O P I N I O N

FOR

THE CENTRE FOR ENVIRONMENTAL RIGHTS

ABOUT

PUBLIC PARTICIPATION IN RESPECT OF THE IMPOSITION OF AN ADMINISTRATIVE FINE IN TERMS OF SECTION 24G OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 107 OF 1998

G Budlender SC
C de Villiers
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On the instructions of:

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Introduction

1. Consultant is the Centre for Environmental Rights ("*the CER*"). It is a non-profit company and a law clinic registered with the Law Society of the Cape of Good Hope.

2. The CER's mission is to advance the realisation of environmental rights as guaranteed in the Constitution, 1996 by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.

3. We have been requested to furnish the CER with an opinion in respect of the following: -

   3.1 whether the right to procedural fairness in section 3 or 4 of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") applies to interested and affected parties ("*I&AP's*") when an administrative fine ("*fine*") is determined by the competent authority in terms of section 24G(4) of the National Environmental Management Act, 107 of 1998 ("*NEMA*").

   3.2 if not, whether there is another legal basis upon which the competent authority is obliged to afford I&AP's an opportunity to make representations when it is determining a fine.

4. Our advice is set out below.

Section 24G of NEMA

5. Section 24G of NEMA regulates the consequences of unlawful commencement of:[1]

5.1 A listed or specified activity without an environmental authorisation;

5.2 The commencement, undertaking or conducting of a waste management activity without a waste management license in terms of the National Environmental Management: Waste Act, 59 of 2008.

6. Section 24G makes provision for a person who has unlawfully commenced such activity to make an application (*"section 24G application"*) to the Minister responsible for environmental affairs, the Minister responsible for mineral resources or MEC concerned, as the case may be *("the Minister")*.

7. The Minister may direct the applicant to:

7.1 compile a report containing:[2]

[1] Section 24G(1).
[2] Section 24G(1)(b)(vii).

"(aa) a description of the need and desirability of the activity;

(bb) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;

(cc) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(dd) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed;

(ee) an environmental management program."

7.2 provide such other information or undertake such further studies as the Minister may deem necessary.[3]

[3] Section 24G(1)(b)(viii).

8. In terms of section 24G(4) the applicant must pay an administrative fine determined by the competent authority, which must not be more than R5 million, before the Minister may act in terms of section 24G2(a) or (b).

9. Section 24G(2)(a) and (b) obliges the Minister to consider any report or information which an applicant was directed to submit to the Minister in terms of section 24G(1).

10. Thereafter, the Minister may:

10.1 refuse to issue an environmental authorisation; or

10.2 issue an environmental authorisation to such person to continue, conduct or undertake the activity subject to such conditions as the Minister may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued.

11. There is no express provision in section 24G obliging the competent authority to notify I&AP's of the proposed determination of a fine, nor to provide an opportunity for I&AP's to be heard in respect of the proposed fine.

12. The Department of Environmental Affairs ("*the department*") has in the past advised the CER that the environmental authorities have developed

a calculator to serve as the *modus operandi* for the determination of a fine as follows:

"This is a tool that was developed for internal use only and is based on the following indices:

1. *Social benefit that may potentially accrue from such a development;*

2. *Socio-economic impact that may be caused by the development;*

3. *The impact on the bio-diversity that may be caused by the development;*

4. *The impact which the development would have on the sense of place / heritage significance of the environment in which it is situated;*

5. *The pollution that has and which may potentially occur from the receiving environment in the event of failure of any mitigation measures implemented."*

13. The CER was further advised that:-

13.1 the calculator allows for a standard application of impact scores linked to the potential risk that the activity may have on the

environment, i.e. the more severe the impact on the environment, the higher the impact score;

13.2 the impact score is determined after review of, *inter-alia,* the additional information that is requested from the applicant and submitted to the department as part of the section 24G process, the findings of inspections conducted by the department and any other relevant information;

13.3 the compliance history of the applicant is taken into account by the enforcement panel in determining the fine.

