after acknowledging that 'many inhabitants of South Africa live in an environment that is harmful to their health and well-being', recognises the right of everyone 'to an environment that is not harmful to his or her health and well-being'. It imposes an obligation on the State to 'respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities.[383]

In the *Human Rights Commission v KwaDukuza Municipality* case, the Court pointed out that 'the statutory framework implemented during the advent of the Constitution provides for a variety of protective measures that give effect to the environmental right in the Constitution.[384] One of the identified measures is the requirement for EIA to be commissioned and the need for EA to be obtained for listed activities before such activities may commence, in terms of NEMA. When a developer commences with a listed activity without commissioning EIA and obtaining EA under the guidance of sustainable development principles, such activity may be seen to violate the environmental right of persons who are affected by the commencement of the project.

In the case of *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism,* the Court highlighted that 'section 24 of the Constitution is not only limited to protecting the environment; rather, it has the objective to promote development.[385]

However, in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, the Department of Agriculture, Conservation and Environment, Mpumalanga Province and others,* the Court made the following remarks;

> [What] is immediately apparent from s 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings. This Court has recognized that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human

[382] [2020] ZASCA para 40.
[383] Ibid.
[384] [2021] 3 All SA 939 (KZP) Para 89.

[385] [2006] ZAGPHC 132 ; 2006 (5) SA 512 (T) 18.

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> rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction.[386]

The Court further stated that the Constitution recognizes the interrelationship between the environment and development; indeed, it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24(b) (iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.[387]

Scholarship reveals that there are insufficient constitutional cases where the environmental right has been extensively interpreted and engaged, as such, this right has been described by some authors as a 'silent or under-utilized right'.[388] Although this constitutional right has been hailed as being sophisticated globally, there is still a gap in its enforcement in our jurisprudence[389], leaving us with very limited precedents to support arguments in scholarship regarding the interpretation of environmental regulatory provisions subject to the Bill of Rights. Those limitations will be discussed in the current study.

The argument that *ex post facto* EA violates environmental right under the Constitution constitutes a blanket conclusion that all *ex post facto EA* applications are generally

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[386] 2007 (6) SA 4 (CC) par 44; also see *Magaliesburg,* para 40.
[387] Ibid.
[388] Melanie Murcott, 'Minding the Gap: The Constitutional Court jurisprudence Concerning the Environmental Right' (2023) 13 Constitutional Court Review 148; also see Ruth Krüger 'The Silent Right: Environmental Rights in the Constitutional Court of South Africa' (2019) 9 Constitutional Court Review 475.
[389] Ibid.

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against environmental right. Economic development is also recognized as a fundamental human right in terms of the United Nations Declaration on the Right to Development.[390] In addition, it is given prominence under section 24 (b)(iii) of the Constitution concerning the promotion of justifiable economic development. It is important to highlight that the environmental rights co-exist with other rights and, as such, it is not an absolute right under the Constitution.[391] Section 36 (1) of the Constitution takes into consideration that there is no right in the Constitution that is absolute.[392] The environmental right may be limited where it is justifiable to do so.[393] This is necessary to ensure that there is a balance between rights that advance economic, environmental, social and cultural interests, as these factors clear a pathway to achieving sustainable development.[394]

Ex post facto EA may be viewed as constituting an infringement of environmental right. However, the view expressed in the current study is that the infringement should not be generally assumed for every case, without assessing the merits of each case, to ascertain whether there are no existing, constitutionally justified considerations or factors that may warrant limitations on the environmental rights. Economic and social development are also constitutionally entrenched values, worthy of justifiable recognition in EIA processes.[395] Therefore, the study advances a view that the environmental right under section 24 of the Constitution may be limited, where a development that commenced without EA can reasonably be justified within the ambit of section 36 of the Constitution, provided that the assessment proves that the commencement of such development has not caused adverse harm to the environment and that the negative impacts already caused are manageable and can be mitigated.

[390] United Nations Declaration on the Right to Development.
[391] CM van der Bank 'Environmental Protection in South Africa: Human Rights Approach' (2014) 5Mediterranean Journal of Social Sciences 2060.
[392] Geoffrey Allsop 'Chapter Seven: Introduction to the Bill of Rights' (University of Cape Town Libraries, ,2021) <ConLaw Chapter 7 (uct.ac.za)> accessed 25 October 2024.
[393] Ibid.
[394] CM van der Bank (n381).
[395] Constitution 1996: s 24 (2) (b) (iii)

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3.2.2. Prevention of pollution and promotion of Conservation

In advancing the environmental rights under section 24 of the Constitution, the relevant state officials dealing with environmental affairs have the obligation to enable the possibility of a wide range of environmental needs, such as, clean water and air, and conducive environment for livelihood, while conserving biodiversity.[396]

Pollution is one of the factors that causes harm to the environment.[397] It is the highest contributory factor to environmental degradation, resulting in land erosion, contaminated and unhealthy water and unhealthy air.[398] As a result, any form of pollution, whether air, water, land or thermal pollution, poses a serious threat to the health of living species, such as human, animals and plants, as well as natural resources, such forests, and vegetation.[399] These are species and natural resources that make up our biodiversity.[400] In protecting the health and wellbeing of human species and their needs from natural resources, section 24 (b) (i) and (ii) of the Constitution mandates the government to take legislative measures that seek to prevent pollution and promote conservation of the environment.[401]

EIA is again one of the protective measures utilized in the prevention of pollution and the promotion of conservation of biodiversity/natural resources during developmental activities.[402] It assists the developer and the administrative authorities to anticipate pollution as one of the negative impacts that may arise during a development activity. [403]EIA enables these parties to identify the form/s of pollution and implement measures

[396] Beata Warnich 'Environmental Right in Terms of the Constitution' (Schoeman Law, 18 February 2018) < https://www.polity.org.za/article/environmental-right-in-terms-of-the-constitution-2018-02-14> (accessed on 31 October 2023); also see the Climate Change Bill of the Republic of South Africa (2021).
[397] Nick O. Okello, Tom W, Okello, and Mark Zunckel 'Changes in health risk associated with air pollution and policy response effectiveness, Richards Bay, South Africa' (2020) 30 Clean Air Journal 1.
[398]Ibid.
[399] Loannis Manisalidus, Elisavet Stavropoulou, et al 'Environmental and Health Impacts of Air Pollution: A Review" (2020) 8 Frontiers in Public Health 1.
[400] Ibid.
[401] Constitution, s 24 (b).
[402] NEMA, s 24 (4)(a) (iv)
[403] Ibid.

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that may help to prevent such pollution from materializing and causing damage to the environment.

If a developmental activity occurs without commissioning EIA, the environment is exposed to pollutants that may negatively threaten the air, water or land, depending on the nature of the activity. This entails that biodiversity becomes susceptible to harm. South Africa hosts industrial and commercial businesses of sugar, paper production, fertilizer production, heavy mineral mines, sugarcane and forestry burning, as well as pesticide usage and dust associated with agricultural processes.[404] These activities are high contributors of pollution; therefore, EIA and EA are required during the implementation of projects such as those, particularly for planning purposes on how environmental management will be employed during the operation of the business[405]

A scenario would require the establishment of an abattoir waste management facility next to a township. This type of facility has the potential to cause air, water and soil pollution from 'animal feaces, blood, bone, fat, animal trimmings, paunch content and urine from operations or areas such as lairage, stunning or bleeding, carcass processing and by-product processing'.[406] This poses a serious risk to the environment and the health of living species (persons/animals and plants).[407] Therefore, this form of activity requires EA in terms of section 24 of NEMA and the waste management license, in terms of the provisions of the NEM: Waste Management Act No.59 of 2008.[408] Failure to conduct an EIA process for an activity such as this one exposes the environment to harm, specifically because there is no planning on how the environment will be managed. Thus, this may result in harm that violates the environmental right under section 24 of the Constitution. However, the process of *ex post facto* EA allows assessment of pollution caused by an activity that commenced without EA, as well as potential pollution should the activity

[404] [404] Nick O. Okello, Tom W, Okello, and Mark Zunckel 'Changes in health risk associated with air pollution and policy response effectiveness, Richards Bay, South Africa' 2.
[405] Ibid.
[406]Tamerenech Bandaw and Tamirat Herago 'Review on Abattoir Waste Management' (2017) 19 Global Veterinaria 517.
[407]Mabatho Moreroa and Moses Basitere 'The challenges and treatment of abattoir effluents: a South African perspective' (2022) 17 Water Practice & Technology 2598.
[408] Waste Management Act No.59 of 2008.

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continue.[409] Section 24G (1) (c) (aa) (D) (E) (F) of NEMA calls for the competent authority to order the applicant during the impact assessment process 'to cease, modify and control any activity or omission that causes pollution', 'to take measures that restrict or prevent pollution' and further do away with 'any source of pollution or degradation'.[410] In this regard, *ex post facto* EA gives prominence to the constitutional value under section 24(b)(i) regarding the prevention of pollution, in an effort to protect or conserve the environment.

In respect of conservation, section 24G (1) (c)(aa)(H) (BB) of NEMA requires an assessment regarding the natural state of the environment, the extent, duration and the considerable consequences of impacts caused by the activity on the environment, the potential effects, taking into account how the geographical, physical, biological, social, economic and cultural attributes of the environment may be affected by the activity.[411] This provision is a clear indication that although *ex post facto* EA may seek to authorize the commencement of certain developments that may be exceptional or have economic and social benefits -without EA- it does not deviate from the need to conserve the environment and protect it from harm. The outcome of the assessment determines whether the unlawfully commenced development has threatened the environment and if that is the case, section 24G of NEMA makes provision for the granting of EA to be denied and for the development to be discontinued within the ambit of the law.[412]

3.2.3. Sustainable development

A possible argument is that -because *ex post facto* EA allegedly disregards EIA and the principles under section 2 (1) of NEMA discussed above, which are the tools employed in pursuit of sustainable development- ex post facto EA is contrary to section 24(b)(iii) of the Constitution. This provision requires the application of legislative measures that will ensure ecologically sustainable development and the use of natural resources, while

[409] National Environmental Management Act 1998, s 24G (1) (c) (aa) (D) (E) (F).
[410] Ibid.
[411] National Environmental Management Act, 24G (1) (c)(aa)(H) (BB).
[412] National Environmental Management Act, s 24G (2) (a) and (3) (a).

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promoting justifiable economic and social development.[413] The various definitions of sustainable development encompass the integration of social, economic and environmental features, as well as the elements of intra- and inter-generational equity.[414]

Apart from the need to protect the environment for the well-being and health of persons, the very same persons require the use of natural resources in order to sustain their lives and those of future generations.[415] On the one hand, there is a need for social and economic development, in order to eradicate poverty, especially in disadvantaged communities.[416] The adverse impact on the environment and natural resources poses a serious threat to life and the environment. Hence, environmental sustainability is an important aspect of preserving lives and natural resources, not just for this generation, but for future generations, too. EIA and section 2 principles encompass several factors that direct South Africa on a pathway to sustainable development: through assessment, precaution, prevention and mitigation of negative impacts on the environment that may arise from developmental activities.[417] However, achieving sustainable development may be challenging, particularly because authorities are faced with having to take actions that preserve natural resources (conservation), while on the other hand permitting the use of natural resources to advance social and economic development and the supply of food, water, electricity and employment opportunities.[418]

In International law, the subject of sustainable development plays a crucial role in dealing with environmental conflicts. In other words, sustainable development creates a framework within which environmental conservation and socio-economic development are reconciled.[419] The White Paper on Environmental Management Policy for South Africa is a great example of the state's dedication to achieving sustainable development. This is presented in chapter 5 of NEMA.[420] The Paper emphasizes that a balance should be

[413] Constitution: section 24 (b)(iii)
[414] *Fuel Retailer*, para 59.
[415] Prof CM van der Bank 'Environmental Protection in South Africa: Human Rights Approach' 2061.
[416] Ibid.
[417] Amori Kock, 'The Effects of Public Participation on Environmental Impact Assessment' (2017)11 Pretoria Student Law Review 45.
[418] Loannis Manisalidus (n 389); also see Michael Kidd , *Environmental Law* (Juta and Company Ltd, 2008)
[419] *Fuel Retailers,* para 57.
[420] White Paper on Environmental Management Policy, 1997.

