1 Introduction

Professor Denis Cowen first dealt with the subject of distinctive principles of environmental law in a keynote address that he delivered at an environmental law conference held in the Kruger National Park in 1989. More recently, he dealt with the subject in his review of Professor Jan Glazewski’s major work published on environmental law.

In his 1989 address Cowen expressed the view that we would need to rely on legislation to play an innovative and seminal role in the development of environmental law. Cowen’s opinion may be compared with the position adopted some years earlier by Professor Barend van Niekerk. In 1975 van Niekerk called for an environmental norm to be established in South Africa, not by legislation, but by judicial-made law.

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1 The address was published as ‘Toward distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation’ 1989 (52) THRHR 3.
2 (2001) 118 SALJ 194 at 197-200. See also Jan Glazewski Environmental Law in South Africa (2000), and Cowen op cit n1.
3 B Van Niekerk ‘The ecological norm in law or the jurisprudence of the fight against pollution’ (1975) 92 SALJ 78.
Little could Cowen’s audience have anticipated the foresight of his vision, and the extent of the legislative changes that have taken place in South Africa since his address twelve years ago. In the light of the new constitutional and legislative framework in South Africa, it is now appropriate to examine, in the context of Cowen’s analysis, the current status in South Africa of distinctive principles of environmental law.

2 The nature of environmental law

In his 1989 address Cowen asked if there were distinctive principles of environmental law, and related to this, what was the nature, scope and role of environmental law, and what new classification, concepts, basic principles, remedies, methodologies and procedures were available. Cowen also asked if we had mutually supportive environmental protection and sound development.

Cowen has observed a difference of opinion between himself and Professor Andre Rabie on the status of these distinctive principles.4 In 1996 Rabie stated that ‘environmental law does not (yet) contain distinctive principles of its own.’5 In considering the nature of environmental law, Rabie went on to say:

'Environmental law thus consists of a collection of legal norms encountered in a number of conventional fields of law. It shares this feature with certain other recognised areas of legal regulation, such as medical law, labour law, press law, social welfare law and the law relating to consumer protection. This factor, accordingly, does not disqualify the recognition of environmental law as a separate area of law.

Environmental law thus practically serves a type of omnibus function, accommodating principles of traditional law, which are united only by their common object in serving environmental conservation. It therefore lacks systematic unity and may be referred to as cross-divisional law.'6

Rabie highlighted for us the uncertainty of what exactly constituted environmental law. He attributed this uncertainty to the vague meaning of the term ‘environment’, and to doubt about what legal rules pertaining to the environment constituted environmental law.7

Is it necessary, however, to establish whether an area of law, such as environmental law, has distinctive principles? Is the presence of distinctive principles a necessary precondition to study environmental law as a separate discipline or branch of law? Rabie appeared to accept that the study of

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4 Cowen op cit n2 at 197.
6 Rabie op cit n5 at 93.
7 Rabie op cit n5 at 90.
environmental law could proceed, whether or not it had distinctive principles. On the other hand, Cowen has suggested that if environmental law does not have distinctive principles it could make the future of environmental law less certain.8

The absence of distinctive principles in environmental law should not prevent our study of the subject. The establishment of distinctive principles for environmental law could, however, contribute to environmental law having a systematic structure that could improve its philosophical and intellectual content. This could lead, in turn, to greater rationality and an improved interpretation and implementation of the law.

From a jurisprudential viewpoint one of the advantages of the establishment of distinctive principles would be the limitation or removal of the application of arbitrary power, to which Cowen has referred.9 This is because environmental law is particularly active in the areas of public and administrative law and developed distinctive principles could assist environmental administrative decision-making in becoming more rational.

The new legislative environment, which was not available to Rabie when he expressed his views in 1996, will certainly make it easier to deal with the questions considered by both him and Cowen. Although Cowen first raised these questions over twelve years ago, however, any enquiry into the subject of distinctive principles of environmental law must even at this stage still be tentative in nature. While there has recently been some judicial interpretation of the principles expressed in section 2 of the National Environmental Management Act 107 of 1998 (‘NEMA’),10 detailed research of domestic and international law remains to be done to obtain a clearer understanding of the subject.

3 Distinctive principles

In the literature, reference has been made to environmental norms, and also to distinctive principles.11 Is there any difference in the meaning of these terms? Put simply, a ‘norm’ may be described as a rule or authoritative statement, while a principle may be defined as a fundamental source or primary element, force or law which produces or determines particular

8 Cowen op cit n 1 at 10.
9 Cowen op cit n 1 at 5.
10 See Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho intervening) 2001 (3) SA 1151(CC).
11 See, for example, Cowen op cit n 1, Rabie op cit n 5 at 93.
results. If there were any meaningful difference between the two terms, it would appear that a principle might be understood as going to the fundamental essence of a thing, whereas a norm may apply more widely. In the literature, however, these terms seem to have been used loosely and interchangeably.

Cowen noted in his address that Mr Justice OW Holmes, in examining whether agency was entitled to rank as a separate branch of law in the United States, had formulated and applied a jurisprudential test of ‘Does agency bring into operation any new and distinct principles of law which are incapable of further generalisation’.

If we were to adopt this test to determine whether there are distinctive principles of environmental law in South Africa, we may enquire whether South Africa has reached the stage where environmental law has distinctive principles, in the same way that the law of contract or the law of delict have distinctive principles.

During the eighties Cowen and van der Walt explored new patterns of ownership of property. Van der Walt referred to the celebrated case of King v Dykes, in which the court stated:

‘The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations.’

A conclusion reached by van der Walt was that there was a need to develop a new conceptual basis for land-use policy, and that:

‘The foundation of the new conceptual framework within which the concept of ownership is to operate is the ethical concept of stewardship. This implies that the limitations and duties brought about by environmental conservation should not be seen as new or unnatural limitations of a primarily unlimited right, but rather as natural and inherent characteristics of the phenomenon of landownership as such.’

It is interesting that these views were expressed thirty and fourteen years ago respectively. At the beginning of the twenty-first century, the concepts of stewardship and trusteeship are all too familiar to the modern

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13 See, for example, references op cit n 1.
14 Cowen, op cit n 1 at 10. See also OW Holmes Collected Legal Papers (1921) 50-51.
16 1971 (3) SA 540 (RA).
17 At 545.
18 Van der Walt op cit n 15 at 477.
environmental lawyer. It could therefore be argued that the distinctive principles of environmental law that may be considered as having been developed are not new and distinct, but actually belong within the conceptual framework of the broader branch of property law, and are not at all special to the narrower field of environmental law.

If there are any such norms that could be described as being distinctive principles of environmental law, it may be necessary to test these principles against other principles, such as those of property law, to see if they are not as new or distinctive as they might first appear to be. While environmental concerns may not have been the prime cause of the reassessment of property law, however, these concerns have certainly advanced the review of property law over the last twenty years.

Clearly, a number of legal principles applied in environmental law are to be found in other conventional branches of law, not only in the law of property, as already suggested, but also in administrative and criminal law, to take but two examples. This conclusion mirrors what Rabie noted in 1976, that ‘....South African environmental law is a collection or amalgam of legal provisions, drawn from several conventional sources....’

The establishment of distinctive principles would support the trend, from a jurisprudential point of view, of what has been happening outside the legislative sphere over the last twelve years. Over this period academic, publishing and commercial approaches have supported the classification of environmental law as a separate discipline.

In assessing what he called norms of environmental law, Rabie identified classes of statutes that ranged from those relating exclusively to the environment to legislation that had no environmental relevance. From this position he sought to identity norms of environmental law. A difficulty with this approach is that even a law that deals exclusively with the environment may still share principles with other branches of law. This enquiry may therefore not qualify that law per se as representing an environmental norm or principle.

It would seem to be necessary, rather, to examine the underlying principles of the law, whether stated implicitly or expressly, to determine

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19 MA Rabie South African Environmental Legislation (1976). See also Rabie op cit n5.
20 The Annual Survey of South African Law published by the University of the Witwatersrand did, for example, produce a separate chapter that covered environmental law, for the years 1992 to 1994 and 1996. This practice seems, however, to have been discontinued. See also, for example, Henderson, op cit n*, Cowen op cit n1, Glazewski op cit n2, and M Kidd Environmental Law: A South African Guide (1997). The South African Law Reports recently established a subject index entry especially for ‘environmental law’.
21 Rabie op cit n5 at 91.
whether or not the law has distinctive principles. Here it is appropriate to examine the content of the law. Thus, in the class of laws described by Rabie as being not aimed at environmental management, but which includes provisions that directly or potentially are of environmental significance (such as land-use planning legislation), one needs to look at the specific provision to assess whether it backs any distinctive principle.

The development of environmental law through statutory law over the last twelve years accords with the prediction of Cowen. A word of caution, however, must be sounded. In the common law, distinctive principles such as may be found in the law of delict, would generally have been developed through the common law and judicial interpretation. This interpretation, through the rule of judicial precedent, would have the binding effect of law until overturned by a higher court, where the court is not bound by precedent for some legitimate reason, or where legislation alters the law in question.

The distinctive principles derived in the common law are generally, it is submitted, principles of substantive law. The position is different in the case of statutory law, through which much of the growth in environmental law has recently taken place. Principles that have been expressed in legislation, such as in NEMA and in the National Water Act 36 of 1998 (‘the National Water Act’), are generally expressions of policy rather than of substantive law. In the case of NEMA, for example, the function of the principles is described as being, inter alia, to guide the interpretation, administration and implementation of this Act and any other law concerned with the protection or management of the environment.