14. Two aspects of the section are important for purposes of the discussion which follows. The first is that the decision to impose a fine when a section 24G application is brought is not discretionary. The determination of the ***quantum*** of the fine is discretionary (subject to the maximum of R5 million), but not whether a fine should be imposed. The second is that the decision in respect of a fine is not linked to the decision which the Minister subsequently makes as to whether to refuse or to grant an environmental authorization to the section 24G applicant.

15. The CER has over time raised various concerns with the environmental authorities and the legislature in respect of the section 24G process as a whole, including the determination of fines. The concerns include that fines that have been imposed have not fulfilled the purpose of acting as a

deterrent in respect of the unlawful commencement of activity, a lack of transparency in the decision-making pertaining to fines, and an apparent lack of consistency and rationality in respect of fines that are imposed.

The role of civil society in terms of section 24 of the Constitution and under NEMA

16. South Africa has adopted an environmental governance model that encourages public participation and relies on civil society to play a role as an effective environmental watch dog. Both the legislature and executive have recognised that the protection of the environment is a matter of fundamental public concern, and that environmental compliance and enforcement is best achieved through the participation of all interested and affected stakeholders.

17. NEMA endorses public participation and environmental governance in a number of provisions.

18. Section 2 of NEMA sets out the National Environmental Management Principles, which must *inter alia* "*guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.*"[4] These principles include the following under subsection 2(4):

[4] Section 2(1)(e) of NEMA.

"(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

(g) Decisions must take into account the interests, needs and values of all interested and affected parties;

(i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, an decisions must be appropriate in the light of such consideration and assessment;

(h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means;

(o) The environment is held in public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

19. Section 2(2) of NEMA provides that environmental management must place people and their needs at the forefront of its concern, and preserve their physical, psychological, development, cultural and social interests equitably.

20. Chapter 5 of NEMA governs integrated environmental management. Section 24G falls within that chapter. The purpose of the chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities.[5] The general objectives of integrated environmental management includes ensuring that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them[6] and ensuring adequate and appropriate opportunity for public participation in decisions that may affect the environment.[7]

21. Section 32 of NEMA confers extended legal standing on private persons in order to enable them to enforce compliance with its provisions or any other environmental law in respect of a breach or threatened breach of such laws.

22. Further, sections 28(12) and 33 of NEMA specifically provide for any person to take enforcement action in respect of the duty of care and

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[5] Section 23(1).
[6] Section 23(1)(c).
[7] Section 23(1)(d).

remediation of environmental damage and by way of private prosecution respectively where it appears that the relevant authorities are not taking the necessary measures.

23. Several statutes addressing specific sectoral environmental concerns have been enacted in the wake of NEMA. These acts also provide for public participation in environmental governance – including in monitoring, administrative decision-making and localised management structures.[8]

24. Our courts have recognised the important role that civil society and the public play in environmental governance. In the recent case of *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*[9] the Supreme Court of Appeal dismissed an appeal against a

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[8] See, for example, the National Water Act 36 of 1998 ("*the NWA*") (ss 10(2)(c), chs 7-9 and 14); the National Environmental Management: Protected Areas Act 57 of 2003 (ss 2(b) and (f), 5, 31(d), 32(d), 39-42); the National Environmental Management: Biodiversity Act 10 of 2004 (ss 2(c), 7, 11(n), 43-45, 47, 49, 74(1), 99, 100); the National Environmental Management: Air Quality Act 39 of 2004 (ss 5, 8(c), 19(4) and (6), 38(3), 39(h), 56, 57); the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ss 5, 23, 42, 43, 53, 93); and the National Environmental Management: Waste Act 59 of 2008 ("*NEMWA*") (ss 2(b), 5, 11(7), 60, 61, 64, 72, 73, 75).