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struck between promoting economic development and protecting the standards of environmental protection.[421] The Report of the World Commission on Environment and Development (Brundland Report) 1987 defined sustainable development as 'the idea that human societies must live and meet their needs without compromising the ability of the future generations to meet their own needs'.[422]

The definition of sustainable development under the Brundland report was acknowledged by the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director General: Environment Management, Department of Agriculture Conservation and the environment, Mpumalanga and others,*[423] where the Court pointed out that there is a need for a balance between environmental protection and socio-economic development.[424] The Court stressed that scholars have desisted from describing sustainable development and have only elected to recognize the advanced elements of the concept of sustainable development, which include the following:[425]

Principle 4 of the Rio Declaration emphasized that 'the notion of sustainable development in practice must ensure that protection of the environment forms an integral part of every development process and cannot possibly be observed in seclusion'.[426] The right to development must also be exercised in a manner that achieves fair developmental and environmental needs, considering the present and future generations.[427]

In the case of the *Minister of Public Workers and Others v Kyalami Ridge Environmental Association and Another*,[428] relating to socio-economic needs, the Constitutional Court was criticized on the basis that it failed to consider sustainable development under section 24 (b) (iii) of the Constitution, before reaching the decision that the government has the

[421] Ibid.
[422] Report of the world Commission on the Environment and Development: Our common Future (Gro Harlem Brundland Oslo, 20 March 1987). Also see *Fuel Retailers Association of Southern Africa v Director General of Agriculture Conservation and the Environment, Mpumalanga and others* 2007 (6) SA 4 (CC) para 44; Mineral *Development and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 SCA para 20 and Van H uyssteen and Others NN O v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 (C).
[423] 2007 (6) SA 4 (CC)
[424] Ibid [paras 44- 55].
[425] Ibid [para 51].
[426] Rio Declaration on the environment and Development 1992.
[427] Ibid.
[428] 2001 (3) SA 1151 (CC) para 76.

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constitutional obligation to provide assistance with temporary accommodation to 300 people who became homeless due to flooding.[429] The reason for the critics were based on the argument that in the construction of such temporary accommodation, the government's activities violated the Town Planning Scheme and the relevant environmental legislation.[430]

Furthermore, the residents argued that the construction of the dwellings would be detrimental to the environment.[431] The Court expressed that the principles of sustainable development must be balanced against other relevant factors, such as the duty of the state to fulfill its constitutional mandate regarding social and economic rights. [432]The Constitutional Court ruled that the decision to make temporary accommodation to the people was lawful, despite the argument about it being against sustainable development.[433] Murcott expressed the same idea that environmental justice takes into consideration the nexus between the distribution of basic resources and the environment, and as such enables the advancement and enforcement of socio-economic rights.[434]

Since the *Fuel Retailers Association*[435] case was decided in 2007, there has not been any new cases that further developed precedents on the sustainable development value under section 24 (b) (iii) of the Constitution, particularly in light of EA processes. As a result, the current study advances the interpretation of *ex post facto* EA in light of how the Constitutional Court described sustainable development in *Fuel Retailers Association of Southern Africa v Director General:Environment Management, Department of Agriculture Conservation and the environment, Mpumalanga and others* matter.[436] The Court had to review the EA granted to Inama Trust for the establishment of a filling station at White River in Mpumalanga.[437] The argument advanced by the applicant for challenging the validity of the EA was that the activities pertaining to the construction of that filling station

[429] Ibid.
[430] *Minister of Public Works*, paras 1-7.
[431] Ibid.
[432] *Minister of Public works,* para 69.
[433] Ibid.
[434] Melanin Murcott 'the Role of Environmental Justice in Socio-economic Rights Litigation' 877.
[435]2007 (6) SA 4 (CC)
[436] *Fuel retailer* para 8.
[437] *Fuel retailer* para 5.

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had the possibility of causing adverse impacts on the environment.[438] The applicant further argued that environmental authorities have to make consideration on whether the filling station will result in environmental, social and economic sustainability, required by section 24 (b) (iii) of the Constitution.[439]

In addressing the issues raised by the applicant, the Constitutional Court expressed that sustainable development provides a principle for the determination and resolution of the tension between the need for the protection of the environment, on the one hand, and the need for socio-economic development, on the other hand.[440] The Court held that sustainable development does not in any way require the relinquishment of social and economic development, but rather seeks to modulate it in a way that gives effect to section 24 of the Constitution.[441]

When a court is faced with an environmental dispute, it must strike a balance between the interests of the environment and developmental considerations brought before it by the involved parties, and as such the court must be guided by the principles of sustainable development, entrenched under section 2 of NEMA. *Ex post facto* EA entrenched under section 24G of NEMA considers the need to advance environmental protection and socio-economic development in its impact assessment.[442] The process in terms of section 24G of NEMA employs Environmental Management Programme (EMPr),[443] which includes extensive information-gathering, as well as research and analysis of the information gathered during the EIA processes. All these efforts are required to safeguard the environment from further degradation/damage, as well as to remedy any existing impacts.

As the initial commencement without EA entails that prevention is not employable, mitigation measures are employed to remedy the existing negative impacts caused to the environment, with an the aim of establishing whether the development, which is subject to the *ex post facto* EA application, has any environmental, social, economic and cultural

[438] Ibid.
[439] Ibid.
[440] *Fuel Retailer,* paras 55 and 61.
[441] *Fuel Retailers* para 58.
[442] National Environmental Management Act: s 24G (1) (c)(aa)(H)(BB).
[443] National Environmental Management Act: s 24G (1) (c) (bb).

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benefits.[444] What determines the continuation or dismissal of such development is the outcome of impact assessment. If the outcome shows that there is a threat to the environment, section 24G of NEMA empowers administrative authorities not to grant the EA *ex post facto*. Thus, EA is not a guaranteed right to every developer. The present researcher believes that considering the manner in which the *ex post facto* EA process under section 24G of NEMA is constructed, it is not convincing that the process undermines the sustainable development principle. The process, in fact, takes into consideration the competing need for environmental protection, social and economic development, that must be reconciled.

3.2.4. Socio-economic development

Economic development is another constitutionally entrenched value that is directly linked to sustainable development through the integration between economic, social, and environmental considerations. Economic development is utilise to give effect to environmental right under section 24 of the Constitution. At the Declaration of the United Nations Conference, held on 16 June 1972, economic and social development were defined as 'essentials required to encourage favorable livelihood and working environment for people and to generate conditions in the world that are necessary for the development and advancement of the quality of lives.[445]

According to Sands, there is a strong relationship between sustainable development, economic and social development. Hence, the current researcher takes an intersectional approach between the two concepts, to express the view that the legal elements of sustainable development as reflected in international agreements consist of integration of environmental protection and economic development (principles of integration) sustainable utilization of natural resources and the need to preserve natural resources for the benefit of present and future generation[446]

[444] National Environmental Management Act: s 24G (1) (c) (aa) (C).
[445] Declaration of the United Nations Conference of the Human Environment; also see *Fuel Retailers* para 49.
[446] Sands P*, Principles of International Environmental* Law (Cambridge University Press, 2002) 253.

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This study concurs with Jonh and Rantlo when they described ex *post facto* EA as a process that has some elements of constitutional objective because it is a 'stride in the direction of pursuing environmental sustainability and economic development, required under section 24 of the Constitution'.[447]

In *Magaliesburg Protection Association V MEC Department of Agriculture, Conservation Environment and Rural Development Northwest Provincial Government,* the Court considered that *ex post facto* EA is necessary for socio-economic development. In this case, a review application was lodged in the Northwest High Court. The Applicant sought several orders, including the setting aside of the decision of the competent authority to grant *ex post facto* EA, of which EA was for the construction of lodge facilities on portions 21 and 85 of the Farm Boschfoentein, in Rustenburg. The said lodge was constructed within an area declared as a protected environment of the Magaliesburg eco-tourism area. At the time of the review application the lodge facilities were already completed.[448]The legal issue before the Court was whether the competent authority's decision to grant *ex post facto EA* was unlawful on the basis that the competent authority failed to consider certain information presented before granting EA.[449]

The Court was of the view that the challenge that the provincial government has in dealing with *ex post facto* EA is to is to strike a balance between environmental protection and conservation on the one hand and the growth of the economy by providing industry and employment opportunities on the other. Eco-tourism strikes a perfect balance. The lodge as an eco-tourism resort represents a meaningful attempt to stimulate economic growth in the Magaliesburg area whilst at the same time being sensitive to the environment[450]

The Court refused to set aside the *ex post facto* EA on the basis that the competent authority had considered all the relevant factors necessary before granting *ex post facto*

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[447] John Rantlo & Germarie Viljoen 'A Critical Appraisal of Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd 2019 (5) SA 275 (GP)' 445.
[448] *Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development Northwest Provincial Government and Others* [2013] 3 All SA 416 (SCA) par 3-11.
[449] Ibid.
[450] *Magaliesburg* Para 75.

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EA, in accordance with section 24G of NEMA.[451] The applicant failed to convince the Court that there were valid grounds to demolish the lodge, erected in the MPE area.[452] The Court, while acknowledging that the environment should be protected, focused on the developmental project, to which *ex post facto* EA contributes to factors such as economic growth, creates employment opportunities and attracts tourism.[453]

Ex post facto EA may also be a tool that considers the socio-economic factors of a project, such as the need to create employment, the need for an essential facility, such as fuel stations, malls, retail stores and the construction of dams for the supply of water. A development project may thus contribute to the creation of jobs, provide facilities for people in the nearby areas and contribute to tourism and economic benefits. These are the positive attributes that people may gain access to because of developmental projects. If a development project commences without EA, in the absence of *ex post facto* EA process, automatically and by operation of the law, all the projects would have to permanently cease. In the case of *Fuel Retailers Association of South Africa Ltd v Director General Environmental Management Mpumalanga and Other*, the Court made a consideration that the dismissal of a development project may have a significant impact on the socio-economic needs, including loss of employment.[454]

Although the environment must be preserved to protect livelihoods, certain projects which could commence without EA need to be afforded assessment considerations before they are completely dismissed or rejected, taking into account all the factors and circumstances surrounding the project, such as financial loss on the project, the rights and needs of the people employed to complete the project, job creation, the economic and social contributions the project will achieve for the surrounding areas and the nation at large, and, finally, these factors must be weighed against the need for environmental protection and not in seclusion.

[451] *Magaliesburg,* para 57 -61.
[452] Ibid.
[453] Ibid.
[454] *Fuel Retailers,* para 75.

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The foregoing discussion implies that if the impacts of the projects are such that they cannot be mitigated, then environmental protection should take precedent, and the *ex post facto* EA application may be dismissed. However, if after the assessment of *ex post facto* EA application, it is established that the project impacts can be mitigated, and the project has socio-economic effects, then *ex post facto* EA may be approved. In simple terms, every development which commenced without EA should be afforded an opportunity to be administratively assessed, based on its own merits. Furthermore, the *ex post facto* authorization process comes in as an administrative tool that seeks to afford such projects the opportunity for consideration by the competent authority (on whether they should proceed or permanently cease). In this regard, the current study argues that the existence of section 24G of NEMA is justified under section 24 (b) (iii) of the Constitution.

3.3. Conclusion

This chapter has demonstrated the constitutionality of *ex post facto* EA process in light of section 2 Principles, EIA and Constitutional values. Through an interpretation of the process under section 24G of NEMA, the study established that the process incorporates environmental protection measures. The impact assessment, conducted in terms of section 24G, takes into consideration the need to redress the impacts and remedy the environment from impacts already caused by commencement without EA. The intention of the legislature is to enable EA *ex post facto* for exceptions where it is reasonably impossible to discontinue a project commenced without EA and to not undermine the EIA process and the sustainable development principles under section 2 (4) of NEMA. However, this is not expressly defined in the provision. The process of ex post facto EA advances economic development under section 24(b) (iii) of the Constitution, while keeping in mind considerations of environmental protection, such as prevention or mitigation of pollution and degradation. In this regard it encompasses sustainable development and is compatible with the Constitution. The concern is about the shift in focus to how the process is applied both by developers and administrative authorities. If

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the focus could shift from critics on its existence and anomality, to how its susceptibility to abuse by developers can be addressed, then its shortcomings would be resolved.