For these important reasons, any statutory principles of environmental law, until they receive judicial interpretation, are materially different in nature from the legally-binding common law distinctive principles referred to by Holmes. They do not have the same binding effect. It may therefore be that at this stage of the development of environmental law the search for distinctive principles, as some form of holy grail, may not be as significant as initially thought.

4 Meaning of ‘environment’

Before reviewing whether or not there are distinctive principles of environmental law, it is necessary briefly to consider what is meant by ‘the
environment'. Writers on the subject have long debated the meaning of the term, and the issue was considered by Cowen in his address. It has been said that the meaning of the word is significant because the definition serves to demarcate and assist in the analysis of environmental law. To the extent that in South Africa the word has been statutorily defined, the general debate on the meaning of the environment, when considered from the statutory perspective, is now less relevant.

At the national level, South Africa has not one but two main statutory definitions of the word ‘environment’. The Environment Conservation Act 73 of 1989 (‘the Environment Conservation Act’) defines the ‘environment’ as follows:

"environment" means the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms;”

This may be compared with the later definition contained in NEMA, which did not repeal the above definition, but which defined the ‘environment’ as follows:

"environment" means the surroundings within which humans exist and that are made up of:

(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;"

Although the NEMA definition is more detailed, the differences would not appear to be substantial. Neither of them is entirely anthropocentric in nature, as is the environmental right in section 24 of the Constitution of the Republic of South Africa, Act 108 of 1996 (‘the Constitution’).
The intention of the legislature in retaining two definitions is not apparent. While the meaning of the term in each Act would be interpreted by the definition of the term in that Act, the potential for conflict between the two definitions is remote because it is unlikely that it would ever be necessary to interpret both terms for one purpose. If there were any such conflict the normal rules of interpretation would apply. Thus, in the case of an interpretation of the term ‘environment’ in statutes where the word is not defined, although principles of interpretation indicate that the ordinary meaning of the word should be adopted, the two statutory definitions may be used as aids to interpretation, if the statutes are *in pari materia*.

The existence of two different definitions in our legal system is legally untidy, however, and should receive the attention of the legislature.

To some extent it remains a logical difficulty to analyse a field of law that cannot be sharply defined, but it is submitted that the broad nature of the definitions does not impact adversely or significantly on an investigation into distinctive principles. Rabie has suggested that since parameters are still evolving it may be better not to attempt to formulate a fixed concept of the meaning (outside the statutory definitions) at this stage. This approach has much to commend it.

5 Concepts

Cowen and Professor Michael Kidd and Glazewski have expressed opinions on what concepts could be regarded as having the status of distinctive principles. Cowen has suggested that distinctive principles of environmental law could include:

- the wise use of non-renewable resources and the sustainable utilisation of renewable resources;
- intergenerational equity;
- ensuring the preservation of biodiversity;
- integrated environmental management;
- the norms underlying protected areas;
- the precautionary principle;
- the polluter pays principle; and

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[31] For a discussion of the expansive and restricted meanings, see Rabie, op cit n25 at 203 to 214, and Rabie op cit n5 at 90.
[32] Rabie op cit n5 at 90.
Distinctive Principles of South African Environmental Law

- the principle of environmentally sensitive pricing.\(^{33}\)

Kidd, on the other hand, has proposed a shorter list, and has noted that at least two distinctive principles may be considered as having been agreed upon.\(^{34}\) He described these as:
- the polluter pays principle; and
- the precautionary principle.

Kidd also mentioned that the following principles have gained some recognition in some jurisdictions:
- the preventative principle;
- the principle of co-operation; and
- the duty of care or the environmental responsibility principle.\(^{35}\)

More recently, Glazewski identified the following principles that he stated could be considered as principles of environmental law:
- sustainable development;
- a human right to a decent environment;
- legal standing;
- intergenerational equity;
- the public trust doctrine;
- the precautionary principle;
- the preventive principle;
- the polluter pays principle;
- local level governance; and
- common but differentiated responsibility.\(^{36}\)

A number of these principles will be considered below, in the course of reviewing the principles established by NEMA. By way of a preliminary observation, however, it may be noted that some of the above concepts have a broader application than environmental law, and others appear to be constituents of other broader environmental principles. In addition, some of the concepts could be better described as management procedures or strategies rather than as principles.

The range of views indicates the extent to which further research and debate are required on the subject of distinctive principles. This article, in providing a broad overview of the subject, can only hope to skim the surface of an interesting and important topic.

\(^{33}\) Cowen op cit n* at 740-741, op cit n1, and op cit n2 at 197 to 200.
\(^{34}\) Kidd op cit n20 at 8.
\(^{35}\) Kidd op cit at 10-11.
\(^{36}\) Glazewski op cit n2 at 14-22.
6 National legislation relating to the environment

In the nineties the South African government brought about a dramatic change to national legislation affecting the environment. In the last eight years there have been passed, in the order of enactment, the Constitution of the Republic of South Africa, Act 200 of 1993, the Development Facilitation Act 57 of 1995 ('the Development Facilitation Act'), the Constitution, the Marine Living Resources Act 18 of 1998 ('the Marine Living Resources Act'), the National Water Act, the National Forests Act 84 of 1998 ('the National Forests Act'), NEMA and the National Heritage Resources Act 25 of 1999 ('the National Heritage Resources Act'). These Acts, together with the Conservation of Agricultural Resources Act 43 of 1983 (which is also due to be replaced) and a number of older pieces of legislation, represent the core set of statutory sources of South African environmental law.

In some of the new legislation there was an attempt to rationalise the law. An example of this is the National Water Act, which repealed some 104 statutes. However, although there has been an extensive reform of laws affecting the environment, the change took place through the reform of individual statutes (with the relevant departments consulting with others), and not through the codification of environmental law in its entirety.

In 1994 TP van Reenen argued for the codification of South African environmental law. He said that a codification, in the form of a comprehensive statutory work, could be:

'...regarded as the appropriate alternative to legal reform by means of individual statutory measures, especially if the legislator intends a durable purification, harmonization and unification of a particular area of the law as the realization of a specific political idea.'


38 Section 163(1).

39 TP Van Reenen 'Reflections on the codification of South African environmental law (I): General considerations' (1994) 2 Stellenbosch LR 214 at 215 et seq; van Reenen op cit n25 at 331 et seq.

40 Van Reenen (1) op cit at 215.
On the other hand, Rabie has questioned whether codification is possible in view of the variety and scope of environmental legislation. Rabie has suggested that "such a type of codification of the entire environmental law could hardly be practically accomplished." Van Reenen identified one feature that could lead to the susceptibility for codification: "...the lack of any uniform normative structure in the multitude of individual legislative instruments operative at all levels of government." The establishment of distinctive principles, within a multiplicity of laws, should be encouraged. This is because the recognition of distinctive principles is likely to have the effect of drawing together and integrating the various pieces of legislation. This would achieve van Reenen's uniform normative structure and avoid the need for codification.

For the current enquiry there are two important features of this right. The first is that in paragraph (iii) there is introduced the internationally-accepted principle of sustainable development and use of natural resources while promoting justifiable economic and social development, and securing ecological and social development. The touchstone signifying the new direction of environmental law in South Africa is section 24 of the Constitution, which provides as follows:

"Everyone has the right:
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development and securing ecological and social development.

Despite this, the constitutional division of powers relating to environmental law between the three tiers of government, and departmental law-making, have weakened as well as challenged the scope of this structure. It could certainly be said that up to the enactment of NEMA, environmental law did not have a uniform normative structure. For this reason the enactment of the section 2 principles in NEMA should deflect any further calls for codification. The constitutional division of powers relating to environmental law between the three tiers of government, and departmental law-making, have weakened as well as challenged the scope of this structure. It could certainly be said that up to the enactment of NEMA, environmental law did not have a uniform normative structure. For this reason the enactment of the section 2 principles in NEMA should deflect any further calls for codification.

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concept of sustainable development. The second feature associated with this, is the reference to present and future generations.

The concept of sustainable development is not new to South African environmental law. In terms of section 2 of the Environment Conservation Act, the Act being partially repealed by NEMA, the Minister determined general policy to be applied, inter alia, with a view to the promotion of sustainable utilization of species and ecosystems and the effective application and re-use of natural resources; and the promotion of environmental education in order to establish an environmentally literate community with a sustainable way of life.44 In view of the statement of principles in NEMA, the policy, while not expressly repealed by NEMA, should be regarded with caution as there is an argument for saying that it has been made redundant by the NEMA principles. There is merit in reviewing the policy, however, as it does describe the content of sustainable development, and includes a form of spiritual response to environmental concerns by referring to sobriety and moderation.45 In debates relating to the environment, these values should not be overlooked.

The section on land use and nature conservation includes the statement that a ‘balance must be maintained between environmental conservation and essential development’. The policy also refers to the sustainable use of resources.46

As noted in the White Paper on Environmental Management Policy for South Africa,47 which laid the groundwork for NEMA, and which dealt with the concept of sustainable development in detail, the term sustainable development ‘continues to be used with a number of different meanings’.48 NEMA sought to address this by defining ‘sustainable development’ as meaning ‘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’.49

Other modern national legislation that refers to sustainability includes the Development Facilitation Act, the National Forests Act, the Marine Living Resources, and the National Water Act.30
Although the bulk of provincial legislation that was in force prior to the 1994 election remains in place, a significant number of provincial laws have been passed that support the principle of sustainability. The expression ‘sustainable’ has been used in the concept of sustainable development and also in the context of sustainable use of environmental resources. Thus, the concept of sustainable development has received considerable support at the provincial level.\(^5\)

the courts, must be consistent with the general principles set forth in s 3. See also the Marine Living Resources Act 18 of 1998 (‘the Marine Living Resources Act’), s 2; the National Water Act, the Preamble, and ss 2 and 3; the National Forests Act 84 of 1998 (‘the National Forests Act’), long title, and ss 1, 3 and 4(2)(i); the Local Government: Municipal Systems Act 32 of 2000, s 1, definition of ‘development’ and ‘environmentally sustainable’, s 4(2)(d) 73(2)(d); and the Minerals Development Bill, 2000, clause 64(2), published by GN 4577 in GG 21840 of 18 December 2000 (‘the Minerals Development Bill’), which provides that mineral development must ‘take place within the framework of sustainable development.’ The concept of sustainable development is expanded upon in clause 64(3) of the Bill.