[9] (69/2014) [2014] ZASCA 184 (26 November 2014). See also, for example, *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment* 1999 (2) SA 709 (SCA) in which the SCA emphasised at [20] that *"Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns"*. As another example, in *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W), the High Court dismissed an application to interdict a wetland conservation association inhibiting the development of a fuel station on an ecologically sensitive area. Tip AJ explained that "*In effect, the applicant requests this Court to issue an injunction that [the Association's Chairperson] Ms Barlow and the Association may no longer speak out, may no longer champion their cause, may no longer seek to persuade. In particular, the applicant wishes to prevent the generation of further public opinion which could be placed before Sasol and which may finally sway it to withdraw from its contractual nexus with the applicant. Likewise, the applicant seeks to put an end to any public mobilisation that may encourage the GDACE to further address its own approval process. The applicant similarly does not wish there to be any further prompts that may move the national Minister or, even, parliament itself to reach the view that there should be some intervention.*" Tip AJ

decision of the Gauteng Local Division in which Carstensen AJ declared invalid and set aside a refusal of a request for access to information in terms of the Promotion of Access to Information Act, 2 of 2000 (*"PAIA"*).

25. Arcelormittal (*"AMSA"*) had argued that the requester, the Vaal Environmental Justice Alliance, which is a non-profit voluntary association advocating for environmental justice, had not established that it held a right of the kind contemplated in section 50(1)(a) of PAIA. In terms of that section, one of the requirements for access to the records of a private body is that the record is required for the exercise and protection of any rights of the requester.

26. The SCA found that, in accordance with international norms and trends, and constitutional values and norms, our legislature has recognized,[10] in the field of environmental protection, the importance of consultation and interaction with the public and that one might rightly speak of collaborative corporate governance in relation to the environment.[11] The court noted that in *Biowatch*,[12] the Constitutional Court had observed that: *"A perusal of the law reports shows how vital the participation of*

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dismissed the application as premised on an unjustifiable limitation on the wetland association's right to freedom of expression. In reaching this finding, he rejected the contention that the environment right means that it is the State alone that must give effect to it, to the exclusion of public campaigns of the sort in issue.

[10] The court had regard to various provisions of NEMA, including the preamble and sections (2)(2), 2(3), 2(4)(b), 2(4)(f) and 2(4)(k), the objects and sections 72 and 73 of NEMWA and sections 2 and 3(1) of the NWA (at [62]-[70]).

[11] At [71].

[12] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), at [19].

public interest groups has been to the development of this Court's jurisprudence . . . Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest."[13]

27. The SCA also referred to *Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government,*[14] in which the court said the following about the importance of the efforts of conservationists: "*We should all laud the efforts of conservationists such as the MPA. It is beyond dispute that the MPA has a genuine concern about the environment and that they globally act to preserve and protect the environment for the benefit of present and future generations.*" [15]

28. It is thus clearly established that the exercise and protection of the right to a healthy environment in terms of section 24 of the Constitution and the legislation enacted to give effect to that right, including NEMA, entails civil society organisations playing an active role in environmental governance.

29. In *AMSA*, the court further held that in striking a balance between the competing concerns of industrial activity and its concomitant significance for the country's development and economy as against concerns about the

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[13] At [19].
[14] [2013] 3 ALL SA 416 (SCA).
[15] At [63].

preservation of the environment for the benefit of present and future generations, the court will be astute to adopt a common sense approach to how far, in any set of circumstances, the principle of public participation and collaboration extends.[16]

Procedural fairness in terms of PAJA

30. Section 3(1) of PAJA provides that "*administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*"

31. "*Administrative action*" is defined in section 1 of PAJA. It includes, subject to certain exceptions, any decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect.[17]

32. In terms of section 3(2), in order to give effect to the right to procedurally fair administrative action, the administrator must give the person referred to in subsection (1):-

32.1 adequate notice of the nature and purpose of the proposed administrative action;

32.2 a reasonable opportunity to make representations;

[16] At [73] read with [3].
[17] The section lists a number of exclusions which are not applicable.

32.3 a clear statement of the administrative action;

32.4 adequate notice of any right of review or internal appeal, where applicable, and

32.5 adequate notice of the right to request reasons in terms of section 5 of PAJA.

33. In terms of section 4(1) of PAJA, where administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide which of the procedures stipulated in sections 4(1)(a) to follow.

34. Two Constitutional Court decisions have dealt with the meaning of "*materially and adversely affects rights*" for purposes of section 3(1) of PAJA in a context which is relevant to the present matter.