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Chapter Four

Ex post facto EA and just administrative action

4. Introduction

The previous chapter established the constitutionality of *ex post facto* EA under section 24G of NEMA, subject to the environmental rights and values under section 24 of the Constitution. This chapter seeks to determine whether the *ex post facto* EA process under section 24G of NEMA is consistent with the principles of just administrative actions, provided for under section 33 of the Constitution.

4.1. Ex post facto EA and the principles of just administrative actions

It is the rule of law that administrative actions must be authorised by an empowering provision.[455] Administrative actions are decisions that are administrative in nature, taken by an organ of state or any person who has the power to perform public functions subject to an empowering provision and such decisions have the legal consequence of adversely affecting people's rights.[456] Just administrative action is founded in section 33 of the Constitution, which provides that 'people have the right to lawful, reasonable, and procedurally fair administrative Actions'. [457]

Section 33 of the Constitution is the pillar of administrative justice. It aims to secure fair administration and governance in the discharge of public duties.[458] The provision

[455] Poovindrin Moodley 'Examining the scope and application of section 24G of the National Environmental Management Act 107 of 1998 (NEMA)' 10.
[456] Code of Good Administrative Conduct <Microsoft Word - D7037B67.doc (justice.gov.za)> accessed 20 October 2024.
[457] Louis J Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' (2004) 2 Potchefstroom Electronic Law Journal 58; Also see Erasmus 'An Analysis of Section 24G of the National Environmental Management Act' 17.
[458] Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 67.

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advances the protection of persons against the exploitation of power and upholds public interest.[459] It further strengthens public participation in administrative decisions, by ensuring that a public servant has the obligation to answer, be accountable and transparent to the public.[460] To regulate administrative actions and hold public servant accountable for their administrative actions, Section 33 (3) of the Constitution calls for the enactment of a national legislation that would enforce people's right to lawful, reasonable, and procedurally fair administrative Actions.[461] As a result, the Promotion of Administrative Justice Act No. 3 of 20000 (PAJA) was enacted in response to this call. [462] Any person whose right has been affected by an administrative action, who alleges that the action was either unlawful, procedurally unfair and unreasonable, has the right to review such action in the courts of law, subject to the provision of PAJA.[463]

The application and granting of *ex post facto* EA embody the taking of administrative actions by relevant administrative authorities.[464] *Ex post facto* EA constitutes the environmental and administrative governance procedure that seeks to rectify unlawfully commenced infrastructural developments which have the potential to cause harm and degrade the environment.[465] Although the environment must be protected and conserved thoroughly, infrastructural developments are, amongst other things, important for socio-economic development, as outlined earlier in this study. This is entirely dependent on administrative actions by relevant environmental departments.[466]

[459] Ibid.
[460] Ibid.
[461] Constitution, s 33 (3).
[462] TMT Services and Supplies Pty Ltd t/a Traffic Management Technologies v MEC: Department of Transport Province of Kwa Zulu Natal and Others [2022] ZASCA 27 para 8.
[463] cliffe dekker hofmeyr 'Administrative fines for unlawful commencing listed activities – Potential increased risk of maximum fine being imposed' (CHD, 25 August 2015) < Administrative fines for unlawful commencing listed activities – Potential increased risk of maximum fine being imposed - Cliffe Dekker Hofmeyr> accessed 25 October 2024.
[464] Cora Hoexter, Lauren Boulle and Bede Harris, Constitutional *and Administrative Law*; *Basic Principles* (Juta, 1989).
[465] Ibid.
[466] Louis J Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 59.

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In *Director: Mineral Development v Save the Vaal Environment*[467], the Court indicated that 'the inclusion of environmental rights and fundamental justifiable human rights in the Constitution by necessary implication requires the environmental considerations to be given appropriate relevance and respect in the administrative processes in South Africa. Together with the change in the ideological climate brought about by the adoption of the Constitution must also come a change in the legal and administrative approach to environmental concerns'[468]

It is important to highlight that Section 24G of NEMA cannot directly be subjected to a test against PAJA, as an regulatory legislation; what may be subjected to PAJA is the decision or an action taken by a relevant competent authority, to grant *ex post facto* EA in terms of section 24G of NEMA.[469] The current study only makes reference to PAJA in respect of the requirements for just administrative actions, as these are extensively set out in the Act but not in the Constitution. This chapter does not seek to directly subject the *ex post facto* EA process in terms of section 24G of NEMA to PAJA, but rather to interrogate its alignment with section 33 of the Constitution, by testing it against the principles of just administrative actions being lawful, procedurally fair, reasonableness and having the right to written reasons.

Erasmus expressed a view that there is absolutely no need for section 24G of NEMA to be tested against the Promotion of Administrative Justice Act (PAJA) because NEMA is a legislation on its own, which can be directly tested against section 33 of the Constitution.[470] This viewpoint is disputable, as PAJA contains provisions that are not necessarily in the Constitution or any other legislation. Consequently, the next overarching question in the current study is whether the *ex post facto* EA process, entrenched under section 24G of NEMA, is aligned with the principles of just administrative action, entrenched under section 33 of the Constitution.[471]

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[467] *Director: Mineral Development v Save the Vaal Environment [1999] ZASCA; [1999] 2 All SA 381 (A)*
[468] Ibid [para 20].
[469] Erasmus 'An analysis of section 24G of the National Environmental Management Act '17.
[470] Erasmus 'An analysis of section 24G of the National Environmental Management Act '17.
[471] Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 67.

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4.1.1. Lawfulness

The first principle under section 33 (1) of the Constitution is lawfulness. The requirement for lawfulness encompasses the rule of law that nobody is above the law and, as a result public authorities, bears the onus to act within the bounds of the law. [472] Lawfulness is a constitutional imperative that imposes an obligation on administrative authorities to comply with the Constitution, as the supreme law, with a provision of the legislation that empowers them to take administrative actions and the requirements for just administrative actions set out in PAJA.[473]

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*:[474] the Constitutional Court pointed out that 'it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law, to the extent at least that it expresses this principle of legality, is generally understood to be a fundamental principle of constitutional law.[475]

The requirements for establishing lawfulness are set out under section under section 6 (2) (a) (i) to (iii) of PAJA, as follows:

> [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[476]

[472] D J Brynard 'The right to lawful administrative action:A Public Administration Perspective' (2013) 6 African Journal of Public Affairs 81.
[473] Poovindrin Moodley 'Examining the scope and application of section 24G of the National Environmental Management Act 107 of 1998 (NEMA)' (UKZN Research Space: 2020) 10.
[474] 1999 (1) SA 374 (CC) at 58
[475] Ibid.
[476] PAJA.

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In terms of this provision, an administrative action is deemed *ultra vires* unlawful if it was taken outside the scope of the empowering provision.[477] Secondly, if the administrative action constitutes the proceeds of misinterpretation of law[478] and lastly if the administrative action was not impartially taken and has the elements of biasness .[479] Before the introduction of section 24G of NEMA, in 2004, there was no provision under the ECA and, subsequently, in NEMA that empowered the granting of EA after commencement with a listed activity. That situation created problems for those developments that administrative authorities could not refuse to authorize. This was due to the nature of their facts; for example, where the development was already completed, such as the Peninsula, which was already completed in *Eagle Landing Body Corporate*. The administrative authorities would be faced with having to authorize such activities without being empowered by any provision. The intention of the legislature, in introducing the process in terms of section 24G of NEMA, was to close this gap and permit the granting of *ex post facto* EA, subject to an empowering provision where it is necessary to do so, particularly in exceptional events, as indicated in chapter 3 of the current study.

In the case of *Transitional Local Council v Van Dyk*,[480] the Court clarified that for an administrative decision to be lawful, the administrative body must ensure that the decision taken satisfies the intention of the legislature.[481] In *Hira and Another v Booysen and Another,[482] the* Court held that in instances where the intention of the legislature is required, to establish whether an erroneous decision is reviewable, or if the error materially had an impact on the decision, the decision is reviewable.[483]

What seems to be a challenge with the process of *ex post facto* EA, under section 24G of NEMA, is that it is difficult to clearly ascertain whether the administrative authorities consistently grant the *ex post facto* EA in terms of the empowering provision in a manner

[477] PAJA, s 6(2) (a) (i)
[478] PAJA, s 6(2) (a) (ii)
[479] Erasmus (n21) 19.
[480] 6 2002 (4) SA 653 (SCA) 13.
[481] Ibid; also see Gideon Erasmus 'An Analysis of section 24G of the National Environmental Management Act' 20.
[482] Ibid; also see Hira *and Another v Booysen and Another* 1992 (4) SA 69 (A) 93 and Dirk J Brynard 'The Right to Lawful Administrative Action: A Public Administration Perspective 80-81.
[483] Ibid para 93; see also Gideon Erasmus 'An Analysis of section 24G of the National Environmental Management Act' 20.

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that satisfies the intention of the legislature. Except for a developmental project that is already completed, as in *Eagle Landing* case, it remains unclear in the provision itself and in case law what other nature of cases should be regarded as exceptional cases, deserving of *ex post facto* EA. Because of this, the administrative process in terms of section 24G lacks transparency; hence, it is susceptible to abuse.

Clarity on whether *ex post facto* EA was granted to satisfy the intention of the legislature. However, this can only be established during a review process with the relevant administrative body or in a court of law. It cannot even be inferred from the provision. Furthermore, members of the public are not privy to the factors considered exceptional for the granting of *ex post facto* EA, unless they seek to review such EA, and this comes at a cost that underprivileged members of the public may not even afford. The current researcher contends that the process is vague in this respect.

However, when dealing with the vagueness of a statutory provision, the Court in *Affordable Medicines Trust v Minister of Health of the RSA*[484] the Court held that 'laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound to it what is required of them so that they may regulate their conduct accordingly'.[485]

One of the shortcomings of *ex post facto* EA under section 24G of NEMA is its failure to clearly indicate that the provision is applicable to exceptional cases and that developers would bear the onus to prove that their application for *ex post facto* EA is exceptional. Despite this shortcoming, the process of *ex post facto* EA under section 24G of NEMA correctly allows for any interested and affected party who is aggrieved by the decision of an administrative body to grant *ex post facto* EA, to challenge the lawfulness of such EA in terms of section 6 (1) and (2) (a) (i) of PAJA.[486] This administrative process allows for the filtering of *ex post facto* EAs that would result in the violation of the environmental

[484] *Affordable Medicines Trust v Minister of Health of the* 2006 (3) SA 247 (CC) 108.
[485] *Affordable Medicines Trust v Minister of Health of the RSA* SA 247 (CC) para 108.
[486] National Environmental Management Act: s 6 (2)(a)(i).

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right and values under section 24 of the Constitution and maladministration in the environmental governance.

4.1.2. Procedural fairness

The second principle enshrined under section 33 (1) of the Constitution is procedural fairness. This is a principle that encompasses a person's right to participate in public decisions that affect them.[487] Procedural fairness is closely linked with the principle of natural justice, and as such embodies the *audi alteram partem,* which requires for both sides to be equally heard.[488]

In *Zondi v MEC for Traditional and Local Government Affairs*, [489] the court described procedural fairness as a 'fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations.[490] A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained.[491] The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision."[492]

Procedural fairness requires a focus to be placed on the procedure followed in taking administrative actions, as opposed to the substantiveness of the actions.[493] Procedural

[487] Manjeet Kumar Sahu 'Principle of Natural Justice in South Africa' (The Social Science Research Network, 19 April 2016) < https://ssrn.com/abstract=2765896> accessed 25 October 2024.
[488] Kotze 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' 68.
[489] 2005 (4) (BCLR) 347 (CC) 112.
[490] Ibid.
[491] Ibid.
[492] Ibid: also *see Compare De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2001 (11) BCLR 1109 (CC); also see *Masetlha v President of Republic of South Africa and Another* [2007] ZACC 20 para 186.
[493] Andrew Konstant 'Administrative Action, the Principle of Legality and Deference: The case of *Minister of Defence and Military Veterans v Motau* (2015) 7 Constitutional Court Review 84: also see Thomas C Grey 'Procedural Fairness and Substantive Rights' (1977)18 American Society for Political and Legal Philosophy 183-184 .