\(^5\) There follows a brief note of these provincial changes, some of which amplify the application of national laws, such as the Development Facilitation Act.

**Eastern Cape**

See the Eastern Cape Tourism Board Act 9 of 1995, s 15(5)(c); the Wild Coast Tourism Development Policy, published under GN 25 in PG 720 of 23 February 2001; and the Eastern Cape land development objectives, regs 1 (definition of ‘development planning’) and 3(c), published in PN 33 in PG 274 of 24 October 1997, under the Development Facilitation Act.

**Free State**

The Free State does not appear to have made any laws that refer expressly to sustainability.

**Gauteng**


**KwaZulu Natal**

See the KwaZulu-Natal Heritage Act 10 of 1997, s 1 (definition of ‘conservation’) and s 10; the KwaZulu-Natal Nature Conservation Management Act 9 of 1997, s 1 (definition of ‘nature conservation’), s 5(3)(a)(ii) (sustainable use of indigenous plants and animals), and the categorisation of protected areas, in which there was adopted the categorisation first published as policy under s 2 of the Environment Conservation Act (published under GN 449 in GG 15726 of 9 May 1994), and the creation of a category of ‘sustainable use area’; and the KwaZulu-Natal Planning and Development Act 5 of 1998, long title and s 22 and item 14 of Schedule 2.

**Mpumalanga**

See the Mpumalanga Parks Board Act 6 of 1995, ss 14(1), 15(1)(b) and (v); the Mpumalanga Nature Conservation Act 10 of 1998, ss 1 (definition of ‘sustainable use area’) and 85(e); and the Mpumalanga land development regulations, regs 3(b), 21(2)(1)(ii), (x) and (xi), published under ON 9 in PG 260 of 15 August 1997, under the Development Facilitation Act.

**Northern Cape**

See the Northern Cape land development objectives regulations, regs 1 (definition of ‘development planning’) and 3, published in ON 10 in PG 254 of 11 August 1997, under the Development Facilitation Act; the Northern Cape Planning and Development Act 7 of 1998 for a
The concept underlying the reference to present and future generations has also been described as intergenerational equity. This is a concept that is inherently associated with, and inseparable from, sustainable development, and is a shorthand way of describing the essential content of sustainable development. This is because the essence of intergenerational equity is that development which is designed to meet present needs must take place without compromising the ability of future generations to meet their own needs. In other words, development must be sustainable over more than one generation. Cowen alluded to the establishment of intergenerational equity when he stated that:

'The major concern of environmental law is to enforce the public interest in environmental quality for the benefit of present and future generations, and to do so in a way which aims at a wise balance between the public interest in environmental quality and potentially conflicting private interests.'

A number of other statutes have referred to the principle of intergenerational equity. A case which recently considered sustainable development in the context of intergenerational equity was that of Director:
Mineral Development and Another v Save the Vaal Environment and Others. Here the Supreme Court of Appeal stated as follows:

'What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs'.

In support of this proposition the court referred to the classic Brundtland Report. The Court went on to say:

'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.'

An interesting feature of the notion of intergenerational equity relates to the environmental right being what has been described as a third generation right. JD van der Vyver has described a basic attribute of this category of right to include the following:

(a) The emphasis of third-generation rights is no longer on the individual, but beneficiaries of these rights are collectively perceived, either in the sense of humanity as a whole, a particular political community, or a distinct section of the population within the body politic.

(b) The beneficiaries of human-rights protection of the third-generation kind are not confined to personae in esse but also include future generations..

Does this mean that in the twenty-first century, in the advancement of environmental law, we shall see a movement away from the rights and liberty of the individual towards collective rights? What needs to be achieved in sustainable development is an appropriate balance between individual and collective rights. We need to ask whether our institutions are sufficiently robust or modelled in such a manner as to facilitate the achievement of such balance.

Expression of the environmental right also raises the question of whether environmental rights should be regarded as being solely anthropocentric in nature. Section 24 considers the environment from a human perspective, and at this stage there is no constitutional backing for giving constitutional rights to the environment. Although section 2(2) of NEMA states that environmental management must place people and their needs at the forefront of its concern, it is time to reopen the debate on whether things other than people should have environmental rights. This debate achieved

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54 1999 (2) SA 709 SCA. See also Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 (C).
55 Save the Vaal Environment supra n54 at para 20.
57 Save the Vaal Environment supra n54 at para 20.
58 Van der Vyver op cit n26 at 482.
prominence with the consideration of whether trees had legal standing.\textsuperscript{59} Environmental pressure groups would support this. The anti-whaling lobby seeks to protect whales for their own sake and in their own right, and not merely to ensure that humankind will continue to enjoy sustainable use of the species. This attitude is attributable, at least in part, to the belief that humanity owes a moral debt to various species of whales, some of which have been taken close to extinction. The same could be expressed for many other species of flora and fauna that have been made extinct or that are close to extinction.

Section 24 of the Constitution also refers to the right to an environment that is not harmful to everyone's health and well-being, to the right to the prevention of pollution and ecological degradation, and to the promotion of conservation. Other relevant provisions of the Constitution include sections 7 and 8, that provide that the state must respect, promote and fulfil the rights in the bill of rights,\textsuperscript{60} and that the bill of rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.\textsuperscript{61}

Since sustainable development, linked to intergenerational equity, and the right of having an environment that is not harmful to health and well-being, have been cited in the Constitution as rights protected under the bill of rights, the Constitution gives primary expression to the establishment of these rights as they relate to environmental law. The principle of sustainable development has a specific environmental lineage, and must be regarded as a distinctive principle, and indeed the founding principle, of environmental law.

**8 The National Environmental Management Act 107 of 1998**

During 1994 van Reenen, in commenting on the Environment Conservation Act, stated:

'It fails to formulate any legal principles aimed at establishing environmental law as a separate branch of law in the sense of a body of rules with their own normative identity, distinct from the rules of other traditional branches of the law. I agree with Cowen that unless distinctive legal criteria can be established which characterize environmental law, the subject will continue to lack coherence and logical structure.'\textsuperscript{62}

\textsuperscript{59} See C Stone ‘Should trees have standing? Towards legal rights for natural objects’ 1972 *Southern Calif LR* 450. See also Cowen n1 at 16-23. It could be suggested that NEMA has advanced along this route by establishing a duty of care relating to the environment. See paragraph 9.1 below under the heading ‘the avoidance, mitigation and remedying effect of certain action’.

\textsuperscript{60} Section 7(2).

\textsuperscript{61} Section 8(1).

\textsuperscript{62} Van Reenen (1) op cit n39 at 218 (footnotes excluded).
NEMA responds to this by stating in the preamble that the Act is to provide, inter alia, for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment. Section 2 of NEMA goes on to describe a number of principles that must apply alongside all other appropriate and relevant considerations; serve as the general framework for environmental plans; serve as guidelines by reference to which any organ of state must exercise any function when taking a decision in terms of NEMA or other Act concerning the environment; serve as principles by which a conciliator must act; and finally, 'guide the interpretation, administration and implementation of this Act and any other law concerned with the protection or management of the environment'.

To the extent that the principles established by section 2 do not apply expressly in respect of other branches of the law, the effect of the section is to establish these principles as overriding principles that must guide the interpretation of NEMA and other laws concerned with the protection or management of the environment. Where these principles are incapable of further generalisation, are distinct from other branches of law, and cannot be excluded on any rational basis, it means that NEMA may have established, at one legislative swoop, distinctive principles of environmental law.

What is meant by the phrase 'guide the interpretation, administration and implementation of this Act'? The word 'guide' implies that the principles of NEMA should 'show the way' in the interpretation, administration and implementation of NEMA. The principles cannot be followed without question, however, because of their nature, and because of the inter­relationship between the principles, which is at times conflicting.

Thus, while the NEMA principles may be used as a guide to interpretation, it is apparent that NEMA itself has not established immutable rules of law or substantive rights and obligations, that would invariably have to be followed or enforced by the courts. This is because, as mentioned above, unlike distinctive principles that may be developed in the common law (for example principles under delict or contract), and by which rights and obligations may be determined, under statutory law such rights and obligations need to be expressly defined. Chaskalson P, in the case of the Minister of Public Works and Others v Kyalami Ridge Environmental

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63 Section 2(1)(a).
64 Section 2(1)(b).
65 Section 2(1)(c).
66 Section 2(1)(d).
67 Section 2(1)(e).
Association and Others (Mukkwevho intervening)\(^6^8\), (‘the Kyalami case’), commented on section 2 of NEMA as follows: ‘The section does not make provision for rights and obligations, instead it sets out principles expressed at times in abstract rather than concrete terms.’\(^6^9\)

This point of view has been expressed by other courts. In dealing with principles laid down by a public body, the high court in *Computer Investors Group Inc v Minister of Finance*,\(^7^0\) noted that the public body may have regard to such a general principle, ‘but only as a guide, not as a decisive factor’.\(^7^1\) The court noted that the administrative official would still be required to exercise his discretion in the matter. Principles that conflict with each other also provide scope for an official to exercise his discretion.