35. The first case is *Walele v City of Cape Town and Others.*[18] The City of Cape Town granted building plan approval for the erection of a block of flats. A neighbour sought to have the granting of the building plan approval reviewed and set aside on a number of grounds, including that the erection of the four storey building in accordance with the approved building plans would devalue the neighbour's property, and the City's

[18] 2008 (6) SA 129 (CC).

failure to give the neighbour a hearing before the approval in compliance with section 3 of PAJA.[19]

36. In considering whether the decision to approve the building plans was procedurally unfair, the Constitutional Court held that there could be no doubt that when approving building plans, a local authority or its delegate exercised a public power constituting administrative action and that the normative value system of the Constitution imposed a duty on decision makers to act fairly towards parties who were affected by their decisions.[20]

37. The court then turned to section 3 of PAJA which deals with procedurally fair administrative action. The court noted that the express precondition for the requirement to act fairly, in terms of section 3(1), was that the administrative action had to materially and adversely affect the rights or legitimate expectations of the aggrieved person.

38. In considering whether the neighbour's rights were adversely and materially affected, the Court had regard to the fact that the parties involved in the application for the building plan approval were the owner of the property on which the building was to be constructed and

[19] At [9].
[20] At [27].

the City of Cape Town, and that the neighbour was not a party to that process, nor was he entitled to be involved.[21]

39. The court drew a formalistic (and surprising) distinction between the approval of the building plans and the consequential erection of the building. It acknowledged that the erection of the building might affect the rights of the owners of neighbouring properties, but held that the granting of the building plan approval could not, by itself, affect the neighbour. [22] Accordingly, as Hoexter points out, the Court took a very narrow view of what it means to affect rights adversely.[23]

40. The second case is *Joseph and Others v City of Johannesburg and Others.*[24] It concerned the termination of electricity supply following arrears in payments to the Municipality. The applicants were tenants in a block of flats. The primary issue before the Constitutional Court was whether the tenants were entitled to procedural fairness in terms of section 3(1) of PAJA before the electricity was disconnected.[25]

41. The respondents accepted that the decision to terminate the electricity supply constituted administrative action vis-a-vis the landlord with whom the public entity contracted to provide electricity.[26] They however contended that the decision did not constitute administrative

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[21] At [31].
[22] At [31].
[23] Cora Hoexter Administrative Law in South Africa (second edition) p.401.
[24] 2010 (4) SA 55 (CC).
[25] At [21].
[26] At [26].

action vis-à-vis the tenants, and that no procedural fairness duties arose toward them on the basis that the decision had no direct external legal effect and did not adversely and materially affect their rights.[27]

42. The key question for consideration was whether rights were affected. The tenants relied upon the right to adequate housing and dignity[28] but the Constitutional Court held that it was not necessary to address these aspects as there were constitutional and statutory obligations on local government to provide basic municipal services.[29] The court held that the concept of "rights" in terms of section 3(1) includes public law entitlements that have their basis in the constitutional and statutory obligations of government.[30]

43. The court further referred to the preamble to PAJA which provides that the objectives of PAJA are, inter alia, to promote efficient administration and good governance and to create a culture of openness, transparency in the public administration or in the exercise of a public power or the performance of a public function. It noted that these objectives give expression to the founding values of the Constitution, namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.[31]

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[27] As above.
[28] At [32].
[29] At [40].
[30] At [43].
[31] At [43].

44. After the *Walele* and *Joseph* cases had been decided, the SCA was called upon in *JDJ Properties CC and Another v Umgeni Local Municipality and Another*[32] to consider whether a municipality's approval of building plans (including two related decisions under the Howick Town Planning Scheme to relax side-space and parking requirements) for the development of a shopping centre in the central business district of Howick on a vacant piece of land, was administrative action adversely affecting the rights of persons other than the applicant for building plan approval.[33]

45. The first appellant owned two properties situated across the road from the property in respect of which the building plans had been approved and the second appellant owned a retail business that operated from the first appellant's two properties ("*the retail business*").

46. The High Court had found that the approval of the building plan did not constitute administrative action because the appellants had failed to show that the building plan approval had adversely affected their rights or had a direct, external legal effect within the meaning of section 1 of PAJA.[34]

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[32] 2013 (2) SA 395 (SCA).
[33] At [1], [2] and [4].
[34] At [10].