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fairness advances the constitutional values of openness, accountability and participation.[494] Any person who is aggrieved by an administrative action is afforded an opportunity through this principle to reasonably object the action.[495] The process of *ex post facto* EA under section 24G of NEMA incorporates the principle of procedural fairness in its impact assessment procedure. Section 24G (1) (c) (aa) (H) (DD) imposes a duty on a developer who applies for EA *ex post facto* to conduct a public participation process. [496] It states that the developer must include in the EIA report: 'the public participation process that was utilized during the course of compiling such report and must make available all the comments submitted by the interested and affected parties.[497]

This entails that during the EIA commissioned in terms of section 24G of NEMA, any person who has an interest or who is affected by the application for *ex post facto* EA should be afforded the opportunity to comment on the development that commenced without EA. In the event that a developer has not conducted a public participation process, and such is not accounted for in the EIA report, as required by section 24G and despite this procedural omission, an administrative authority may proceed to grant *ex post facto* EA. However, such EA is reviewable in terms of section 6 (2) (b) and (c) of PAJA. The requirement for procedural fairness regarding the application for *ex post facto* EA is not only limited to public participation, but generally requires compliance with the procedure itself. This means that in the EIA report, it should be clear that every regulatory step imposed by section 24G of NEMA has been duly followed and accounted for, failure of which a review proceeding against the EA granted is warranted.

In the case of *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and others,*[498] the Court held that the procedure envisaged under section 3 of PAJA is the general and bare minimum procedure which must be followed when taking an administrative action. In cases where a different procedure exists and is empowered

[494] D J Brynard 'Procedural fairness to the public as an instrument to enhance public participation in public administration' (2011) 19 Administratio Publica 101.
[495] *Masetlha v President of Republic of South Africa and Another* para 75.
[496] NEMA, s 24G (1)(c) (aa) (H) (DD).
[497] Ibid.
[498] *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and others,* (No 1) 2008 (3) SA 91 (E) 71.

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by a legislative provision, such procedure must be utilized. [499] Section 2 (a) of PAJA indicates that "a fair administrative procedure depends on the circumstances of each case". [500]

When dealing with *ex-post facto* EA applications, the competent authority must follow the procedure set out under section 24G of NEMA.[501] Failure by the administrative decision to grant an EA can be reviewed and challenged in the court of law. In this regard, the study is of the view that the process enshrined under section 24G of NEMA reasonably caters for *ex post facto* EA to be challenged on the grounds that it was granted against the constitutionally premised principle of procedural fairness. There are no uncertainties concerning its alignment with the principle of procedural fairness.

4.1.3. Reasonableness

Section 33 (1) of Constitution further incorporates the doctrine of reasonableness in just administrative actions.[502] It requires that an administrative action must be equitable and rational and premised on a sound reason.[503] The standard of reasonableness does not require the administrative actions to be correct in every aspect. However, it stipulates that the actions must be those that a reasonable public servant may take. [504] The principle of reasonableness has components of rationality, proportionality and contextuality.[505]

Rationality is the central minimum requirement for reasonableness.[506] In the case of *Pharmaceutical Manufacturers Association v SA In re ex parte Application of the*

[499] Ibid.
[500] Promotion of Administrative Justice Act, s 2(a).
[501] Ibid.
[502] NEMA, s 33 (1).
[503] Brynard 'Justifying Administrative Action for Reasonableness; A Quest for Accountable Public Administration' 73.
[504] Ibid 71.
[505] Brynard 'Justifying Administrative Action for Reasonableness; A Quest for Accountable Public Administration' 2013) 21 Administration Publica 72.
[506] *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of President of the RSA* 2000 (2) SA 674 (CC) para 90; also see *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 108 and Brynard 'Justifying Administrative Action for Reasonableness; A Quest for Accountable Public Administration 72.

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President of RSA, the Court pointed out that 'rationality is the minimum threshold requisite for the exercise of public power. [507] In *Carephone Pty Ltd v Maraus No and Others*, the Court pointed out that 'there must be a rational purpose that show cause for the link between the information (evidence) submitted for consideration and the final decision made by the competent authority'.[508]

In the case of *National Student Financial Aid Scheme v Moloi and Others,*[509] the Court emphasized that 'It is a trite principle of Administrative Law that public power must be sourced in the law and the Constitution. Courts must review the exercise of public power to ensure compliance with this principle.[510] The principle of legality requires that exercise of executive power must be rationally related to the purpose for which it is conferred,[511]

In the *Minister of Health v New Clicks South Africa (Pty) Ltd*[512] the Court explained that rationality imposes on public servants the highest standard of reasoning and analysis exercise before an administrative action is taken. This is to ensure that the action taken is reasonable, such that a reasonable person would have taken such a decision.[513] Rationality is more concerned with the structure of the action taken and not necessarily its effects. A decision is not rational in terms of Section 6 (2) (f) (ii) of PAJA if:

the action itself –

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator[514]

[507] 2000 (2) SA 764 (CC) Para 20.
[508] *Carephone Pty Ltd v Maraus No and Others*, 1999(3) SA 304(LAC) 37; also see Erasmus 'An Analysis of Section 24G of the National Environmental Management Act' 21.
[509] [2024] ZASCA para 36
[510] Ibid.
[511] Ibid.
[512] 2006 (2) SA 311 (CC).
[513] Ibid para 108
[514] PAJA.

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Rationality, in *ex post facto* EA, entails that reasons to grant EA must be connected to the submission made in the EIA report, that was compiled in terms of section 24G of NEMA and the purpose of the process of *ex post facto* EA. This means that for administrative authorities to grant *ex post facto* EA, they should deliberate and make consideration on the outcome of the assessment, particularly the evidence and information contained therein. If the assessment entails that commencement with a listed activity without prior EA has left the environment with negative impacts, incapable of mitigation, and that the activity has either economic, social or cultural benefits, it should not be granted.

The fact that the negative impacts cannot possibly be mitigated for the activity to continue, dictates that the application for *ex-post facto* EA be rejected, regardless of the benefits that come with it. However, if the negative impacts are capable of mitigation, such that the activity can continue without gross destruction of the environment and the project has exceptional factors with positive benefits, such as economic, social and cultural development, the granting of *ex post facto* EA for the listed activity may constitute a rational decision, as long as measures are applied to protect the environment from degradation. In *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA,*[515] the Supreme Court of Appeal held that the review threshold is rationality, and the test is an objective one. The Court emphasized that the decision-maker must show that the subjective opinion relied on for exercising power was based on reasonable grounds.[516]

However, it appears to be quite challenging because the process is not transparent enough to the public. The public may have some interest in the application for section 24G of NEMA on what reasons/factors influenced the administrative authorities to grant *ex post facto* for a particular project to continue, despite being unlawfully commenced without EA. Such can only be figured out during the review process with the relevant department or in a court of law. This possibility makes the process more susceptible to abuse. This is because there is no accounting on the part of administrative authorities such as providing reasons for the granting of *ex post facto* EA. In *Rustenburg Platinum*

[515] 2003 4 All SA 589 (SCA); 2004 3 SA 346 (SCA)
[516] Ibid.

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Mines Ltd v Commission for Conciliation, Mediation and Arbitration,[517] the Court remarked that "Once the bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it".

The second component of reasonableness is proportionality which focuses on the effects of the decision. It advances the notion that administrative action must not only be rational, but it must be justifiable subject to its consequences and the effects on the rights of those involved. Administrative actions must show reasonable equilibrium between all the factors involved in a case. There is no express provision on proportionality in the PAJA. However, it is premised on the provision of section 36(1) of the Constitution, which provides for consideration of proportionality in circumstances where a fundamental right that is premised on the Constitution is limited.[518] This principle requires that the said limitation be reasonable and justifiable.

The considerations under section 36 of the Constitution make provision for a limitation, to ensure that there is proportionality or a balance between affected interests or factors; the considerations require that the Court must assess the nature of the interest, the significance or purpose of the decision, the nature of severity of the impact and the interests of the public.[519] Additionally, more restrictive measures should be explored in considering *ex post facto* EA applications made in terms of section 24G of NEMA.[520]

As the granting of *ex post facto* EA entails adhering to the limitations of the environmental right, under section 24 of the Constitution, the proportionality test in the *ex post facto* EA would require that the reason for granting EA *ex post facto* be directly proportional to the decision to grant *ex post facto* EA.[521] This implies that if -in granting *ex post facto* EA- the competent authority takes into consideration socio-economic benefits of a development project as a significant factor, such socio-economic benefits must not be disproportionate

[517] 2007 (1) SA 576 (SCA) para 34; also see *Z.H and Others v Minister of Home Affairs and Another* [2022] 4 All SA 129 (WCC) para 42.
[518] Brynard 'Justifying Administrative Action for Reasonableness; A Quest for Accountable Public Administration' 75-76.
[519] Ibid.
[520] Ibid.
[521] Ibid.

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to the impacts caused to the environment by the unlawfully commenced activities.[522] If the benefits are disproportional, then the granting of *ex post facto* EA is not justified.

In *Batho Star Fishing Pty Ltd v Minister of Environmental Affairs and others*, O Regan J defined section 6 (2) (h) of PAJA by setting out a criterion that had to be considered, to determine whether an administrative decision is reasonable. The Court pointed out that administrative decision must consider the nature of the action or decision; the identity and expertise of the decision; the reasons provided for the decision; the nature of the competing interests; and the impact of the decision on the lives and wellbeing persons affected by such decision"[523]

The criteria set out in the *Bato Star Fishing* are relevant in establishing the reasons for the decision by administrative authorities to *grant ex post facto* EA.[524] This is true whether there exists proportionality between the effect caused by the decision to grant *ex post facto* EA and the purpose for which such decision intends to serve.[525] When dealing with an application *for ex post facto* EA in terms of section 24G of NEMA, the relevant competent authority has to account for the decision to grant or refuse to grant ex post facto EA.[526] In order to do so, the competent authority must have weighed the factors considered against each other, in order to ensure that there is a balance between all the relevant factors. The authorities must also provide the reasons for deciding to grant or refuse to *grant ex post facto* EA. The reasons in practice are not provided to the interested and affected parties when EA is granted *ex post facto*. The only time the interested and affected parties participate is during the impact assessment process through public participation process. However, how the administrative authorities reach a decision to grant *ex post facto* EA is not very transparent under section 24G of NEMA.

[522] Ibid.
[523] 2004 (4) SA 490 (CC0) 2004 (7) BCLR 687 (CC) 45; Also see Gideon Erasmus 'An analysis of section 24G of the National Environmental Management Act' 21.
[524] Brynard 'Justifying Administrative Action for Reasonableness; A Quest for Accountable Public Administration' 79.
[525] Ibid.
[526] Ibid.