An example of the general proposition is the principle relating to life cycle responsibility. It cannot possibly be argued that expression of the principle in NEMA has imposed a statutory liability on persons to be responsible for products manufactured by them from the cradle to the grave. Until such time as legislation expressly determines such a liability, the principle itself will fall short of imposing such an obligation.

Since 1994 the tendency of the legislature has been to establish principles to govern the manner in which the statute in question should be interpreted and on which administrative action in relation to such statute should be based. Although the courts have deferred to such principles\(^7^2\), the courts have, with the partial exception of the Kyalami case, still comprehensively to comment on how principles that have been expressed in statutes in this form should be interpreted.

9 Section 2 of NEMA - the principles

The construction of section 2 is not clear in the manner in which the principles are set out. The section has four subsections. Subsection (1) is introductory in nature and states the manner of application of the principles. Subsection (2) asserts that environmental management must be people-centered, and subsection (3) states that development must be socially, environmentally and economically sustainable. Subsection (4), which is divided into eighteen paragraphs, defines what must be taken into account

\(^{6^8}\) Op cit n10.

\(^{6^9}\) At para 69.

\(^{7^0}\) 1979 (1) SA 879 T.

\(^{7^1}\) At 898.

\(^{7^2}\) See, for example, *Van Hayssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* op cit n54.
when considering sustainable development (which is defined in section 1), and goes on to make a number of statements.

Section 24 of the Constitution has already established the environmental right in anthropocentric terms, and the principle of sustainable development. For these reasons subsections (2) and (3) are not further considered here.

A start must be made in considering how the section 2(4) principles should be taken into account when considering sustainable development. These principles are considered below in their order of appearance in section 2(4). The subject of environmental principles is a dynamic subject, however, and should be the subject of debate and judicial interpretation.

9.1 The avoidance, mitigation and remediying effect of certain action (section 2(4)(a)(i), (ii), (iii) and (iv))

These sub-sections all deal with the responsibility of a person to avoid certain harm, and where such harm cannot be avoided, to minimise and remedy such harm. The avoidance of harm is described in relation to the disturbance of ecosystems and loss of biological diversity (paragraph (a)), pollution and degradation of the environment (paragraph (b)), the disturbance of landscapes and cultural heritage sites (paragraph (c)), and waste (paragraph (d)). In the case of waste the further duty to reuse and recycle the waste is included.

Under South African common law a delict is an act of a person that in a wrongful and culpable manner causes harm to another. The wrongfulness element relates to the breach of a duty of care owed by one person to another. The element of culpability, or fault, arises from the commission of either an intentional or negligent act.

The standard test for negligence, which has applied since Roman law times, is that fault arises if a reasonable person (diligens paterfamilias) in the position of the defendant:

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and

(ii) would take reasonable steps to guard against such occurrence, and

(iii) where he failed to take such steps.

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73 Paragraph(a).
75 Kruger v Coetzee 1966 (2) SA 428 (A) at 430.
These principles were recently refined by the Supreme Court of Appeal, when the court held that the enquiry was whether the general manner in which the harm occurred was foreseeable, and not whether the precise or exact manner in which the harm occurred was foreseeable.76

These elements establish a duty of care that a person owes to other persons. The environmental obligation to avoid, mitigate and remedy the effects of certain action, as provided in section 2 of NEMA, deals with a similar obligation, and could also be described as having established a ‘duty of care’. Indeed, the words ‘duty of care’ are used in the heading of section 28 of NEMA. The duty corresponds to the common law duty of care to avoid delictual harm, except that the obligation to avoid, mitigate and remedy is described in relation to harm that may be caused to environmental objects and not to persons. The obligation to reuse and recycle waste, would appear, however, not to have a corresponding common-law delictual obligation.

Section 28 of NEMA imposes a statutory obligation on persons who cause, have caused, or who may cause significant pollution or degradation of the environment, to take reasonable measures to prevent such pollution or degradation. This duty would seem to apply whether or not there is a victim or complainant. The duty of care approach has also been taken up in government policy, draft legislation and legislation.77

What standard should be applied when dealing with the avoidance, mitigation and remedy principle of section 2 of NEMA? Would the standard follow delict and be one of reasonableness? While reasonableness is not referred to in the principle described in section 2(4)(a)(i), (ii), (iii) and (iv) of NEMA, the obligations imposed by section 28 of NEMA refer to ‘reasonable measures’ that should be taken by a person to avoid environmental harm. As with delict, this is also based on reasonableness.

Section 2(4)(b) of NEMA provides that environmental management should pursue the selection of the best practicable environmental option. This is defined in section 1 of NEMA as: ‘...the option that provides the most

76 Sea Harvest Corporation (Pty) Limited and Another v Duncan Dock Cold Storage (Pty) Limited and Another 2000 (1) SA 827 (SCA) at para 22.

77 The principles of section 28 have been repeated in section 4 of the Antarctic Treaties Act 60 of 1996. Although legislation on integrated pollution and waste management is still awaited, the White Paper on this subject, published in March 2000 (GN 227 in GG 20978 of 17 March 2000), describes a duty of care principle in the following manner: ‘Any institution which generates waste is always accountable for the management and disposal of this waste and will be penalised appropriately for any and every transgression committed.’ (at 13).

See also clause 64(3)(a)(iv) to (vii), (ix) and the heading of clause 65, of the Minerals Development Bill, that refer to a duty of care.
benefit or causes the least damage to the environment as a whole, at a cost that is acceptable to society, in the long term as well as the short term."

The notion of practicability carries an element of reasonableness, and the idea of what is acceptable to society, as far as the cost is concerned, may be a modern way of expressing what cost would be acceptable to a *diligens paterfamilias*. The best practicable environmental option would therefore seem to have at least some elements of reasonableness, which is consistent with the test of reasonableness referred to in section 28 of NEMA. Accordingly, it could be stated that the avoidance, mitigation and remediying principle, read with section 28 of NEMA, has created a statutory form of quasi-delictual duty of care towards things other than persons, which corresponds to the common-law delictual duty of care owed to persons. It will be interesting to see how the courts interpret this principle, and the extent to which the courts may be prepared to describe a duty of care in favour of things other than persons.\(^7\)

Since this duty may be likened to existing common law duties, it could be argued that the principle to avoid, mitigate and remedy is not per se distinctive to environmental law. In view of the fact that the duty is imposed in favour of the environment, and not people, however, it is submitted that NEMA has established a distinctive statutory principle of a duty of care that is specifically directed towards the environment. It remains for the nature of the principle to evolve, through judicial interpretation.

9.2 The taking account of the depletion of non-renewable resources (section 2(4)(a)(v))

This is one of the principles that Cowen suggested could be regarded as a distinctive principle. If we were to attempt to generalise this statement further, the underlying motivation for it relates to sustainable development. At the heart of the statement is the acknowledgement that, in the words of the Stockholm Declaration,\(^79\) "non-renewable resources must be employed in such a way as to guard against the danger of their future exhaustion".\(^80\) The Minerals Development Bill, 2000, which is concerned in particular with non-renewable resources, amplifies the meaning of this notion by stating that

\(^78\) This raises the debate about whether non-human living things have environmental rights. See references op cit n59 and the associated text.
\(^80\) Principle 5.
such exploitation should be responsible and equitable and take ‘into account the consequences of the depletion of the resource’.81

This norm lies within the principle of sustainable development, and it should be regarded more as a management strategy designed to meet the principle of sustainable development, rather than as a distinctive principle in its own right.

9.3 The integrity of renewable resources (section 2(4)(a)(vi))

Similarly, the underlying rationale for this statement is also sustainable development. The meaning of the word ‘integrity’ is not clear, but the statement must surely mean that renewable resources should be utilised on a sustainable basis, thereby ensuring the integrity of the resource.

Once again, this statement lies within the broader principle of sustainable development and it should be regarded not as a distinctive principle but as a management strategy.

9.4 The cautionary approach (section 2(4)(a)(vii))

This was one of the concepts proposed by Cowen, Kidd and Glazewski as a distinctive principle.82 The notion, which in South Africa has still to be given proper definition, has been described internationally as follows: where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.83

Other laws have also incorporated reference to this principle.84 Although the principle could be regarded as being an essential component of sustainable development, it has a particular legal significance that distinguishes it from sustainable development.

In the White Paper on Environmental Management Policy for South Africa,85 the principle of ‘Precaution’ was expressed more broadly as:

81 Clause 64(3)(a)(ii).
82 Cowen, op cit n* at 741; Kidd op cit n20 at 8-10; and Glazewski op cit n2 at 19-20.
83 Birnie & Boyle op cit n79 at 97.
84 Section 2(c) of the Marine Living Resources Act provides as an objective ‘the need to apply precautionary approaches in respect of the management and development of marine living resources’. See also the World Heritage Convention Act 49 of 1999, section 4(2)(g), and the Minerals Development Bill, clause 64(3)(a)(viii), both of which contemplate that ‘a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.’
85 Op cit n47.
'Government will apply a risk averse and cautious approach that recognises the limits of current knowledge about the environmental consequences of decisions or actions.'

In a text box associated with the principle, as printed in the White Paper, the approach was stated to include 'identifying the nature, source and scope of potentially significant impacts on the environment and on people’s environmental rights,' and 'the potential risk from uncertainty.'

Before legal recognition can be given to this principle it should be described judicially with far greater legal certainty and clarity. If effect is to be given to the principle as expressed internationally, it must be emphasized that at the international level the principle has been stated to come into operation when there are threats of a serious or irreversible nature, and not in the case of all possible effects or impacts. As a result the principle should not necessarily apply to all administrative decisions that may impact on the environment. The qualification that the threat should be serious or irreversible is consistent with the principle of significance as expressed in section 2 of NEMA.