47. On appeal, the two elements of the definition of administrative action in PAJA which were in dispute were the requirements of an adverse effect on rights and direct, external legal effect.[35]

48. The SCA had regard to its earlier decision in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[36] in respect of the meaning of administrative action. This included Nugent JA's finding that administrative action is action that has the capacity to affect legal rights: the two qualifications in PAJA, i.e. that rights must be adversely affected and that the action must have a direct, external legal effect, serve to emphasise that administrative action impacts directly and immediately on individuals.

49. On the facts of the *JDJ Properties* case, the SCA held that the approval of the building plans did have such an effect.[37] The consequence of the development of the shopping centre would be an increase in traffic using the road where the shopping centre and the retail business were located, with an increase in congestion. Because of the small amount of parking authorized by the Municipality for the shopping centre, it would inevitably follow that the free parking provided by the retail business would be used by the customers of the shopping centre.[38]

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[35] At [12].
[36] 2005 (6) SA 313 (SCA). *JDJ Properties CC* at [15] – [17].
[37] At [18].
[38] At [18].

50. The SCA criticised the High Court for having approached the issue in a narrow, legalistic manner rather than purposively and in accordance with the requirements identified by Nugent JA in *Grey's Marine*. It held that the decision to approve the building plans had the capacity to affect the rights of the appellants and others living and doing business in the area concerned, and would impact directly on them. Accordingly, the decision to approve the building plans was administrative action.[39]

51. The court held that even if the decision to approve the building plan was not administrative action, that would not mean that it was immune from review. It was the exercise of public power, and reviewable in terms of section 1(c) of the Constitution, the principle of legality and rationality. It would be reviewable on essentially the same grounds as those set out in section 6(2) of PAJA: Where (as in this matter) the attack on the decision was based on a lack of authority and on irrationality, the 'gateway' to review - PAJA or section 1(c) of the Constitution - would make no difference to the result.[40] The High Court had therefore erred in finding that the application had to be dismissed on the sole ground that the decision under challenge was not administrative action.[41]

52. In the *Save the Vaal* case, the court held that interested parties wishing to oppose the grant of a mineral right are entitled to be heard before such a decision is taken. The case was decided before PAJA was enacted, and

[39] At [20].
[40] At [23].
[41] At [23].

before the decisions referred to above. The court reached its conclusion on the basis of the common law principle of *audi alteram partem.*[42] It took into account the enormous damage mining can do to the environment and ecological systems.

Does the determination of an administrative fine constitute administrative action?

53. The determination of a fine under section 24G of NEMA undoubtedly constitutes administrative action in relation to the person on whom the fine is imposed.[43] However, in the light of the case law discussed above, a court is in our view unlikely to find that the determination of a fine materially and adversely affects the rights of I&AP's. This would also apply to section 4(1) of PAJA, which includes the requirement that the administrative action materially and adversely affects the rights of the public.

54. It is true that a broad approach was taken in *Joseph* and *JDJ Properties* – but in those cases the relevant decision had a tangible negative effect on the parties claiming a right to procedural fairness, namely the disconnection of electricity supply in *Joseph*, and the traffic and parking impact in *JDJ Properties*.

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[42] At [9] and [15].

[43] See the report of the Law Reform Commission of Saskatchewan: Administrative Penalties, Final Report March 2012 @ www.lawreformcommission.sk.ca. See also Potgieter and Another v *Howie & Others* 2014 (3) SA 336 (GP) in which a decision of the Financial Services Appeal Board, which included the imposition of a fine or penalty, was reviewed and set aside on grounds of review in terms of PAJA.

55. The determination of a fine does not have a "direct" effect on I&AP's. To the extent that it has an effect on them, it is at most indirect: if the fine is inadequate, there will not be an adequate deterrent effect on other potential offenders in the future. It is important to note that the fine does not authorise (or prohibit) the carrying on of a listed activity. The imposition of a fine does not determine whether the Minister will refuse or grant an environmental authorization pursuant to the section 24G application. That is a separate decision, which is taken after a fine has been imposed. Section 24G expressly makes provision for I&AP's to participate in the process of compiling a section 24G report which is placed before the Minister when he or she decides whether to grant or refuse the applicant an environmental authorization.[44]

56. The fact that I&AP's may have an interest in the deterrent effect of a fine does not mean that the imposition of the fine adversely affects their rights and has a direct, external legal effect on them.