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It was clearly stated in the case of *Minister of Public Works and others v Kyalani Ridge Environmental Association and Others*[527] that the fundamental principles do not make provision for rights and obligations.[528] In *De Reuck v Director of Public Prosecutors and Others,*[529] the Court clarified that the rights entrenched in the Bill of Rights are not absolute, and as such, they have to be enforced subject to the consideration of other rights. The Court further indicated that it is common cause that the right exercised by one person may conflict with the right of another.[530] The environmental right under section 24 of the Constitution is not absolute as advanced in chapter 3. As a result, it may be subjected to the law of general application under section 36 of the Constitution, where it is reasonable and justifiable to do so.[531]

Environmental rights should also be subjected to the law of general application, where it is necessary to do so in relation to *ex post facto* EA. The limitation of assessment in terms of the law in the application may be necessary to strike a fair balance between the EIA requirements, principles under section 2 of NEMA, and the need for *ex post facto* EA in terms of section 24G of NEMA. As Erasmus suggested, the factors outlined in *Bato Star Fishing* may be used as a limitation clause in administrative procedures. Therefore, these criteria should establish what exactly constitutes a reasonable decision.[532]

4.2. Conclusion

This chapter shows that *Ex post facto* EA, to a certain extent, aligns with some principles of just administrative action, enshrined under section 33 (1) of the Constitution. The study also established that the process of *ex post facto* EA is fully compatible with the procedural fairness principle. To a certain extent the *ex post facto* EA process under section 24G of NEMA aligns with lawfulness and reasonableness in that administrative authorities give every development activity which commenced without EA an opportunity

[527] *Minister of Public works para* 69.
[528] Ibid.
[529] 2002 (6) SA 370 (CC).
[530] *De Reuck v Director* Para 89.
[531] The Constitution, s 7(3); IM Rautenbach 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014)7 Potchefstroom Electronic Law Journal 2248.
[532] Gideon Erasmus 'An analysis of section 24G of The National Environmental Management Act' 22

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to be assessed based on individual merits. The assessment considers both environmental protection and other factors, such as economic and social development. The process makes it possible to assess the nature of the project, the nature of the competition rights and the nature of the effect of the administrative action on people's rights and interests. In terms of the process, it is possible for these factors to be weighed against environmental interests, to strike a balance between environmental protection and economic development. In this regard, proportionality allows for *ex post facto* EA to be granted subject to limiting the environmental right in terms of section 36(1) of the Constitution, where it is justified to do so. However, the problem encountered in the current study was lack of transparency about whether the administrative authorities grant *ex post facto* EA for the purpose it seeks to serve, which is to enable EA for exceptional cases where a listed activity commenced without EA, or not. Furthermore, the reasons are not always provided to the public as to why an *ex post facto* EA was granted for a development that was commenced without EA, and what factors the administrative authorities considered to arrive at the decision to grant the EA *ex post facto.* Lack of transparency in this regard such decisions susceptible to internal abuse by administrative authorities, in the interest of developers. In the absence of this shortcoming, *ex post facto* EA process is compatible with section 33 of the Constitution.

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Chapter Five

Ex post facto EA: Lessons from English and Indian jurisprudence

5. Introduction

This chapter comparatively explores the practice of *ex post facto* EA in Indian and English jurisprudence. The comparative exercise is necessary to weigh *ex post facto* EA process in South Africa against the good practices of other jurisdictions in establishing whether there are any lessons that may be required to refine the practice under South African jurisprudence. The comparative angle adds novelty to the study.

5.1. The process of ex post facto EA in Indian jurisprudence

As in the South African legal system, the practice regarding *ex post facto* EA has faced controversial opinions under the Indian legal system.[533] In India, the process is referred to as *ex post facto* environmental clearance.[534] As a point of departure, the study explored the environmental clearance regulations of India, to establish how the *ex post facto* clearance process is utilized in that legal system. Section 48 of the Indian Constitution provides that 'the state shall endeavor to protect and improve the environment and safeguard the forests and wildlife of the country'[535]

As in South Africa, the Constitution of India is the supreme law of the land, and all laws must be consistent with it.[536] Section 3 of the Environment Protection Act 29 of 1986 imposes a duty on the 'Central Government of India to take all reasonable measures it deems relevant or convenient for the protection and development of the quality of the environment and safeguarding and preventing environmental pollution'.[537]

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[533] ' Ex post Environmental Clearance' (AZB and Partners Advocates and Solictors ,31 December 2022) at https://www.azbpartners.com/bank/ex-post-facto-environmental-clearance/ accessed 06 December 2023.
[534] Ibid.
[535] The Constitution of India.
[536] *Kalpana Mehta and Ors. vs Union of India and Ors* 2018,7 SCC (1) para 13.
[537] Environment Protection Act No. 29 of 1986.

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To give effect to the constitutional mandate of protecting and improving the environment, clause 2 of the Environmental Impact Assessment (EIA) Notification of 2006, which repealed the EIA Notification of 1994, makes provision for the requirement of obtaining environmental clearance before certain specified activities are commenced with in the environment.[538] Clause 2 of the EIA Notification stipulates the following:

> [The] following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forest for matters falling under category 'A' in the schedule and a State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification [539]

In terms of clause 6 of the EIA Notification, an applicant for environmental clearance is required to complete the relevant forms 1 and 1A (when applicable) subsequent to establishing the prospective project site prior to commencement of any activity .[540] The application should be accompanied by a copy of the preliminary environmental assessments report concerning the project.[541] Clause 7 of the Notification outlines the stages of obtaining environmental authorization, as follows:

(i) The four stages in a sequential order are
- stage (1) screening
- stage (2) scoping
- stage (3) public participation
- stage (4) appraisal[542]

Unlike in South Africa, the Indian ex post facto clearance is not expressly included in any environmental regulation. [543] This is because the granting of *ex post facto* environmental clearance in India is somewhat viewed as being against the precautionary principle of

[538] Environmental Impact Assessment Notification, 2006 (Ministry of Environment, Forest and Climate Change).
[539] Ibid; also see *Electrosteel Steels Limited vs Union of India o* 2021 SCC Online SC 1247 para 17; also see the Impact Environmental Assessment (EIA) Notification of 1994.
[540] Ibid.
[541] Ibid.
[542] Ibid.
[543] Ibid.

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environmental protection and management.[544] It lacks an express provision on the granting of *ex post facto* environmental clearance. Furthermore, there have been debates in case law on whether the granting of an environmental clearance after the commencement of certain activities is allowed within the Indian jurisprudence.[545] In several cases, the Supreme Court of India has delivered controversial judgments, wherein on one occasion the Court disagreed with the granting of *ex post facto* environmental clearance, stating that it is foreign to Indian environmental jurisprudence, while in other cases the same Supreme Court permitted the granting of *ex post facto* environmental clearance.[546] Similar controversy was experienced in South Africa before the introduction of section 24G of NEMA in 2004.

Despite the controversy, India has not taken legislative steps to formalize the process of *ex post facto* environmental clearance. Its position remains determined through case precedents. In this chapter the researcher discusses these precedents, to establish how the Indian Courts applied the concept of *ex post facto* EA and what considerations or factors influenced the granting of such *ex post facto* environmental clearance. In this chapter the researcher discusses the following precedents.

5.1.1. Case Law Analysis

In the *Common Cause v Union of Indian and Ors,*[547] community members were leasing properties at Keonjar, Sundergard and Magurbhanj, in Odisha, and they aggressively engaged in the mining of iron and manganese on the land of the said properties without the required mining clearances from the competent authority. Their conduct led to the destruction of the environment and forests. Amongst the several issues raised before the Court, was whether *ex post facto* mining clearance could be granted for the continuous operation of the mines.[548]The Court emphasized that the EIA Notification of 1994 clearly states that 'every new project that is specified in schedule 1 of the said Notification shall

[544] *Kalpana Mehta and Ors. vs Union of India and Ors* (n 534).
[545] Ibid.
[546] *Common Cause v Union of Indian and Ors* (2017) 9 SCC 499 para 132.; also see *v Karnataka State Pollution Control Board,* 2022 SCC OnLine SC 1278 para 47.
[547] Ibid.
[548] Ibid.

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not commence without an environmental clearance granted by the Central Government and subject to the provisions of the Notification.[549] The Court held that 'the granting of ex post facto environmental clearance would be detrimental to the environment and could lead to the irreparable degradation of the environment. The concept of an *ex-post facto* or retrospective environmental clearance is completely alien to Indian environmental jurisprudence including the EIA, 1994 and EIA 2006.[550]

In 2017 the Central Government of India issued Notification S.O 804 (E), acting in accordance with section 3 (1) and section 3 (2) (v) of the Environment Protection Act.[551] The said notification made provision for the granting of environmental clearance *ex post facto*, for projects that were started and even completed without environmental clearance, as required by the EIA Notification of 2006.[552] However, this provision in terms of the 2017 Notification was only meant to exist for six (6) months, meaning it was a one-time provision.[553] The Notification concerning the granting of ex post facto environmental clearance was challenged in the High Court case of *Fatima v Union of India*.[554] The Court held that the said notification was *ultra vires* and contrary to EIA regulations, particularly the EIA Notification of 2006.[555] It emphasized that the notion of *ex post facto* environmental clearance was a foreign practice in India and it is offensive to the EIA Notification of 2006. [556]

The case of Fatima differed with the judgment of the Supreme Court in *Alembic Pharmaceuticals Ltd v Rohitl Prajapati,* where the Court demonstrated that -although *ex post facto* environmental clearance is foreign to Indian Jurisprudence, as held in *Common Cause* case- *ex post facto* environmental clearance may be approved in exceptional cases.[557] It was further indicated by the Supreme Court in *D.Swamy v Karnataka* that the

[549] *Common Cause* para 93
[550] n 475 above.
[551] *D.Swamy,* para 21.
[552] Ibid.
[553] *D.Swamy, para 30;* also see *Puducherry Environment Protection Association v. Union of India* 2017 SCC OnLine Mad 7056 2 and the Office Memorandum F. No. 22-21/2020-IA.III [E 138949] < https://environmentclearance.nic.in/writereaddata/OM/500889371$28.1.2022.pdf> accessed 06 December 2023.
[554] W.P. (MD) No. 11757 of 2021 (*Fatima v. Union of India*); also see D.Swamy, paras 33-43.
[555] Ibid.
[556] Ibid.
[557] *Alembic Pharmaceuticals Ltd v Rohitl Prajapati* (2020) 17 SCC 157 para 36.

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High Court in *Fatima* incorrectly interpreted and applied its judgment, as held in *Alembic Pharmaceuticals*. According to the discussion of the following cases, *ex post facto* environmental clearance is generally prohibited in India. However, it may be granted in exceptional cases.

In Alembic Pharmaceuticals Ltd v Rohitl Prajapati, the decision of the Union Ministry of Environment and Forestry to issue a circular permitting the granting of *ex post facto* environmental clearance was reviewed in the National Green Tribunal (NGT).[558] The NGT held that the law of India did not permit the granting of *ex post facto* environmental clearance and that the circular of 14 May 2002 was mere internal communication and could not prevail over the EIA Notification of 1994, which prohibits *ex post facto* environmental clearance.[559] The decision of the NGT was appealed at the Supreme Court of India.[560]The issue before the Court was whether a circular could override the EIA Notification of 1994 and make a provision for the granting of *ex post facto* environmental clearance to industries?

The Court pointed out that 'the concept of an *ex post facto* environmental clearance is in derogation of fundamental principles of environmental jurisprudence and is an anathema to the EIA Notification dated 27 January 1994.[561] The Court further referred to the indicated judgment in Common Cause where it was held that *ex post facto* environmental clearance holds a detrimental effect to the environment and could lead to irreparable degradation'[562]

The Court went further to provide clarity on the reasons the *ex post facto* environmental clearance was not permitted under Indian law:

> [The] reason why retrospective environmental clearance or *ex post facto* clearance is alien to environmental jurisprudence is that before the issuance of an environmental clearance, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity. An environmental clearance can be issued only

[558] *Alembic Pharmaceuticals* para 1.
[559] Ibid.
[560] Ibid.
[561] Ibid.
[562] *Alembic Pharmaceuticals,* para 23.