What is the legal importance of this principle? Cowen has suggested that its application could have the effect of altering the burden of proof. This should not be the case. The context in which the principle has been described indicates that there has been no express intention to disturb the principles of the burden of proof required in criminal and civil law cases. These rules have been established over centuries. Given the fundamental importance of the burden of proof in the criminal and civil justice systems, any fundamental change to the burden of proof should only be brought about by express enactment, and not by inference from a statutory principle or policy.

The precautionary approach should rather be regarded as a general injunction to authorities and decision-making authorities of administrative bodies to be cautious. The preferred route should be that the precautionary principle should be interpreted in a similar way in which the cautionary approach has been applied in judicial and administrative decision-making.

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86 Op cit at 24.
87 Ibid.
88 Ibid.
89 Section 2(1).
In the criminal law cautionary approaches as rules of evidence are well known in South African law. In the law of evidence a distinction is drawn between a rule requiring corroboration and a cautionary rule. Rules of corroboration have always been of statutory origin, which require that certain evidence must be corroborated in some material respect by evidence from another source. Cautionary rules, on the other hand, have been developed by the courts, and require that certain evidence should be treated with due caution. Examples of the cautionary rule are the evidence of a single witness in relation to evidence given by an accomplice, evidence by children and in sexual crimes, evidence in civil cases involving sexual misconduct, evidence in police traps and where given by private detectives, and evidence in identification issues and in claims against deceased estates. Each of these classes of evidence has its own reason for the application of a precautionary approach in receiving evidence.

The cautionary rule amounts to requiring that the trier of fact should warn himself of the danger of relying on the evidence which is subject to the cautionary rule, and that he should not do so unless there is some feature that renders it trustworthy.

The South African courts have still to interpret the environmental cautionary principle. It will be interesting to see how they will deal with it. If a court were to interpret the cautionary principle referred to in section 2(4)(a)(vii) of NEMA it could do so by applying a similar approach to the cautionary rule in the criminal law. It is suggested that in this case the application of the cautionary principle could be expressed as follows: The cautionary rule in environmental law amounts to requiring that the court should warn itself of the danger to the environment of relying on the evidence which is subject to the cautionary rule, and that the court should not rely on such evidence unless there is some feature that renders it trustworthy. This rule should only be applied where there are threats of serious or irreversible damage. Where there is a lack of full scientific certainty, the rule should not be used as a reason for postponing measures to prevent environmental degradation.

The courts could establish such a rule by which administrative officials should act in decision-making.

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92 Schmidt & Zeffertt op cit at 436.
93 Ibid.
94 Schmidt & Zeffertt op cit at 437.
While cautionary rules are well known in our law, does this mean that the environmental cautionary principle is capable of wider generalisation and should therefore not be accepted as a distinct principle of environmental law? While the cautionary rules of evidence relate specifically to the criminal law, and although there are similarities, the environmental precautionary rule relates specifically to administrative decision-making on the environment, and has a particular environmental context. It is therefore submitted that although the principle has still to be fully developed, and established in decision-making processes, it is sufficiently distinct to warrant acceptance as a distinctive principle of environmental law.

Section 2(4) of NEMA also refers to the following:

9.5 Integrated environmental management (section 2(4)(b))

Chapter 5 of NEMA is devoted to describing the general objectives and manner of implementation of integrated environmental management. If the principle of integrated environmental management is further generalised, it means that the management of any aspect of human activity should be integrated. There is considerable sense in applying this approach to all human activity, and not just to the environment. This suggests that the idea is not, nor should it be, distinct to environmental protection.

An integrated approach is already provided for in the way in which NEMA has defined the term ‘sustainable development’. It is therefore submitted that to the extent that this may be considered as a principle (since it could be regarded rather as a management strategy), it is already incorporated within the principle of sustainable development.

For these reasons the principle should not be considered as a distinctive principle of environmental law.

9.6 Environmental justice (section 2(4)(c))

The concept of environmental justice envisages that environmental resources should be equally distributed, and that certain sectors of society should not bear unequal negative environmental impacts. Environmental justice was

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92 Section 23.
93 Section 24.
94 Section 1 of NEMA, and see text associated with n49 above.
95 See Glazewski op cit n2 at 4-5. Environmental justice was the subject of a conference hosted by the Faculty of Law at the University of Cape Town in collaboration with the
described in the *White Paper on Environmental Management for South Africa* in the following manner:

> To comply with the requirements of environmental justice, government must integrate environmental considerations with social, political and economic justice and development in addressing the needs and rights of all communities, sectors and individuals.99

On the international front the idea of environmental justice has developed specifically in the area of environmental law. In South Africa, and having regard in particular to the racial history of the country, the principle could be further generalised to the constitutional right of equality referred to in section 9 of the Constitution. This is because section 9 refers specifically to being disadvantaged by unfair discrimination. Subsections 9 (1) and (2) read as follows:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The notion has a broader political significance in that it seeks to protect those groups in South Africa that have not been previously represented in government, and which in many cases have borne the brunt of environmental pollution and other harm.

One might have expected that this principle would have been established as a principle in the Development Facilitation Act, it being an important part of planning law, but this is not so. The best that one may do is to infer this principle from section 3(1)(h)(iv) and (v) of the Act, which paragraphs provide that development should seek to meet the basic needs of all citizens in an affordable way, and that land must be safely utilised by taking into consideration factors such as geological formations and hazardous undermined areas.

The corollary of environmental harm is environmental benefit. The grant of environmental benefits should, accordingly, also fall within the consideration of environmental justice.

Much recent legislation refers to inequality in an environmental sense, and has incorporated the concept of environmental justice. The preamble to the National Forests Act recognises that 'the economic, social and environmental benefits of forests have been distributed unfairly in the past'. This concept is reflected in one of the purposes of the Act, which is

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99 Op cit n47 at 22.
described as to 'promote the sustainable development of forests for the benefit of all'. Section 3(3)(c)(ii) of the Act states the principle of environmental justice in a positive form by expressing the principle of promoting the fair distribution of the environmental benefits of forestry.

This sentiment is also found in the National Water Act, which notes that 'discriminatory laws and practices of the past have prevented equal access to water', and that the purpose of the Act is, inter alia, 'promoting equal access to water' and 'redressing the results of past racial and gender discrimination'. The Act also provides that the Minister is responsible for the equitable allocation of water. The Marine Living Resources Act provides, as an objective, 'the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'.

There is international acceptance of the principle of environmental justice. In the local context it must be interpreted within the ambit of the equality clause of the Constitution. As a result it could be argued that this should prevent it from being described as a distinctive principle of environmental law. Acknowledging that the principle may be a shorthand means of expressing the equality provisions of the Constitution, as they relate to the environment, and accepting that the term has significant political momentum, it is submitted that the principle should nevertheless be regarded as being a distinctive principle of environmental law.

9.7 Equitable access to resources (section 2(4)(d))

For the same reason as that given under environmental justice referred to above, which may be seen as including environmental benefits, this principle has a wider political application, and it falls within the principle of equality as expressed in the Constitution. Since the principle has been separately described in NEMA, it could be inferred that the principle is distinct from environmental justice. However, it is submitted that the notion of environmental justice is sufficiently broad to include within its scope the benefit of equitable access to resources.
9.8 Life cycle responsibility (section 2(4)(e))

This principle envisages that a person who is initially responsible for producing a dangerous or toxic substance should remain responsible for such substance for the life of that substance, until it has been properly disposed of. In other words, the initiator of the dangerous or toxic substance should remain responsible from the ‘cradle to the grave’.

The principle goes beyond conventional rules of liability and compensation. Although it may be expressed as being a principle of environmental law, until such time as appropriate cradle to grave liability has been legislated in substantive form, existing statutory and common law rules of liability must continue to apply.¹⁰⁷

The principle is related to the polluter pays principle. In terms of section 28 of NEMA and section 19 of the National Water Act, environmental liability has been extended, but not on the basis of cradle to grave liability.

In the case of NEMA, section 28(1) imposes an obligation on a person who has ‘caused’ the pollution or degradation to take ‘reasonable measures’ to prevent pollution or degradation. The courts have yet to interpret the causation aspects that this obligation entails, or what is meant by reasonable measures. The latter would depend in any event on the circumstances of each particular class of pollution or specific case. A polluter may take what might be considered to be reasonable measures to prevent pollution, and then dispose of the land or product to a third party. Disposal of the polluting thing may, under the reasonable measures rule, break the causation link between the original polluter and the polluting thing.

In order to establish cradle to grave liability, short of statutory intervention, it may be necessary for the court to require the obligation to include, as a reasonable measure imposed on the polluter, a responsibility for the polluting thing after its disposal. One example by which this could be achieved would be for the original polluter to be obliged to establish, as a reasonable measure, an insurance product that would respond to any later pollution incident, in order to prevent or mitigate pollution after the disposal of the polluting thing.

Prior to the promulgation of NEMA and other statutes that have provisions similar to section 28, if the court were to have intervened after the disposal of the polluting thing, it may have been difficult, except in the case of section 22A of the Water Act 54 of 1956, for the court to have gone back to the person who was the original polluter.

¹⁰⁷ The principle has, however, been referred to in draft legislation. See clause 64(3)(d) of the Minerals Development Bill.
Under NEMA it is possible, in defined circumstances, to go back to the original polluter, but not, in the first place, on the basis of cradle to grave responsibility. Section 28(2) of NEMA provides that the obligation of a person to take reasonable measures referred to in section 28(1) includes an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which the offending activity has taken place. Should a person who is liable, fail to comply with a directive to take reasonable measures, the state may take the reasonable measures and recover the costs thereof from various persons, including the person who was responsible for the pollution.