57. Given our conclusions in this regard, it is not necessary to consider whether the other requirements of the definition of administrative action apply.

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[44] Section 24G(a)(iii).

Rationality review

58. As was pointed out in the *JDJ Properties* case, even if a decision by an organ of state does not constitute administrative action, this does not mean that it is immune from review. It is an exercise of public power that is reviewable in terms of section 1(c) of the Constitution, the principle of legality and rationality.

59. The *Albutt* case[45] is of great relevance to the present matter. It dealt with a "special dispensation" which the President established after the conclusion of the work of the Truth and Reconciliation Commission, to consider applications for pardon from persons who had committed offences which they said were for political motives, and who had not been granted amnesty in the TRC process.[46] Unlike in the TRC process, victims were not given the opportunity to make representations.[47] They challenged this, seeking an interdict.[48]

60. The victims (represented by NGOs) contended that the granting of these pardons would constitute administrative action in terms of PAJA, giving rise to the right to make representations.[49] The Court declined to decide this issue. It held that the objectives that the special dispensation sought

[45] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).
[46] At [4].
[47] At [8].
[48] At [9].
[49] At [38].

to achieve were national unity and national reconciliation.[50] This process had the same objectives as the TRC, namely nation-building and national reconciliation.[51] The participation of victims was crucial to the achievement of these objectives.[52] It could hardly be suggested that the exclusion of the victims from the special dispensation process was rationally related to the achievement of the objectives of the process.[53] Victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity.[54] The disregard of these principles and values without any explanation was irrational.[55] On this basis, the decision to exclude the victims from participating in the special dispensation process was irrational and unlawful.[56]

61. Reference may also be made to *Democratic Alliance vs President of the Republic of South Africa and Others.*[57] This case concerned President Zuma's decision to appoint Mr Bheki Simelane as the National Director of Public Prosecutions. The Constitutional Court held that both the process by which the decision is made, and the decision itself, must be rational.[58]

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[50] At [53].
[51] At [55].
[52] At [59].
[53] At [68].
[54] As above.
[55] As above.
[56] As above.
[57] 2013 (1) SA 248 (CC).
[58] At [34].

62. In regard to the steps taken to reach a decision, the lack of an opportunity to be heard could also mean the decision maker ignored a relevant factor. If, in the circumstances of a case, there is a failure to take into account relevant material, that failure would constitute part of the means to achieve the purpose for which the power was conferred and if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.[59]

63. To similar effect is *Minister of Home Affairs and Others v Scalabrino Centre and Other.*[60] That case concerned the decision of the Director-General of Home Affairs to close the Cape Town refugee reception office in terms of section 8(1) of the Refugees Act, 130 of 1998.

64. The SCA found that the decision was one of an executive and not administrative nature, as it was quintessentially one of policy.[61] That did not mean that the decision of the Director General was immune from scrutiny by the Courts.[62] Nugent JA expressed the view that a general obligation on those who exercised public power to afford a hearing to interested parties would take it too far.[63] However, he found that there are circumstances in which rational decision-making calls for interested

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[59] At [39].
[60] 2013 (6) SA 421 (SCA).
[61] At [57-58].
[62] At [60].
[63] At [67].

persons to be heard. He referred in this regard to the decisions in *Albutt* and *Democratic Alliance*.[64]

65. Importantly, the court held that the Director-General was aware that there were a number of organisations, including the Scalabrino Centre, with long experience and special expertise in dealing with asylum seekers in Cape Town. The court held that a duty on decision-makers to consult organisations or individuals having an interest in their decisions will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person organisation to be consulted, of which the decision-maker is aware. [65] The Scalabrino Centre represented asylum seekers and the closure of the office would obviously affect that group of persons. Furthermore, the Director-General, through his representatives, had at a meeting acknowledged the necessity for such consultation.[66]

66. Accordingly, the SCA upheld the finding of the High Court that the decision of the Director General was unlawful and fell to be set aside.