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> after various stages of the decision-making process have been completed. Requirements such as scoping, and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity… are considered in decision making. Allowing for ex post facto clearance would essentially condone the operation of industrial activities without the grant of environmental clearance, in the absence of environmental clearance; there would be no conditions that would safeguard the environment. Environmental law cannot countenance the notion of an *ex post facto* clearance as this would be contrary to both the precautionary principle as well as the need for sustainable development[563]

The Court considered the decision held in *Electrothern Ltd v Patel Vipulkumar Ramjibhai31*[564] not to order the shutting down of the project, as an important expansion was already underway. The Court did not order the shutting down of the pending operation on the basis that it would go against the principle of proportionality. However, the Court did not ignore the considerations for environmental degradation, caused by the operations without environmental clearance. Therefore, the Court ordered the industries to pay an administrative penalty. The amounts imposed would be channeled towards restoring and mitigating the environment.[565]

From the above cases, it is clear that -unlike in South African law- *ex post facto* environmental clearance in the Indian legal system is viewed as being contrary to the sustainable development principles and EIA, and the one principle highlighted in law is the precautionary principle, which ensures the achievement of sustainable development. In the unreported case of *Electrotherm Ltd v Patel,* the Court stressed the importance of considering the principles of sustainable development when dealing with issues that have a negative impact on the environment. It added that, 'It cannot be gainsaid that utilization of the environment, and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices'.[566]

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[563] Ibid.
[564] *Electrotherm (India) Limited v Patel Vipulkumar Ramjibhai* (2016) 9 SCC 300; also see *Alembic Pharmaceuticals* para 19 and *Electrosteel Steels,* para 46-7.
[565] *Alembic Pharmaceuticals* para 19; also see *Electrosteel Steels,* para 86.
[566] Electrotherm para 19.

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Although this study does not concur nor argue that *ex post facto* EA is contrary to sustainable development principles, at least India has established the contrariness in case law, while in South Africa it remains an academic debate. Similarly, both the Indian and South African legal systems incorporate the well-established international principle of sustainable development, meaning that both states seek to achieve sustainability of the environment through protecting and conserving natural resources. However, both legal systems acknowledge the significance of economic development. In India, *ex post facto* EA was upheld in case laws, based on economic development considerations.

One of the cases where *ex post facto* EA was granted despite a lack of empowering provision in Indian jurisprudence is the case of *Electrosteel Steels Ltd. v. UOI.* In that case, the Appellant industry owned a steep plant that housed 3000 permanent employees and 7000 employees who were employed on a contractual basis.[567] In addition to the permanent and contractual employees, it was disclosed that 30 000 people were also dependent on the steel plant for a living.[568] The steel plant was worth 3 4200 crones in the 2019/2020 financial year.[569] The Appellant had initially applied for the operation of the steel plant. However, upon establishment, the steel plant was operated on a land that was 5.3km away from the land upon which the EIA, rezoning and scoping had taken place for the establishment.[570] The appellant was advised to apply for *ex post facto* environmental/forest clearance for the new land where the steel plant was already operating.[571]

The legal dispute before the Court was whether the established operation that made a significant contribution to the economy of India and the livelihoods of hundreds of locals should be shut down for failure to obtain environmental clearance before the commencement of activities[572] Could the shutting down take place without a platform for the industry to bring its operation within the regulations of law, by obtaining the required

[567] *Electrosteel Steels,* para 2-4.
[568] Ibid.
[569] *Electrosteel Steels* para 5.
[570] Ibid.
[571] Ibid.
[572] *Electrosteel Steels* para 82.

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environmental clearances?[573] The Court in this case carefully considered the importance of environmental protection. However, the Court also considered the underlying factors concerning the state of the industry. [574] It reasoned as follows:

> The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down for the technical irregularity of shifting its site without prior environmental clearance, without opportunity to the establishment to regularize its operation by obtaining the requisite clearances and permissions, even though the establishment may not otherwise be violating pollution laws, or the pollution, if any, can conveniently and effectively be checked. The answer must be in the negative.[575]

The issue of lack of an express provision that prohibits *ex post facto* environmental clearance was raised by the Court in this case, to defend its reasoning.[576] The Court also indicated that the Environment Protection Act of 1986 does not expressly disapprove of an *ex post facto* clearance in India.[577]Therefore, in certain circumstances, the granting of an *ex post facto* clearance in compliance with the environmental regulations may be appropriate and not entirely impermissible in law.[578] The Court further pointed out that it cannot be unconscious of the economy and the need for consideration of the hundreds of livelihoods who are employed and depend on the project operation for their income, provided that the project implementers were willing to comply with the law.[579] The Court therefore applied the principle of proportionality, as guided by the case of *La Farge Umiam Mining Limited v Union of India3,*[580] where the Court reasoned as follows:

> the time has come for us to apply the constitutional doctrine of proportionality to matters concerning the environment as part of the process of judicial review in the contradistinction to merit review. It cannot be gainsaid that the utalisation of the environment and its natural resources has to be in a way that is consistent with the principles of sustainable development and the intergenerational equity but balancing of these may entail policy choice.[581]

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[573] Ibid.
[574] *Electrosteel,* para 83.
[575] Ibid.
[576] ibid.
[577] Ibid.
[578] Ibid.
[579]*Electrosteel,* para 84.
[580] Ibid; *La Farge Umiam Mining Limited v Union of India3* 2011 7 SCC 338 *para* 119; also see *D.Swamy,* para 42.
[581] Ibid.

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The Court explored the factors that must be considered in balancing the utilization of the environment and its natural resources and indicated that the use of natural resources must be subjected to a principle of judicial review, in this instance. [582]The questions in deciding whether the granting or refusal of *ex post facto* environmental clearance was in fact necessary are, 'were all the necessary factors considered? Was the decision influenced by irrelevant considerations/factors? Was the decision made in strict compliance with the relevant legislative provisions and whether the decision taken was compatible with the principles of sustainable development, such that it took into full consideration the said principles and relevant factors, to reach a balanced decision.[583]

The Court stressed the importance of reviewing the administrative processes, where necessary, to ensure that the decision to grant or refuse to grant *ex post facto* environmental clearance is fair and well-established, subject to the relevant principles, without any bias or limitations.[584] However in acknowledging the importance of obtaining prior environmental authorisation and putting a disclaimer that *ex post facto* environmental clearance should not be taken for granted, the Court took into account the *Alembic Pharmaceuticals*,[585] where the Court pointed out that the practice of *ex post facto* environmental clearance is foreign to Indian law,[586] that although this was held in *Alembic Pharmaceuticals*, the court in the same case did not entirely disapprove the *ex post facto* clearance because it did not order the shutting down of the 3 industries liable for breach of environmental law. This was because the Court had taken into serious consideration the repercussions of shutting down the industries.[587] Instead, the Court considered the infrastructural development and the livelihood of employees of the said industries.[588]

In that case the Court concluded that it needs to apply a balanced approach, that will ensure the accountability of industries for operating the steel plant initially without an

[582]*Electrosteel Steels,* para 85.
[583] Ibid.
[584] *Electrosteel Steels* para 86; also see *Alembic Pharmaceuticals,* para 23 *and Pahwa Plastics Pvt. Ltd. v. Dastak NGO*2022 SCC OnLine SC 362 para 58.
[585] Ibid.
[586] Ibid.
[587] Ibid.
[588] Ibid.

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environmental clearance. However, the Court refrained from ordering the shutting down of the operation.[589] It held that the High Court of India had failed to consider the repercussions of shutting down a big steel plant, with over 3000 permanent employees and 7000 people employed on a contractual basis.[590] Therefore, the Court concluded that permitting the continuance of the operation of such a huge industry cannot prevent action being taken against the industry itself for violating the law. It ordered that the principle of 'polluter must pay' should come into play. Therefore, administrative penalties were imposed.[591]

In *Electrosteel Steels Ltd. v. UOI,* judgment was reiterated in the case of *Pahwa Plastics v Dastak NGO and Ors,*[592] where a manufacturing company, known as Pahwa Plastics Pty Ltd, with over 8000 people employed in the manufacturing sector, commenced the operation of a business that sold basic organic chemicals, called the formaldehyde, without a prior environmental clearance. [593]The Company only had consent from the Haryana State Pollution Control Board (HSPCB) to develop a manufacturing unit.[594] The Company only lodged an application for *ex post facto* environmental clearance after the Central Government of India had issued a notice in accordance with section 3(1) and 3 (2(v) of the Environment Protection Act, which makes provision for the granting of *ex post facto* environmental clearance for activities that had commenced, proceeded and were even completed without prior environmental clearance, but in breach of the EIA Notification.[595] DASTAK challenged the order made by the state of Haryana, contemplating to grant environmental clearance to the Company ex post facto.[596] At first, the National Green Tribunal (NGT) dismissed the application.[597]

When the matter was appealed to the Supreme Court of India, the legal dispute before the Court was similar to the one in *Electrosteel Steels* case, which was, whether a

[589] *Electrosteel Steels,* para 94.
[590] Ibid.
[591] Ibid.
[592] *Pahwa Plastics*. .
[593] *Pahwa Plastics* para 2.
[594] *Pahwa Plastics* para 21.
[595] Ibid.
[596] Ibid.
[597] *Pahwa Plastics* para 1.

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development that employed about 8000 people, and that had been established with the consent of the HSPCB and had a pending application for *ex post facto* environmental clearance, should be shut down, pending the said application.[598]

The Court simply reiterated the remarks and the reasoning of the Court in *Electrosteel Steels* case. It took into serious consideration the large number of employees whose livelihoods depended on the manufacturing unit of the company and further acknowledged the high annual turnover of the manufacturing Unit.[599] Therefore, the Court made a decision that it felt was reasonable and rational concerning the shutting down of the unit that contributed significantly to the economy of India and the lives of ordinary people.[600] The Court held that the manufacturing unit would not be shut down due to the technicality or irregularity of failure to obtain environmental clearance before the commencement of operations.[601] The court also took into account that the operation of the manufacturing unit was in no way causing pollution.[602]

It must be noted that the Court in this case did not contravene itself, and it followed the exact steps as in its judgment in *Eletrosteel Steels* case, by citing the exact remarks already discussed. However, the Court in *Pahwa,* remarked that environmental clearance is a significant requirement in the EIA processes and without any doubt, the need to comply with the prerequisite of obtaining environmental clearance is a non-negotiable requirement.[603] Further, that -to protect future generations and advance sustainable development- it is vital for pollution laws to be uncompromised. [604]

In the recent case of *D.Swamy v Karnataka*[605] the Court provided an important guideline concerning the granting of *ex post facto* clearance in India. An appeal was lodged at the Supreme Court of India against the decision of the National Green Tribunal (NGT) to dismiss an application for an order to shut down the common biomedical waste Treatment

[598] *Pahwa Plastics* para 55.
[599] Ibid.
[600] Ibid.
[601] *Pahwa Plastics,* para 64-68.
[602] *Pahwa Plastics,* para 63
[603] *Pahwa Plastics,*para 62.
[604]Ibid.
[605] *D.Swamy v Karnatak.*

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Facility which had commenced without an environmental clearance.[606] The application for environmental clearance was made *ex post facto.*[607]The dispute was whether the Karnataka State Pollution Control Board should have refused to grant consent for the development of a biomedical waste Treatment on the grounds that there was no prior environmental clearance to operate same.

The Court made remarks that 'the proposal for the grant of environmental clearance in case of violation are to be considered on merits with prospective effect applying the principles of proportionality and the principle that the polluter pays and is liable for costs of the remedial measures'[608]

The Court in this case considered its previous judgments, particularly the *Alembic,*[609] *Electrosteel steel*[610] and *Pahwa Plastics*[611] and adopted the same remarks, that it remains true that *ex post facto* clearance should not in ordinary circumstances be granted; that is, it should not be routinely granted. However, it should be granted in exceptional circumstances, after taking into consideration all the relevant environmental factors.[612]

The Court outlined other guidelines to accompany exceptional circumstances in the determination of whether to grant *ex post facto* environmental clearance and stated that where the adverse consequences of the denial of ex post facto approval outweigh the establishment concerned otherwise conforms to the requisite pollution norms, ex post facto approval should be given in accordance with law, in strict conformity with the applicable Rules, Regulations and/or Notifications, in a given case the deviant industry may be penalized by an imposition of the heavy penalty on the principle of polluter pays and the costs of the restoration of the environment may be recovered from it[613]

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[606] *D.Swamy v Karnataka* para 1-2.
[607] Ibid.
[608] *D.Swamy v Karnataka* para 47.
[609] *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors* para 88.
[610] *Electrosteel Steels,* para 83.
[611] *Pahwa Plastics,* para 56.
[612] Ibid; also see Ashok KM, 'The Grant of Ex Post Facto Environmental Clearance permissible in exceptional circumstances: Supreme Court ' *Livelaw* (India, 22 September 2022) and Jayashree Nandi 'Ex post Facto Environmental Clearance allowed in exceptional Circumstances:SC' *Hindustan Times* (New Delhi, 27 March 2022).
[613] *D.Swamy v Karnataka* para 47; Also see *Pahwa Plastic,* para 88.