The approach for the extension of liability would therefore seem to be not towards cradle to grave liability, but to control of the thing involved. This corresponds to some extent to delictual liability over dangerous things. Cradle to grave responsibility is not a feature of these sections, because if a person were to transfer control of the property to a third party, the first party would usually be liable only for the historic damage caused while he was in control.

There are exceptions to this. An element of liability under section 28 includes liability of a person that may have profited from a polluting product. The state may recover from such a polluter the costs of clean-up incurred by the state. The courts have yet to determine the nature and extent of liability of such a polluter. In this case the life-cycle principle does, to some extent, find expression in the existing legislation.

Although the principle finds some recognition in section 28(8) of NEMA and similar provisions elsewhere, and is supportive of sustainable development, it is submitted that it will be necessary to wait for extended liability and compensation provisions to be enacted for the principle to be given substantive content. In view of its special features the principle may, however, be regarded as a distinctive principle of environmental law.

9.9 Participation of interested and affected parties (section 2(4)(f) and (g))

The participation of interested and affected parties fulfills an important role in environmental law, and is a requirement of environmental impact assessments completed under section 21 of the Environment Conservation Act, and of other environmental legislation.

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108 Section 28(8).

The underlying principle is not, however, special to environmental concerns. The rule may, where the rights or interests of persons are to be affected, be considered as a subset of the *audi alteram partem* rule, which provides that a person whose rights are to be affected has the right to be heard. It therefore applies in numerous administrative law matters, many unrelated to environmental protection.

It is therefore submitted that this principle should not be regarded as a distinctive principle of environmental law.

9.10 Environmental education (section 2(4)(h))

While environmental education is an important strategy to be used in the furtherance of environmental protection, the same strategy applies to many fields of human activity. It is therefore suggested that it cannot be regarded as a distinctive principle of environmental law.

9.11 Cost benefit analysis (section 2(4)(i))

Cost benefit analysis implies that before taking a decision that could impact on the environment, both the costs to the environment of the proposal, as well as the economic and other benefits of the proposal, should be considered. There is some linkage between this principle and the principle of the 'best practicable environmental option, since the latter refers to an environmental option at a 'cost acceptable to society'.

While cost-benefit analysis is an important aid to environmental decision-making, and forms part of the best practicable environmental option, cost-benefit analysis is applied in many areas of decision-making in society, and it cannot be regarded as being distinctive to environmental law.

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110 See the Development Facilitation Act, s 3(1)(d); the Marine Living Resources Act, s 2(h).
111 LG Baxter *Administrative Law* (1984) at 542-557. In this regard see also section 33 and Schedule 6 item 23(2)(b) of the Constitution, that deals with the right to just administrative action, in respect of persons who are subject to administrative action, or whose rights or interests may be affected, as well as the Promotion of Administrative Justice Act 3 of 2000. It may also be noted that section 38 of the Constitution extended the *locus standi* rule to a broader class of persons that are now entitled to enforce certain rights.

112 See s 1 of NEMA for a definition of the 'best practicable environmental option'.
9.12 The right to refuse to do work harmful to health (section 2(4)(j))

Section 23 of the Mine Health and Safety Act 29 of 1996 provides that an employee has the right to leave any working place whenever circumstances arise that with reasonable justification appear to the employee to pose a serious danger to his health or safety. This right is established in labour law, and has cross-divisional impacts. The notion cannot be restricted to environmental law issues, and it is therefore submitted that it should not be regarded as a distinctive principle of environmental law.

9.13 Access to information (section 2(4)(k))

A right of access to information is provided for in terms of section 32 of the Constitution. This section provides that specific national legislation on access to information should have been enacted within three years of the coming into force of the Constitution. This condition was fulfilled by enactment of the Promotion of Access to Information Act 2 of 2000. Although the Act includes within the meaning of information, matter that relates to 'public safety or environmental risk', access to information under the Act is broad in nature and is wider in scope than the right of access to information relating solely to the environment.

Thus, although access to information is an important feature of environmental law, it should not be construed as a distinctive principle of environmental law.

9.14 Co-operative governance (section 2(4)(l))

Chapter 3 of the Constitution is devoted to co-operative government, which is applicable to all spheres of government. Although NEMA has been drafted specifically and comprehensively to deal with how co-operative governance may be dealt with in relation to the environment, and co-
operation is essential for the long term protection of the environment, the principle cannot be construed as a distinctive principle of environmental law.

9.15 Conflict resolution procedures (section 2(4)(m))

NEMA provides specifically for conflict resolution procedures. Once again, there are a number of statutes that contain provisions that deal with conflict resolution, and this principle cannot be considered distinctive to environmental law.

9.16 International responsibilities (section 2(4)(n))

Chapter 6 of NEMA deals with international responsibilities. The chapter lays down procedures by which international instruments may be incorporated into South African law, and thereafter managed. International environmental law is broad in scope, and deals with a wide range of environmental issues, including biodiversity and global warming. As such, international environmental law has and will continue to have a material impact on domestic law.

The provisions of Chapter 6 are supportive of the provisions of sections 231 to 233 of the Constitution, which govern the application of international agreements, international law and international customary law. These sections deal with all international instruments, and not just environmental international agreements. Section 231 of the Constitution requires that consideration must be given to international law. This is because any international agreement that has been enacted into South African law is legally binding, and customary international law is law in the Republic unless it is inconsistent with the Constitution or with an Act of Parliament.

When interpreting any legislation, a court is also required to prefer any reasonable interpretation of the legislation that is consistent with

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118 See sections 17 to 18 (conciliation), section 19 (arbitration), section 20 (investigation), and sections 21 and 22 (general).

119 See, for example, the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991, the Development Facilitation Act and the Restitution of Land Rights Act 22 of 1994.


121 See Section 231(4), which states that 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation;.....'

122 Section 232.
International law over any alternative interpretation that is inconsistent therewith.\textsuperscript{123}

It is outside the scope of this article to cover the many international conventions that deal with principles that under domestic law could be considered as distinctive principles of environmental law. A number of international conventions have, however, been given the force of law in South Africa.\textsuperscript{124} These were drafted some years ago and do not include reference to some of the modern principles referred to in NEMA.

Thus, although international environmental law is likely to drive much of the development of domestic environmental law, the principle cannot be restricted to environmental law, and should therefore not be regarded as a distinctive principle of environmental law.

9.17 Public trust (section 2(4)(o))

The doctrine of public trust was first introduced into the statutory regime in South Africa by section 3 of the National Water Act, which section bears the heading ‘Public trusteeship of nation’s water resources’. The section provides as follows:

‘(1) As the public trustee of the nation’s water resources, the National Government; acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.’

The doctrine is also provided for in NEMA, which describes the section 2 principle in the following manner: ‘The environment is held in public trust for the people, the beneficial use of environmental resources must serve the

\textsuperscript{123} Section 233.

public interest and the environment must be protected as the people’s common heritage.’

The expression is repeated in section 28 of NEMA, which provides that the director-general, in considering any measure or time period referred to in section 28(4), must have regard to ‘the desirability of the state fulfilling its role as custodian holding the environment in public trust for the people.’

While the National Heritage Resources Act does not refer expressly to the public trust doctrine, one of the principles referred to in the Act provides as follows: ‘Every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans.’

Clause 3 of the Minerals Development Bill, 2000 proposes a number of environment-related principles, drawn from NEMA, but adapted to the mining environment. The public trust doctrine is referred to in clause 3 of the Bill, but not fully. While the heading of clause 3 reads ‘Public Trusteeship of the nation’s resources’, the term is not defined in the clause itself. The clause refers rather to custodianship, sustainable development and sovereignty over the mineral resources.

It is necessary to place the concept of public trusteeship and custodianship in the context of the property rights clause in the bill of rights. This is because in its early form (in the United States of America), the doctrine was expressed as follows: when a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties.

Since the National Water Act abolished riparian rights that vested ownership of certain water in private hands, the concept of custodianship may indeed be applicable to publicly-owned water. Environmental things other than water that fall within the definition of the ‘environment’ in

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125 Section 2(4)(o).
126 Section 28(5)(e). The same provision is contained in s 30(6)(d) of NEMA. See also s 4(1)(o) of the World Heritage Convention 49 of 1999, which states that ‘the cultural and natural heritage is held in public trust for the people, the beneficial use of cultural and environmental resources must serve the public interest and the cultural and natural heritage must be protected as the common heritage of the people’.
127 Section 5(1)(b).
128 Op cit n50.
129 The concept of custodianship is also referred to in the preamble and clause 2(b).
130 See generally Illinois Central Railroad v Illinois 146 US 387 (1892), and s 25 of the Constitution.
NEMA,131 such as land, plants, animals and cultural properties, may, however, at least be held partly in private ownership. What need to be debated are the manner and extent to which the state, without statutory intervention in respect of privately-held environmental rights, may impose its rights of custodianship over private property through the public trust doctrine, and the relationship of the public trust doctrine to the King v Dykes notion of property owners holding private property in trust for future generations.

Cowen has questioned the application and validity of the public trust doctrine in South African law.132 It is apparent that the meaning of the concept is not entirely clear, and it is not certain which interpretation of the concept may be adopted, and how it may be applied.133 The wisdom of introducing the concept into South African environmental law, which may only add to the confusion,134 must therefore be questioned. Debate has still to be undertaken on the suitability of this doctrine for South African law, and its application.135

Although the doctrine has been expressed in a number of laws, until such time as the principle receives academic and judicial clarification, its description as a distinctive principle of environmental law is premature.

9.18 Polluter pays principle (section 2(4)(p))

Kidd has suggested that the polluter pays principle has been accepted as a distinctive principle of environmental law.136 Although the principle, as expressed, has current usage in the context of South African statutory law, the expression would appear to be a misnomer.