67. It is therefore well established that where a decision does not constitute administrative action, the failure to grant interested or affected parties the opportunity to make representations will in some circumstances be irrational and therefore unlawful.

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[64] At [69].
[65] At [72].
[66] At [70] and [72].

68. In our view, there are compelling grounds on which it can be contended that it is irrational for fines to be determined without giving I&AP's an opportunity to be heard.

69. As we have noted above, section 2 of NEMA sets out National Environmental Management Principles, which must "*guide the interpretation, administration and implementation*" of the Act. The participation of all interested and affected parties in environmental governance must be promoted. Decisions must take into account the interests, needs and values of all interested and affected parties. The question which arises is whether these objects can be achieved through the process which the department currently follows, namely to exclude any opportunity for interested and affected parties to place their interests and needs before the decision-maker, and to make representations in that regard.

70. In our view, to adapt the finding of the Constitutional Court in the *Albutt* case: the participation of "*interested and affected parties*" is crucial to the achievement of these objectives. It could hardly be suggested that their exclusion from the process is rationally related to the achievement of the objectives of the process.

71. The department has informed the CER that the competent authority takes into account the impacts of the unlawful activity when determining a fine. Clearly, the input of those affected by the unlawful activity is a

relevant consideration which must be taken into account when considering such an impact.

72. In order to give effect to the right to the environment in section 24 of the Constitution, NEMA has expressly adopted a model in terms of which civil society plays an active role in environmental enforcement and governance. In this sector, I&AP's have specialist knowledge and expertise, including in respect of assessing environmental impacts.

73. We do not suggest that there is a duty to give notice to the public at large, every time the Minister considers the amount of the administrative fine which is to be imposed. Cases such as *Albutt* and *Scalabrino Centre* require that notice be given to those with a particular interest in the matter – in the words of NEMA, *"interested and affected parties"*.

74. Having regard to the decisions to which we have referred, this class of persons includes those who are affected by the decision, and those who have experience and special expertise in respect of the matter in issue.

75. We have noted above that in *AMSA*, the SCA held that the court will adopt a common sense approach to how far, in any set of circumstances, the principle of public participation and collaboration extends.[67] In the CER's view, the simplest way for I&AP's to be heard in circumstances where the Minister has directed a section 24G applicant to compile a

[67] At [73] read with [3].

report in terms of section 24G(1)(vii), is for the section 24G applicant to be required by the department to invite comments in respect of the proposed *quantum* of the fine from the I&AP's registered as such for purposes of the public participation process which was followed during the course of compiling the report. The department would then take those comments into account before determining the *quantum* of the fine.[68]

76. It can be contended that the mere fact that a person registered as an I&AP, does not prove that it is affected by the decision, or has experience and special expertise in respect of the matter in issue. That is so. But undoubtedly some of the persons registered as I&AP's will fall within those classes. In theory, it would be permissible to undertake a process which seeks to separate out those which in fact do and do not qualify. However, that would probably be a burdensome business, and would likely give rise to further dispute. It seems to us that the approach recommended by the CER would be a practical and common sense way of identifying who is to be given notice.

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[68] This approach would have an added benefit, and further contribute to rational decision making, by avoiding the situation where competent authorities determine the *quantum* of a fine before receiving a report which assesses the impact of the unlawful activity.

Conclusion

77. For the reasons set out above, we advise as follows:

77.1 The determination of a fine in terms of section 24G of NEMA is administrative action. However, it does not materially and adversely affect I&AP's, and does not have a direct effect on them. It does not constitute administrative action as far as they are concerned.

77.2 A court is likely to find that rational decision-making calls for a class of persons to be heard in respect of the *quantum* of a fine before a decision is made in that regard. That class is not unlimited, but it includes those who will be affected by the decision, and those who have experience and special expertise on the matter. A practical and common sense way to achieve this would be for the persons registered as I&AP's in the public participation process to be given the opportunity to comment before a decision is made.

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13 February 2015