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The Court, as in the Pahwa decision, went further, to emphasize the remarks in *Electrosteels steels,* that the Environment Protection Act does not expressly proscribe the granting of environmental clearance *ex post facto* in India.[614] The Court concluded that the refusal by the NGT to order the shutting down of the Bio-medical Waste Treatment Facility of the Company was correctly founded because the company had the necessary consent to operate and, as such, could not be shut down due to lack of prior environmental clearance.[615] Therefore Court made it known that it cannot lose sight of the fact that the operation of a Bio-medical waste treatment facility is in the interest of prevention of the environment pollution. The closure of the facility only on the ground of want of prior EC would be against public interest. As a result, it dismissed the appeal.[616]

5.1.2. Comparative Insights

Indian Jurisprudence demonstrates that *ex post facto* EA should be generally prohibited but only approved in exceptional cases. Although the process has not been expressly enacted into law, the Supreme Court has validated the process where necessary, to do so for the sake of economic and social development. The Court used the Indian principles of just administrative justice, as demonstrated in chapter 4 of this study regarding the South African *ex post facto* EA process and just administrative actions. The Supreme Court of India used rationality and proportionality principles of reasonableness to determine whether the granting *ex post facto* environmental clearance is justified or not. These principles are already provided for in the South African legal system and can be utilized when dealing with *ex post facto* EA applications. However, because of lack of transparency and case law on the concept of *ex post facto* EA, it remains unclear what the factors in the South African administrative authorities are considered when granting *ex post facto* EA.

The lesson from India is that although the process of *ex post facto* EA is not legislated, when utilizing it in case law, the Court always puts a disclaimer that it is prohibited and

[614] *D.Swamy v Karnataka* para 48.
[615] *D.Swamy v Karnataka* para 50.
[616] Ibid.

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only applicable in exceptional cases. Since the South African concept of *ex post facto* EA is legislated under section 24G of NEMA, and there is no need to get rid of it, the provision should clearly state in definitive terms that the process is only applicable in exceptional circumstances, and that generally it is prohibited. The court cases in India make the process of *ex post facto* EA transparent because it is clear what factors the courts consider when granting *ex post facto* EA there. In South Africa, this kind of clarity is still lacking, particularly because of lack of precedents.

5.2. The process of Ex post facto in England

It is important to highlight that the English law has played a significant role in shaping the South African jurisprudence, dating back to the 19th (Nineteenth) century and has since formed an integral part of our legal system.[617] It is, therefore, crucial to assess the good practice in English jurisprudence regarding the concept of ex *post facto* EA. To establish lessons for South Africa, this section explores the background of *ex post facto* EA in England in assessing its applicability to developments which commenced without EA.

The recent National Planning Policy Framework of England indicates that the main aim of the planning framework is to give effect to sustainable development, particularly to ensure the development of home dwellings, commercial and infrastructural developments, in a way that is sustainable.[618] The said policy emphasises that the purpose of sustainable development requires 'achieving the needs of present generations, while preserving the ability of the future generations to achieve their own needs'.[619]Therefore, the planning framework should seek to achieve economic, social and environmental objectives in integration.[620]

[617] Oliver D Scheiner, *The Contribution of English Law to South African Law and the Rule of Law in South Africa* (Juta and Company Limited, 1967).
[618] National Planning Policy Framework, (NPPF) 2023.
[619] Ibid.
[620] Ibid.

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Clause 11 of the said National Policy provides that 'all plans must advance a sustainable model of development which aims to achieve developmental needs of areas align grown and infrastructure, develop and protect the environment, minimize the effects of climate change'.[621] Therefore according to clause 179 of the policy, plans must take into account the promotion of conservation, restoration improvement of biodiversity.

When considering whether to grant or refuse a planning permission, the local authority is tasked with applying the following guiding principles; namely, development that aims purpose to conserve or improve biodiversity, should be considered, while the idea of enhancing biodiversity in developments must be integrated as a significant part of the planning system.[622] Similarly, these are also the fundamental environmental and sustainable development principles in South African jurisprudence.

In English planning jurisprudence, as opposed to South Africa, the practice of *ex post facto* EA is referred to as the 'retrospective planning permission'. It is a process wherein a developer commences with a listed developmental project without permission/ or consent from the relevant local authority.[623] A local authority directs a person who commences with a listed developmental project to make an application for retrospective approval within a prescribed timeframe.[624] Even though such a request is made by the local authority, retrospective planning permission is not automatically guaranteed to applicants and can still be refused.[625]Section 71A of the Town and Country Planning Act gives power to the secretary of the state to enact regulations in respect of which proposed developments may be considered before planning permission may be granted for those developments that are classified as likely to cause environmental impact.[626] It is also important to note that -as in the South African and Indian legal systems, the prior

[621] Ibid.
[622] The National Planning Policy Framework: Clause 180.
[623] Tifanny Snowden 'Retrospective Planning Permission' (Blue Willow Heritage, 23 February 2022) < Retrospective Planning Permission (bluewillowheritage.co.uk)> accessed 31 December 2023.
[624] Ibid.
[625] Ibid.
[626] Town and Country Planning Act, 1990.

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environmental Impact assessment (EIA) process is important in the consideration of whether a planning permission should be granted or not.

Regulation 3 of the Town and Country Planning (EIA) Regulations stipulates that ' relevant planning authority, the secretary of state on an inspector must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development'[627]

Regulation 4 (1) of the Town and Country Planning (EIA) Regulations provides that:

(1)(a) the environmental impact assessment (EIA) is a process consisting of the preparation of an environmental statement

(b) any consultation, publication and notification required by, or by virtue of, these regulations or any other enactment in respect of EIA development[628]

(2) the EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors;

(a) population and human health;

(b) biodiversity, with particular attention to species and habitants protection[629]

Section 73A of the Town and Country Planning Act 1990 provides as follows:

(1) [On] Application made to a local authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application

(2) sub-section (1) applies to development carried out;

(a) without planning permission

(b) In accordance with the planning permission granted for a limited period; or

(c) without complying with some conditions subject to which the planning permission was granted.

(3) planning permission for such development may be granted so as to have effect from

(a) the date on which the development was carried out[630]

As in South Africa, The primary purpose of EIA in England is to ensure that projects that have the potential of causing harm to the environment are sufficiently assessed,

[627] Town and Country Planning (EIA) Regulations.
[628] Ibid.
[629] Ibid.
[630] Ibid.

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investigated and mitigated even before the project can be commenced with on the environment.

Regulation 37 of the same Town and Country planning (EIA) Regulations makes provision for *ex post* planning permission in respect of EIA, that the ' secretary of states or inspector must not grant planning permission on subsequent consent (grant or modification of planning permission on appeal against enforcement notices) in respect of unauthorized EIA development unless an EIA has been carried out in respect of that development'[631]

5.2.1. Case analysis

In England, unlike in India, *ex post facto* EA is provided for in law. In *R Padden v Maidstore Borough, Borough Council and Others*,[632] a couple was granted planning permission on the 17th of September 2003 for development work that required the alteration of land use and its physical landscape, to establish and extend a fishing farm at Monk Lakes. [633] The development included the establishment of lakes, ponds, car parking and buildings. The planning permission was granted subject to compliance with the pre-conditions stipulated therein, including but not limited to the submission of pre-commencement information to the local authority for consideration.[634] The couple did not make the required submissions. However, they continued and commenced with the unapproved development, which resulted in the environment suffering gross harm, such as groundwater flooding.[635] The Couple sought retrospective planning permission to retain the development, although it was unlawfully commenced, and such planning permission was granted retrospectively. However, the validity of the planning permission was challenged.[636]

It is important to note that retrospective environmental planning in this case was granted without any environmental impact assessment being conducted. Therefore, the legal

[631] Town and Country Planning (EIA) Regulations.
[632] *R Padden v Maidstore Borough Council and Others* 2014 EWHC 51 para 59; also see *R Baker v Bath and North East Somerwest Council* [2013] JEWH 946 para 15.

[633] *R Padden* para 3.
[634] Ibid.
[635] Ibid.
[636] Ibid.

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dispute before the Court was[637] Whether exceptional circumstances exist to justify the granting of planning permission, retrospectively;[638] whether the lack of assessment of the retrospective application for planning permission afforded the couple an unfair advantage;[639] and whether it is significant to consider the impact caused on the environment by the unauthorized development.[640]

The Court referred to a non-environmental case, *the Secretary of State for Education and Science v Tameside MBC,* where it was pointed out that the state authority has an obligation to take reasonable steps to enquire and investigate factual details relevant for it to make a rational decision on an application brought before it.[641] The Court indicated that in the instance of planning permission application, the relevant authority has the authority in terms of regulation 4 of the Town and Country Planning Regulations of 1988 to request that the applicant submits further information which is necessary to assist the authority in reaching a reasonable decision.[642] The Court also made the following remarks:

> An environmental impact assessment or EIA is a requirement derived from EU law which it is common ground applies to the disputed planning consent. The aim of the EIA regime is to ensure that consent for a particular project makes its decision in the knowledge of any likely significant effects on the environment. EIA is a process of drawing together in a systematic way an assessment of a project's likely significant environmental effects. This allows the decision maker to properly consider whether or not to grant consent and if so to provide any necessary mitigation[643]

The Court further emphasized the significance of public participation in environmental administrative decision-making.[644] The concern of the Court in this case was not whether exceptional circumstances existed to warrant the granting of retrospective planning permission, but the fact that the environmental impacts of the works were not considered

[637] *R Padden,* para 47.
[638] Ibid.
[639] Ibid.
[640] Ibid.
[641] Ibid para 49; also see *Secretary of state for Education and Science v Tameside MBC* [1977 A.C para 10-14.
[642] Ibid.
[643] Ibid para 50.
[644] Ibid para 51; also see *Berkely v Secretary of State for environmental Transport and the Regions* [2001] 2.A.C.603 paras 15-16.

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when granting retrospective EA, particularly regarding groundwater flooding. The Court considered the judgments delivered by the EU Court of Justice in the cases of *Commission v Ireland*[645] and R *(Ardagh Glass Ltd v Chester City Council and Others,*[646] where the Court emphasized that 'retrospective planning permission can be lawfully granted for environmental Impact Assessment development only exceptionally'.

In the *Commission v Ireland case,* the EU Court of Justice remarked as follows in respect of 'exceptional circumstances:

> [In] addition, the grant of such retention permission, use of which Ireland recognizes to be common in planning matters lacking exceptional circumstances, has the result under the Irish law, that the obligation imposed by Directive 85 337 as amended are considered to have in fact been satisfied. While community law cannot pre-clude the applicable national rules from allowing, in certain cases, the regularization of operations on measures which are unlawful in the light of community law, such a possibility should be subject to the conditions that it does not offer persons concerned the opportunity to circumvent the community rules or to dispense with applying them and that it should remain the exception[647]

In *Ardagh Glass Ltd v Chester City Council and Others,* the Court expressed the following:

> [The] decision-taker can and in my view should also consider, in order upholding the Directive whether granting permission would give the developer an advantage he ought to be denied. Whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the decision-taker ensures that he gains no improper advantage and he knows he will be required to remove his development, unless he can demonstrate that exceptional circumstances justify its retention[648]

In *R (Baker v Bath and North East Somerwest Council),* the Court made a finding that the EU law permitted the grant of retrospective planning permission in respect of EIA

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[645] *Commission v Ireland* (2008) ECR 1-4911.
[646] *R(Ardagh Glass Ltd v Chester City Council and Others* [2011] P.T.S.R 1498.
[647] *Commission v Ireland para* 56-57.
[648] *Ardagh Glass Ltd v Chester City Council and Others* para ; also see *R Padden v Maidstore Borough Council Borough Council and Others* para 58.

