



# **SOUTH AFRICA'S INCOHERENT SUSTAINABLE DEVELOPMENT LAW – ‘an opportune time for reform?’**

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## “Sustainable development” - buzzword and mantra



.....'a much used term in our legislation - it appears in over 40 statutes and countless policy documents

....'a term much talked about in political circles in the wake of Rio + 20

(buzzword = an important sounding usually technical word or phrase often of little meaning used chiefly to impress laymen; mantra = a mystical formula of invocation and incantation - Merriam Webster online dictionary)

Our only statutory definition is contained in NEMA:

*“sustainable development means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations”*

- Integration in what relative proportions?
- Planning, implementation and decision making relating to what?
- What does development mean?

## *Differing conceptualisations of sustainable development*



- “triple bottom line” ?
- “the three pillars” ?

.....these suggest a balancing exercise as a method for evaluating sustainability ..... supported in most of our legislation and case law ..... sometimes called a weak sustainability perspective

Our latest national policy document on sustainable development gives a different perspective - the economy and the socio-political world embedded within the ecosystem - a “stronger” sustainability perspective - will / should this be carried forward into our legislation and judicial decision-making?





## Evolution of the concept internationally

- Stockholm Conference: 1972 - reference to the “human environment” - anthropocentric approach
- Brundtland Report 1987 - increasing urgency, broader scope - acknowledgment of ecological thresholds, focus on consumption by humans, dynamic view of non-severability of ecosystem elements, new focus on social and political dynamics, equity and justice, need for leadership & longer term perspectives
- Rio Declaration & Agenda 21: 1992 - holistic and multi-faceted, but premised on Western economic paradigms
- Millenium Summit: 2000 - setting of quantitative goals emerging from frustration at lack of implementation of Rio’s norms - sustainable development mentioned as one of several goals
- WSSD: 2002: sense of urgency, identified poverty and consumption and production as overriding issues
- Rio + 20 : weak outcome, merely setting up mechanisms for strengthening institutions and working towards green economy, with green economy left undefined

# Adoption of the concept into South African law and policy



... 'used in a variety of ways in different statutes - examples

- Marine Living Resources Act - loosely applied to any practice which maintains integrity of the resource
- National Water Act - sustainable use of water (but the sustainability of macro-scale governance for water is questionable)
- MPRDA - refers to sustainable development of minerals, but mining by its nature unsustainable
- NEMA - definition suggests balancing of environmental, social and economic considerations - many weaknesses in definition - no exploration of synergies or overall governance paradigms - mention only of intergenerational equity and polluter pays - does not address poverty or consumption and production issues - part of NEMA's project-based environmental governance regime

# The courts' interpretations



## The petrol station cases

*Fuel Retailers* is considered the cardinal case, and is significant in the pro-active application of sustainable development as a decision-making principle - however, it is used simplistically as a balancing tool, with reference to outdated sources

*Sasol Oil* and *All the Best Trading* - both saw the courts overtly thwarting the attempts of the authorities to use the concept to apply a broad spectrum of considerations in decision making - this was thankfully reversed in the *Sasol Oil* appeal case

## Use of sustainable development as a decision-making tool in other contexts

*Oudekraal* - used as a guiding principle, with normative value, along with other principles, to uphold the principle of legality

*Khabisi* - obiter exposition of the duty of the authorities to ensure sustainable development and use of natural resources in a manner consonant with the Constitution



Cases continued.....

Cases relating to marine living resources :

*Foodcorp* - sustainable development of marine living resources used as a criterion to assess whether a PAJA review was warranted, in the context of allocation of fishing rights

*Bato Star* - sustainable development mentioned obiter as a principle to be invoked to protect a threatened resource

Mining cases:

*Bengwenyamana Minerals* - reinforces applicability of sustainable development principles with regard to mining

*Maccsand* - Saw the Minerals Minister fighting to have mining excluded from land use and NEMA control - unfortunate that the Constitutional Court refused to decide the applicability of NEMA



## The sum total : confusion and incoherence

**Sustainable development is important, because it is a concept which could give direction to future macro-scale environmental governance. It is a value laden concept which needs to be given normative/value content by our legislature.**

**Court decisions are by their nature reactive and narrowly focused - the legislature needs to take the lead in prescribing the direction environmental governance should follow.**

**Our new National Strategy and Action Plan is of some assistance in interpreting the meaning of sustainable development in our legislation.....**



## Sustainable Development National Strategy and Action Plan 2011

As a national policy document, it should serve to guide government decision-making nationally.