This is because the statutes that are frequently cited as evidence that there is such a principle in South African law do not restrict liability to the polluter but rather deal with liability and compensation issues on a broader level.

For example, as mentioned above under the cradle to grave principle, in terms of section 28 of NEMA, liability is imposed not only on the polluter,
but also on a number of other classes of persons, such as the owner or occupier of the land concerned. The state is empowered under section 28(8) of NEMA to take reasonable measures and to recover the costs of such measures from the owner or occupier of the land concerned and also from the person who has benefited from clean-up undertaken by the state. This person is accordingly deemed to be the polluter, and is required to take reasonable measures to prevent pollution. However, the owner of the property that has caused the pollution and the actual polluter may not necessarily be one and the same person. Thus, liability may be imposed on a basis of ownership and control rather than causation or fault.

The polluter pays principle calls for a variation and extension of conventional and traditional forms of liability and compensation, based on considerations other than delictual or other common law causes of action. The principle should rather be understood as a shorthand expression for describing distinctive liability and compensation aspects of environmental law.

The concept of the polluter pays principle has gained considerable national and international acceptance. Given the provisions of section 28 of NEMA as well as similar legislation, until clarity is reached on the nature of the principle, and the manner in which it is reflected in new compensation and liability legislation, it would be premature to regard the principle as having substantive authority. On this basis the status of the principle could be similar to that of the public trust doctrine. It is submitted, however, that in view of the broad acceptance of the polluter pays principle, it should be accepted as a distinctive principle of environmental law.

9.19 The role of women and youth (section 2(4)(q))

Numerous government policies and laws have emphasised the importance of enhancing the role of women and youth in South African society. The equality clause in the Constitution, which provides that the state must not unfairly discriminate against anyone on account of, inter alia, gender, sex and age, is the underlying principle for this position. The state has also established specific institutions to promote the role of women and youth.

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137 See the National Water Act, s 19 and the Minerals Development Bill, clause 75. For an interesting provision relating to the continuation of liability until the issue of an exoneration certificate, see the Minerals Development Bill, clause 73.

138 See s 9(3) and (4).

139 The Commission for Gender Equality, established by s 181(1)(d) of the Constitution, and the National Youth Commission Act 19 of 1996.
For these reasons the role of women and youth is intended to fulfil a far broader position than that envisaged in NEMA, and this principle should not be regarded as a distinctive principle of environmental law.

9.20 Management of sensitive ecosystems (section 2(4)(r))

The management of sensitive ecosystems is important in the promotion and management of sustainable development. This principle should be regarded more as a management strategy than a distinctive principle of environmental law. This could change in the future, however, in the event of such rules being developed into distinctive principles.

10 Case law — the Save and Kyalami cases

Disputes that deal with environmental legislation do not frequently come before the courts. They are of particular interest when they do, and the cases referred to below are in striking contrast to each other.

In the matter of Director: Mineral Development and Another v Save the Vaal Environment and Others, the claimant was an association called Save the Vaal Environment ("Save"). The case dealt with the question whether interested parties, such as Save, wishing to oppose an application by the holder of mineral rights for a mining authorisation in terms of section 9 of the Minerals Act 50 of 1991 ("the Minerals Act"), were entitled to raise environmental objections and to be heard by the Director: Mineral Development. Sasol opposed Save’s claim on the basis, inter alia, that the mere issuing of a mining authorisation did not impact on the environment, and that Save had the right to a hearing at a later stage when the environmental management programme of Sasol was to be considered, in terms of section 39 of the Minerals Act.

The Supreme Court of Appeal, in holding that the audi alterem partem rule should be observed in the granting of a mining authorisation in terms of section 9 of the Minerals Act, and in granting Save’s application, stated as follows:

'The issue of a licence in terms of s 9 enables the holder to proceed with the preparation of an environmental management programme, which, if approved, will enable him to commence mining operations. Without the s 9 licence he cannot seek such approval. The granting of the s 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia, where it lays ‘...the necessary

140 Supra n54. See also van Huyssteen’s case supra n54.
foundation for a possible decision...’ which may have grave results. In such a case the audi
rule applies to the consideration of the preliminary decision...’

The court went on to say of the audi alterem partem rule: ‘Nothing in s 9
or in the text of the Act either expressly or by necessary implication excludes
the application of the rule, and there are no considerations of public policy
militating against its application’. 141

The court noted, in support of its argument, that mining could have a
significant impact on the environment, and referred to the principle of
intergenerational equity. Its reference to significance anticipated the
criterion of significance contained in section 2 of NEMA.

The Save case dealt with the law prior to the coming into force of NEMA.
The judgment gave firm support, however, for the principle of consultation
with interested and affected parties. In essence, the Supreme Court of
Appeal held that the relationship between the decision to grant a mining
authorisation/and its implementation by means of the further requirement to
complete an environmental management programme was, for practical
purposes, inseparable. This makes sense if one has regard to the
environmental consideration of a development proposal, which should
include the investigation of alternatives, including the ‘no-go option’.

This judgment may be contrasted with the case of Minister of Public
Works and Others v Kyalami Ridge Environmental Association and Another
(Mukhwevho intervening). 142 Here the constitutional court considered, for
the first time, the section 2 principles of NEMA.

The facts of the case were that the Gauteng government had decided that
people made homeless by floods early in 2000 should be housed in
temporary accommodation at Leeuwkop, near Kyalami. The Kyalami Ridge
Environmental Association, representing local residents in Kyalami, objected
to this. It argued that the environmental rights of residents would be
adversely affected by the decision. The association contended that in
deciding to establish a transit camp at Leeuwkop, the Minister of Public
Works had failed to comply with certain principles set forth in section 2 of
NEMA, specifically that ‘decisions must take into account the interests,
needs and values of all interested and affected parties...’, 143 and that
‘decisions must be taken in an open and transparent manner...’. 144 The

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141 At para 20.
142 Supra n10. The case was reported shortly before this article was completed and submitted
for publication. The case is of relevance to environmental law, however, and must receive
detailed examination. This is outside the scope of this article. In the circumstances, this review of
the judgment, is limited to certain issues.
143 Section 2(4)(g).
144 Section 2(4)(k).
constitutional court was required to weigh the rights and needs of the homeless against the rights of neighbours (accepting that the neighbours did indeed have rights for which they could claim protection), in the context of the constitution and the principles stated in section 2 of NEMA.

The court held, in effect, that the rights and interests of the homeless had to be favoured over the rights of the neighbours. The rationale for the decision is partially to be found in paragraph 102 of the judgment, which provides as follows:

'Where as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it.' \(^{145}\)

Clearly the position of the homeless in South Africa must weigh significantly in any test of proportionality. In the words of Chaskalson P, referring to the principles claimed by the association: '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.' \(^{146,147}\)

In holding against the association, the court held that:

(a) NEMA was framework legislation that made provision for the preparation of environmental implementation and management plans;

(b) in the words of the judgment,

'...seen in the context of the Management Act as a whole the principles are directed to the formulation of environmental policies by the relevant organs of state, and the drafting and adopting of their environmental implementation and management plans, rather than to controlling the manner in which organs of state use their property.' \(^{148}\)

The court was prepared to assume that the principles could be applied to disputes not regulated by such plans, but it was not prepared to make an actual finding on this aspect.

(c) The section 2 principles related to actions 'that may significantly affect the environment'. The court held that the association had failed to prove that the harm complained of 'significantly' affected the environment.

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\(^{145}\) In a footnote to this paragraph, the following cases were cited: *Janse van Rensburg NO & Another v Minister of Trade and Industry NO and Another* 2001 (1) SA 29 (CC), 2000(11) BCLR 1235 (CC) para 24, *Premier, Mpumalanga and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999(2) BCLR 151 (CC) para 39.

\(^{146}\) Section 2(1)(a).

\(^{147}\) At para 68.

\(^{148}\) Paragraph 68. Emphasis supplied.
The case was referred to the constitutional court in circumstances where not all the issues had been dealt with by the trial court. This was to create certain difficulties. The constitutional court decided, however, to deal with the matter, having regard to the urgent circumstances of the homeless, who were waiting for temporary accommodation.\(^{149}\)

It is appropriate briefly to consider three aspects of the judgment: the separation by the court of a decision from its implementation, the extent to which NEMA governs decision-making on matters affecting the environment, and the criterion of significance.

10.1 Separation of the decision and its implementation

As noted by the court, the matter of the state's decision, and its implementation, relate to the lawfulness of the decision, as compared with the procedural fairness of such decision. The court held that on the facts, the right to make an administrative decision could be distinguished from the right to implement such a decision. The court commented on the contrary finding of the high court as follows:

"...This finding failed to distinguish between the taking of the decision and its implementation. There may be cases where the process of decision-making and implementation are so closely related that they have to be treated as a single transaction for the purpose of evaluating its validity. In the present case, however, the legislative impediment, if there be one, is relative and not absolute which means that the decision can be lawfully implemented if the necessary consents are obtained.

The taking of a decision is logically anterior to the procurement of consents that may be necessary for its execution. Indeed, it is only after a decision has been taken and details of the work to be done have been determined, that an application for consent can properly be made and considered. The absence of such consent may found an application for an interdict to restrain implementation of the decision. In itself, however, it is not a ground on which the decision can be set aside'.\(^{130}\)

What is meant by ‘relative’ is not entirely clear. It is assumed that it is intended to mean that the legislative impediment, if there is one, is relative to the implementation of the decision, and not absolute in the sense that the impediment would render the decision void.