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development (with the environmental assessment carried out carried out after a development had started) but only in exceptional circumstances[649]

In *Ellaway v Cardiff County Council and Others,*[650] a renewable energy and waste management company known as Viridor was granted planning permission for the generation of energy from waste from a field in Cardiff.[651] The planning permission specifically directed that the said project must take place subject to strict compliance with the application, environmental assessment plans and the prec-commencement conditions in the planning permission.[652] The company proceeded and commenced with the project without complying with the pre-commencement conditions, as stipulated in the planning permission.[653]The legal issues before the Court were, whether the granting of retrospective planning permission is not permissible, according to English and Wales common law principles, whether the local authority correctly established that the exceptionality test was satisfied prior to granting planning permission retrospectively.[654] Finally, whether the planning permission may be retrospectively granted without invoking section 73A of the Town and Country Planning Act of 1990.[655]

The Court pointed out that the granting of planning permission retrospectively is not illegal under the common law of England and Wales, and that the local authority correctly established that the exceptionality test was satisfied and, as such, the granting of retrospective planning permission was necessary. The Court held further that it is possible to grant retrospective planning permission without observing the provision of section 73A of the Act. The events of this case do not allow the Company to avoid European law or constitute non-compliance with community law/rules.

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[649] *R (Baker v Bath and North East Somerwest Counci)l* para 15.
[650] *Ellaway v Cardiff County Council & Others [*2014] EWHC 836.
[651] Ibid.
[652] Ibid.
[653] Ibid.
[654] *Ellaway* para 64.
[655] Ibid.

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5.2.2. Comparative insights

It is apparent from the discussions of the preceding cases that English law legislatively permits the granting of retrospective planning permission, like the South African legal system does. Furthermore, both states prioritize the internationally recognized principle of sustainable development and acknowledge the need for *ex post facto* EA for certain developments. Unlike in South Africa, English jurisprudence considers the possibility of abuse of retrospective planning permission and developers gaining improper advantage. Therefore, English planning law has generated a system that allows retrospective planning permission in exceptional circumstances only. To consider whether the granting of *ex post facto* EA is justified, the English system uses reasonableness principles such as rationality and proportionality, where a developer is required to make submissions for reasons why retrospective planning permission should be granted. Developers have the duty to establish exceptionality for unlawfully commenced projects. This approach is -to a certain extent- established in the Indian Jurisprudence. In South Africa, the legislature should state in clear terms that the process of *ex post facto* EA is meant for exceptional cases, and as such the developers would bear the onus to prove the exceptionality of their cases. This would clarify the fact that *ex post facto* EA application is generally prohibited, and only restricted to cases with exceptional merits. Therefore, South Africa needs to unambiguously highlight this fact, as well as provide an idea of what would constitute an exceptional case.

5.3. Conclusion

This Chapter has examined how the concept of *ex post facto* EA in Indian and English jurisprudence has been utilized and shown that *ex post facto* EA in these two legal systems is only catered for where the developers prove that the development is exceptional, subject to the economic and social factors discussed in case precedents. The study has also demonstrated how the South African legal system may draw lessons from Indian and English jurisprudence, to curb the abuse of the process, by clearly and

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unambiguously stressing that EA should only be made available in exceptional cases but is generally prohibited.

Chapter Six

Conclusions and Recommendations

6. Conclusion

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The main concern raised in the study was that *ex post facto* EA undermines the requirement for EIA and section 2 of NEMA principles. Additionally, it encourages abuse of the EA process, in that project implementers may commence with dangerous activities, without prior EA, knowing that that they can always apply for *ex post facto* EA after the commencement of the activity/activities, which then defeats the EIA procedure, and the principles mentioned above. The study's aim was to address these concerns, by examining the compatibility of *ex post facto* EA with sections 24 and 33 of the Constitution as well as through exploring good practices from other legal systems that may assist with legal clarification and application of *ex post facto* EA.

The overarching research question in the study was whether *ex post facto* EA of environmentally harmful activities is constitutional. To fully answer the main research question, other questions were answered regarding the historical evolution of *ex post facto* EA, in terms of section 24G of NEMA. These include whether *ex post facto* EA in terms of section 24G of NEMA is compatible with section 24 of the Constitution, whether *ex post facto* EA in terms of section 24G of NEMA consistent with section 33 of the Constitution and what are the good practices on *ex post facto* EA in other legal systems, such India and England?

Chapter two of the study extensively laid down the historical evolution of *ex post facto* EA and covered the evolution of EIA and EA from international law, as well as the importance of the processes. The study has succeeded in demonstrating the challenges in case law that led to the inception of *ex post facto* EA, that there was no provision empowering authorities on how to deal with applications for *ex post facto* EA, where developers commenced unlawfully without EA. Section 24G was enacted to fill this gap and allow for authorities to decide whether to grant or disapprove applications for *ex post facto* EA. However, the same process which ought to bring a solution was scrutanised for other shortcomings. The study laid down the process of *ex post facto* EA and how the provision under section 24G has been a subject of many amendments that never fully addressed the concerns, particularly the concern regarding *ex post facto* EA's susceptibility to abuse by administrative authorities and developers.

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In chapter three, the study assessed the constitutionality of *ex post facto* EA, subject to the constitutional values under section 24 of the Constitution, being environmentally protective, pollution fighter, conservation defender, sustainable development enforcer, and economic development guardian. The study focused on the preventative, precautionary and integrated environmental management principles of sustainable development. The study established that the *ex post facto* EA process under section 24G of NEMA is capable of an interpretation that aligns with these principles, as well as the values under section 24 of the Constitution. In respect of the principles and EIA requirement, *ex post facto* EA does not incorporate prevention and precaution, but only mitigation of already existing harm and planning measures for mitigation of further harm. It further encompasses the EMPr programme, to align with integrated environmental management.

Regarding environmental rights, chapter three determined that the right, just like other rights in the Constitution, is not absolute, and may applied where it is reasonably justified, be limited in terms of section 36 (1) of the Constitution. *Ex post facto* EA qualifies to limit the right where a development is justified by either economic, social or cultural factors. In addition, the environment can be effectively mitigated and protected from degradation. In respect of sustainable development, the study established that sustainable development requires a balance to be kept between the need for environmental protection and the need for economic development. However, a development should not take precedence over a deteriorating environment. The study also established that the *ex post facto* EA process under section 24G of NEMA takes into serious consideration the need for protection of the environment and economic development. Therefore, a development that commences without EA poses a serious threat to the environment, such that the negative impacts cannot be mitigated to allow continuation of the development, for economic benefits. The administrative authorities will therefore reject the application for EA, as it is not a guaranteed right for every application. The study concluded that there is compatibility between *ex post facto* EA and section 24 of the Constitution.

In chapter four, the study explored the compatibility of *ex post facto EA* with the principles of administrative justice, under section 33 (1) of the Constitution. The study established

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that *ex post facto* EA allows for a review on the grounds of lawfulness and procedural fairness. Procedural fairness requires the *ex post facto* EA process under section 24G of NEMA to incorporate the public participation process, which is included during the assessment of impacts. With regard to lawfulness, the approach is that administrative action should be taken, subject to an empowerment provision, which is section 24G of NEMA, as well as to satisfy the intention of the legislature without bias. The study established that it is not clear in *ex post facto* EA cases whether the EA is granted to serve the intentions of the legislature, which is to make it available for exceptional cases, such as the *Eagles Landing.* Bias can therefore only be determined during a review of proceedings, as it is unclear in the provision itself what factors warrant the granting of *ex post facto* EA.

Regarding reasonableness, the rationality principle requires that the decision to grant *ex post facto* EA should be rational and of sound reason. The study found that it is difficult to agree that *ex post facto* EA satisfies these principles, as it is not apparent to the interested or affected parties as to what reasons or considerations warrant the granting of *ex post facto* EA.

In addition, the provision barely refers to “exceptional cases,” and as such it is vague as to what factors constitute an exceptional case. However, *ex post facto* EA aligns with the proportionality principle in that the decision to grant EA must be proportionate to its effect on the interests or rights of others. This is because *ex post facto* EA allows for a reasonable equilibrium of factors, where environmental protection interests and economic development interests are given equal considerations, to arrive at a decision that is reasonable on whether *ex post facto* EA should be granted.

The process, like all other processes, has shortcomings, as discussed in the study. However, it allows any person who is aggrieved with the granting of *ex post facto* EA to review such EA in the Court of law, subject to the rules of Just Administrative Action under section 33 (1) and PAJA. For these reasons, it is compatible with section 33 (1) of the Constitution. The main issue established in the study is not so much about its deviation from the EIA regulations. Rather, it is about how the process is open to abuse, particularly because of its lack of transparency.

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In chapter five, the study assessed good practices from Indian and English jurisprudence regarding *ex post facto* EA. The study found that in India, *ex post facto* EA is not expressly incorporated in law and it is regarded as unlawful, while in England it is incorporated in law. However, in both jurisdictions, precedents clearly explain that the process of *ex post facto* EA is generally unlawful, and it should be granted only in exceptional cases, where rationality and proportionality principles of reasonableness merit the granting, subject to consideration for economic factors. A lesson for South Africa, as drawn from the assessment of both English and Indian jurisprudence is that South Africa has to clearly indicate that the process is applicable in exceptional cases only, like the other two nations do. Secondly, South Africa needs to explain unambiguously what constitutes an exceptional case. The onus on proving or demonstrating exceptionality will therefore lie with the developers during their applications for *ex post facto* EA.

6.1. Recommendations

The *Ex post facto* EA process under section 24G of NEMA has been a subject of many amendments since its inception in 2004. The amendments aimed at addressing some concerns about its susceptibility to abuse. However, these seem to have yielded no result, as some developers can afford the administrative penalties. To address the shortcomings of the process, the provision should be amended, to include stricter conditions. Specifically, authorities should make express provision against general *ex post facto* EA approval. In other words, *ex post facto* should generally be prohibited, and should only be granted in exceptional circumstances, subject to the process set out under section 24G of NEMA. In addition to the payable administrative fine, stricter conditions, such as proving exceptional circumstances, would assist in holding developers accountable for projects commenced without EA. Currently, section 24G of NEMA already gives them a chance to be heard. Therefore, they must make their case in a manner that is transparent. Section 24G of NEMA should also make a provision that imposes an obligation on administrative authorities to provide reasons to the interested and affected parties for every application where *ex post facto* EA is granted or rejected, the reasons why it was

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granted and the factors considered when granting such EA should form part of the application outcome. This would make the process more transparent, and the administrative authorities and developers account for every development that has commenced unlawfully but was later granted *ex post facto* EA. This would also minimize the abuse of the process or make it more transparent and reviewable to the public.

6.2. Suggestions for Future Studies

The aim of this study was to assess the Constitutionality of *ex post facto* EA for potentially harmful activities. This is because of considerations in scholarship that the provision conflicts with EIA and the principles entrenched under section 2 of NEMA and because the provision is susceptible to abuse by developers. The study found that *ex post facto EA* contributes to socio-economic development and, as such, is compatible with the principle of sustainable development, under section 24 of the Constitution. Furthermore, the administrative process of *ex post facto* EA, in terms of section 24G of NEMA, is compatible with section 33 of the Constitution.

The current researcher suggests that the process be amended, to incorporate accountability and transparency, by allowing the granting of *ex post facto* EA only in exceptional circumstances and through a provision of reasons by the administrative authorities to the public for the decisions/outcome made. The aim of this study was therefore achieved. Future researchers on this topic may conduct an in-depth study on the applicability of the framework of exceptional circumstances under South African environmental jurisprudence.

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