It has a number of innovative components :

- It advocates a systems approach to assessing sustainability, recognising the embeddedness of the economic and socio-political life within ecosystems.
- It refers to “ecological sustainability in the first instance” and to humans as “part of nature”.
- It advocates stewardship of the environment.
- It links sustainability to “the vision and values of the country”.
- It contains 20 headline indicators and 113 interventions!
- It requires that the National Committee on Sustainable Development work in “multifolds” with all sectors of society.
- It recognises the unsustainability of the growth path being GDP-focused.



## Innovative components continued.....

- It recognises that long held beliefs and ideologies may have to be challenged.
- It emphasises the need to incorporate its principles into policy and legislation.
- It establishes links between sustainable development and national planning.
- It provides for auditing of indicators and targets.
- It requires all spheres of government to set targets.
- It creates links between sustainability and spatial planning.

# “Green economy”



- The concept is not defined in the Rio + 20 outcome document ‘The future we want’. Each state is left to pursue its own conceptualisation. There are differing viewpoints in the preparatory literature for the conference. Could this become another buzzword/mantra?
- It appears from our new national strategy that green economy is conceptualised as attaching monetary value to natural resources - see p15 - one of the headline indicators under ‘Towards a green economy’ is *Share of GDP of the Environmental Goods and Services (EGS) Sector [3% of GDP by 2014]*. Turning nature into a commodity is conceptually and ideologically problematic and was opposed by many civil society groups at Rio + 20.
- Serious thought should be given to whether we should attach monetary value to environmental goods and services.

## Thoughts on the potential future use of the concept of sustainable development in SA



- The outcomes of the neo-liberal economic system prevailing in SA should lead us to question its appropriateness in the SA context: the gap between rich and poor is growing.
- A quality-of-life index would serve as a useful component of our sustainability evaluation.
- There may a need to change environmental governance models : ‘You cannot solve the problem with the same thinking that created the problem’.
- Our society is premised on protecting individual rights - private rights trump collective well-being. Private law is accessible only to the wealthy. This is problematic in the environmental governance context.
- Non-binding soft law principles are not enough. They have achieved little in the past forty years. In the South African context, sustainable development policy must be mainstreamed into legislation.



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- Synergies may offer more value than trade offs - we need to understand that natural and social systems behave in non-linear ways. Science and law need to forge mutual synergies.
- Fragmented and reactive governance does not support sustainability. The national strategy and action plan addresses this, but the initiative to overcome these issues must be driven further into national legislation. The Maccsand case shows the disconnect between government departments.
- There is a need to address the relationship between man and nature. The South American countries have become leaders in reminding the world of the interconnectedness between man and nature. This corresponds with African tribal ideologies and should be pursued in the South African context.



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- Environmental laws preventing further environmental degradation are not enough in the context of a society where natural resources on which the poor depend for their wellbeing have been destroyed or degraded - redress may be necessary.
- Issues of severe deprivation of basic human needs will expose our entire society to the risk of anarchy - these must be addressed in ecologically sound ways before other aspects of sustainable development are considered.
- Legislation is needed to regulate agriculture - our outdated Conservation of Agricultural Resources Act no longer serves the needs of the agricultural sector. Food security is linked to this important issue.

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- Sustainability discourse is reminiscent of George Orwell's 'Newspeak' with its inbuilt assumptions and inflexibilities. It is unfortunate that our legislation and policy borrows verbatim from international instruments without consideration of their value in the SA context. There is also a risk that the use of sustainability jargon can mask the real substantive environmental governance issues. Better legislative drafting is needed in this sphere.
- With the need to redress injustices of the past in SA, thought should be given to focusing on intragenerational equity in addition to, or perhaps in preference to, intergenerational equity.
- Many writers on environmental governance argue that the company laws prevailing in the Western capitalist world should be drastically reformed to include greater stakeholder involvement and constraints on use of natural resources.

## We have much to overcome.....



- In a case study on South Africa in the UNEP report of 2011 entitled *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth*, the following is said:
  - ‘... the dominant economic growth and development paradigm fails to address a wide range of underlying resource constraints that can rapidly undermine the preconditions for the kind of development and growth that is required.’
- ‘South Africa is consistently placed in the top range of the most unequal countries in the world, irrespective of the measure used and the data on which it is based.’ - from Poverty and Inequality in South Africa and the World, South African Society of Actuaries, 2010



Thank you.