The reasoning of the constitutional court differs markedly from that in the Save judgment. Apart from referring to the Diepsloot case,\(^{151}\) the constitutional court failed to deal with how the facts of the case could be distinguished from those of the Save case.

\(^{149}\) Paragraph 28.
\(^{130}\) At para 58 (footnote omitted).
\(^{151}\) Op cit n44 of the judgment.
The process of approval of a mining authorisation, which is followed by the approval of an environmental management programme (as in the Save case), would seem to be a very similar process to that of the decision by the state to establish a transit camp, followed by the environmental approvals that would be required under other legislation (as in the Kyalami case). In both cases the preliminary decision could have serious consequences for the subsequent situation.

While the decision of the state on how it intends to deal with its own property may be distinguished from the decision of an official in carrying out an administrative law decision-making function, the constitutional court dealt with the decision and implementation debate on the basis that it was applicable to both. Both NEMA and the Environment Conservation Act bind the state. This implies that the same rules should apply in both instances. It is therefore submitted that adherence to the *audi alteram partem* rule should be allowed in both cases.

The reasoning of the constitutional court differs from how environmentalists see the application of the *audi alteram partem* rule in an environmental context, and the involvement of interested and affected parties in the decision-making process. Interested and affected parties choose to be involved in the process for the very reason to have an influence over the ‘details of the work to be done’, which the constitutional court stated should be determined prior to the application for any necessary consent.

The judgment did not take into account the fact that the application for an environmental consent should not merely be an administrative process that will be granted as a matter of course provided that the formal requirements are fulfilled. An essential requirement of the process of involving interested and affected parties is that the hearing of the other side could lead to a consideration and possible acceptance of work alternatives and the ‘no-go option’. In this regard the judgment has had the effect of challenging the way in which environmentalists perceive the application of the principles of integrated environmental management and impact assessment.

### 10.2 Objects of NEMA - decision-making on matters affecting the environment

The reasoning of the constitutional court is difficult to follow in its statements referred to in paragraphs 10 (a) and (b) above. It is hard to reconcile these statements, which held that NEMA was framework

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152 See section 2(1) of NEMA and section 48 of the Environment Conservation Act.
legislation that made provision for the preparation of environmental implementation and management plans, and that NEMA was not concerned with controlling the manner in which the state used its property, with the following provisions of NEMA:

(i) The long title of NEMA describes the object and scope of NEMA as being to establish principles generally for decision-making on matters affecting the environment.\(^{153}\) The long title reads as follows:

‘To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment. institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state: and to provide for matters connected therewith.’\(^{154}\)

(ii) Section 2(1) of NEMA states that the principles apply to the actions of all organs of state that may significantly affect the environment. The section provides as follows: ‘The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and...’\(^{155}\)

In this section the phrase ‘actions of all organs of state’ is not qualified in any manner. NEMA consists of ten chapters, with only chapter three dealing with environmental implementation and management plans. The actions of an organ of state must surely include a decision by that organ of state on how it is to use its own property.

(iii) It will be recalled that section 2 of NEMA refers to the principles as acting as ‘guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment.’\(^{156}\)

How is it possible to reconcile these provisions with the view of the court that the section 2 principles are designed to deal with the formulation of plans and policies rather than to control the manner in which organs of state use their property, which necessarily involves a decision-making process? It is submitted that section 2 cannot properly be interpreted as applying only to the preparation of environmental implementation and management plans.

It is therefore unclear why the court was not prepared to come to a finding on whether or not the section should apply to disputes relating other than to environmental implementation and management plans. The court only accepted this proposition for the purposes of argument.

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\(^{153}\) In cases of ambiguity the long title may be used as an aid to interpretation. See Kellaway op cit n29 at 259.

\(^{154}\) Short title of NEMA. Emphasis supplied.

\(^{155}\) Emphasis supplied.

\(^{156}\) Section 2(1)(c).
(iv) Section 2(4) of NEMA states that neither a reference to a duty to consult specific persons or authorities nor the absence of any reference in the Act to a duty to consult 'exempts the official or authority exercising a power or performing a function from the duty to act fairly.'

In this context the word 'fairly' must certainly include an obligation on the official or authority to act in accordance with the rules of natural justice, which include the obligation to hear the other side. Thus, rather than weakening and qualifying the section 2 principles, the court should rather have considered in detail the circumstances where the principles could not be applied, possibly on some basis involving proportionality.

10.3 Significance

The application of section 2 of NEMA is limited to acts that may 'significantly' affect the environment.\(^{157}\) Perhaps the strongest legal argument in support of the position taken by the court, concerned its finding that the association had failed to prove 'significance'.

NEMA defines the environment to include the 'surroundings within which humans exist' made up of 'aesthetic' properties and conditions.\(^{158}\) While it could be argued that a transit camp could impact negatively on property values and aesthetic conditions of neighbours, it is possible to conclude that the impact would not have been significant in nature, and that accordingly the section 2 principles were not applicable to the Kyalami case. The application of this requirement alone could have resolved the dispute on a rational basis and comparatively quickly.

10.4 Concluding remarks on the judgment

In the context of the high levels of poverty in South Africa, and the social, economic and political history of the country, the constitutional court was placed in the position of having to weigh its constitutional responsibilities in respect to social and economic rights of the homeless, against its constitutional obligations in respect to the environment and fair process.

It is difficult to criticize the eventual outcome, on the basis of proportionality, that the right of flood victims to temporary accommodation should outweigh the right of neighbours to protection of their environmental interests. In seeking a just outcome, however, the court failed to deal

\(^{157}\) Section 2(1).

\(^{158}\) Section 1.
properly with the legal context in which the dispute was placed. Ruling against principles of procedural fairness, without giving clarity on the limits that may apply in such cases, failing to express an opinion on how the various relevant factors should be balanced, and failing properly to interpret the objects of NEMA, make the judgment remarkable. The judgment raises concerns about how NEMA should be interpreted, and more generally, about the impact of the judgment on the rule of law.

The court could have gone some way in supporting its position, and it would have been helpful, for the development of environmental law, had it dealt with the following:

1. The court could have considered in greater detail the subject of significance. Guidance from the court on a test for significance would have been useful.
2. The court could have expressed stronger support for procedural fairness, in particular for the audi alterem partem rule. At paragraph 102 of the judgment Chaskalson P observed that ultimately procedural fairness depended in each case upon the balancing of various relevant factors including the nature of the decision, the ‘rights’ affected by it, the circumstances in which it is made, and the consequences resulting from it.

Clearly the facts of each case are important, but this test applied by the constitutional court appears to be broader than that described in Van Wyk NO v Van der Merwe, quoted with approval in the Save case, in which the court accepted that in ‘exceptional circumstances’ the audi alterem partem principle could be passed over. In the Save case, the Supreme Court of Appeal recognised that there may be considerations of public policy that could militate against the rule being applied.

The court could have explored the exceptional circumstances and public policy considerations which, on the basis of these authorities, would have entitled it to rule against the association.

3. The court could have dealt with and sought to have distinguished the Save judgment, which was given by the Supreme Court of Appeal.

On the strength of this judgment it is possible that environmentalists may find it difficult to rely on the NEMA principles when faced, not with the social and economic claims of the homeless, but with the claims of developers who may argue equally convincingly that development and

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139 See n146 above and the associated text.
160 See Premier, Mpumalanga v Association of State-Aided Schools 1999 (2) SA 91 (CC) at para 39.
161 1957 (1) SA 181 (A) at 188B-189A
162 At para 17.
163 At para 20, and see n141 (supra) and the associated text.
employment must be promoted in order also to address social and economic claims. It is of concern that the judgment of the constitutional court may have weakened principles of environmental law, the audi alterem partem rule and the principle of fairness.

11 Conclusion

The environmental principles expressed in the Constitution, NEMA and other legislation comprise some principles that are well founded, some that have still to be properly articulated, and others that fall within a broader legal context or that may be better described as management strategies. This broad, and therefore limited review suggests, however, that South African environmental law does indeed have distinctive principles.

The principle of sustainable development is well established and may be regarded as the founding distinctive principle of substantive law. Other principles, that may be described as statutory distinctive principles and which at this stage are guides to interpretation, include:

- the duty of care to avoid harm to the environment;
- the precautionary principle;
- life cycle responsibility;
- environmental justice; and
- the polluter pays principle.

Some may regard the public trust doctrine to be distinctive, but it is submitted that in view of the significant uncertainties associated with the meaning of this doctrine, it would be premature to describe it as such.

To the extent that it may be possible under current legislation, progressive and enlightened judicial interpretation should nurture these principles. This could lead to the principles developing into substantive principles of environmental law. Academic research, and more particularly developments in international environmental law, would assist in this process.

These distinctive environmental principles are of sufficient weight to enable us to conclude that South African environmental law has, at last, a normative structure by virtue of which environmental law may described as a distinct field of law.

The past twelve years have proved Cowen to be prophetic. Legislation has indeed been the primary engine for the development of distinctive principles of environmental law. The challenge has now broadened. While legislation still has a part to play in the development of environmental law, a greater contribution from the courts is now required. This is why the Kyalami judgment is disappointing.
Finally, what is the answer to Cowen’s question, do we have mutually supportive environmental protection and sound development? We have seen a significant increase in the number and quality of the laws passed that have the objective of protecting the environment, and some principles have matured into distinctive principles of environmental law. However, with some notable exceptions, there has been little tangible or quantifiable improvement in the effective implementation of these laws or in the state of the environment itself. Proper interpretation and implementation of environmental laws, together with accelerated sustainable economic growth to address unemployment and poverty, are the challenges to which South African society must now respond more energetically than it has done in the past.

164 Consider, for example, the St Lucia decision and the steady advances made in the declaration of more land as having protected status.