

The importance of environmental laws in housing developments: Lessons from the Diepsloot housing project

Grace Mafunganyika*

Democratic local governments can only bring about prospects for sustainable development. Nothing more, nothing less. It is their participatory, creative spirits and innovative capacities which people and organisations at local government will have to employ collectively to bring about the betterment of the quality of lives.**

1 Introduction

South Africa comes from a past of great oppression where the majority of the citizens, especially blacks, lived in abject poverty and deprivation.¹ Apartheid laws such as the Native Resettlement Act 19 of 1954 and the Bantu/Native Building Workers Act 27 of 1951 distorted access to natural resources and denied the majority of citizens basic needs such as water, land and clean air.² In 1994, with South Africa's new dispensation, there were serious social, economic, legal, moral and environmental problems.³ The post-apartheid government had to take immediate action to address these problems.

The government immediately, after being elected, implemented programmes aimed at improving the citizens' quality of life.⁴ These programmes were mostly

*LLB (Cum Laude), LLM, Lecturer, School of law, University of Limpopo (Turfloop Campus). This article is an excerpt from a research paper submitted in completion of my LLM (2009).

**Ntsime (2003) 33/1 *Africanus* 50.

¹Fuggle and Rabie *Environmental concerns in South Africa* (1983) 23-29, see also Turpie 'Environmental and resource economics' in Strydom and King (eds) *Fuggle and Rabie's Environmental management in South Africa* (2009) (2nd ed) 34-38.

²The Reconstruction and Development Programme: A Policy Framework (RDP) (1994) para 2.10.1.

³Carlson and Van Staten 'Environmental concern in South Africa: The Development of a measurement scale' (2006) 2 *New Voices in Psychology* 3-7.

⁴White Paper on the Reconstruction and Development Programme GN 1954 of 1994, GG 16085, 1994-11-23 and the Growth, Employment and Redistribution Strategy: A macroeconomic strategy 1996-06-14.

directed at the realisation of socio-economic rights, which encompass the right to sustainable development as guaranteed in Section 24 of the Constitution.⁵ As a result, the government focused on the advancement of socio-economic development and neglected environmental issues.⁶ However, the Constitution of the Republic of South Africa, 1996 (the Constitution) protects both the right to development and the right to environmental protection.⁷

The State had two main problems, namely, the realisation of socio-economic rights and protecting the environment.⁸ In order to strike a balance between the two seemingly competing rights, the government came up with the White Paper on Environmental Management Policy in May 1998.⁹ In 1998, the government enacted the National Environment Management Act 107 of 1998 (NEMA), an environmental framework law aimed at achieving sustainable development.¹⁰ NEMA provides a framework in which development projects are established in a sustainable manner taking into account their possible negative impact on the environment.¹¹ Section 2(4)(f) of NEMA also makes provision for public involvement in decisions affecting the environment.

South Africa as a developing country has embarked on large-scale infrastructural development including the construction of roads, dams, housing, and other facilities. These developmental projects will in one way or the other have an adverse effect on the environment. However, in the realisation of socio-economic rights the government often neglects to take into account the importance of a sustainable natural environment and its benefits in ensuring that development projects are sustainable.¹² The result of which is poor service delivery and unsustainable development projects.¹³ As a result, a carefully planned development process, which will take into account environmental issues, is a necessity.¹⁴

The question which this article aims to address is whether or not the right to development should be exercised, or given effect to, in such a manner as to ensure environmentally sustainable development in South Africa.

⁵Scheepers *Practical guide to law and development in South Africa* (2000) 17-20, see also arts 1 and 6(2) of the Declaration on the Right to Development UN Gen Assembly Resolution 41/128 of 4 December 1986.

⁶*Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 (Tk). This case involved a group of people who erected shacks on environmentally sensitive coastal areas with the respondents' permission.

⁷Sections 24, 26 and 27 of the Constitution.

⁸Carlson and Van Staden (n 3) 4-5.

⁹See para 4 (Strategic Goal 2 Sustainable Resource Use and Impact Management).

¹⁰Couzens 'A step closer to coherence' (1999) 6 *SAJELP* 13, 14-15.

¹¹Bray 'Towards sustainable development: Are we on the right track' (1998) 5 *SAJELP* 1, 1-9.

¹²See *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* paras 717D-F

¹³Beyers 'A figure/ground analogy for integrating sustainability and planning' (2006) 5 *Town and Regional Planning* 13-25.

¹⁴Odendaal 'Integrated development planning: An opportunity for planners to enable transformation?' (2007) 51 *Town and Regional Planning* 67-74.

The article has two main aims, namely to:

- link the right to development and the right to the environment to show their mutually supportive characteristics and illustrate their acceptance as justiciable fundamental rights; and to
- set a guide on how the government and developers can strike equilibrium between developmental activities and environmental management.

For the purposes of this article personal interviews with local authority representatives were conducted with respect to the impact of low-cost housing on the environment. The Diepsloot Township was used as a case study.¹⁵

2 The pertinent Constitutional Rights

2.1 Section 24 as a justiciable human right

Section 24 of the Constitution reads as follows:

Everyone has the right

- (a) To an environment that is not harmful to their health or wellbeing; 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.

Therefore, the entrenchment of the right to an environment that is not harmful to health or well-being in section 24 of the Constitution ensures that all government conduct, including individual conduct that impacts negatively on the environment, must comply with the constitutional right to a safe and healthy environment.¹⁶ The justiciability of the right to a safe environment finds its basis in section 7 of the Constitution, which provides that the State must respect,

¹⁵The reason I chose Diepsloot is that I have been a Diepsloot resident since 2001 and have witnessed the benefits and shortcomings of the Diepsloot project. Consequently, I saw the need to highlight the flaws of rushed government projects in order to prevent future unsustainable projects. I used unstructured open-ended questions for the interviews. Due to time constraints, not all respondents were interviewed. The City of Johannesburg officials, for example, were not interviewed. Four local government officials of Wards 95 and 96 (Region A) of the Johannesburg Metropolitan Council were interviewed. Three of the respondents, Dorah Mogano, Sam Sikhosana, and Abram Mabuke were original Diepsloot squatters. Sipiwe Mlotywa is a housing officer and moved to Diepsloot in 2001. The purpose of the interviews was to determine and discuss at community level measures employed to address the negative impact on the environment caused by the construction of new houses in the area. This method was used to determine the current reality, be it in only one area as a case study. However, the main method used in the research is a literature study. Primary and secondary sources of law such as legislation, case law, textbooks, journal articles, and the Internet were used as sources of information.

¹⁶Currie and De Waal *The bill of rights handbook* (2005) (5th ed) 522-523.

protect, promote, and fulfil the rights in the Bill of Rights.¹⁷

The incorporation of section 24 in the Constitution entails that it has both a vertical and horizontal application. This argument is based on the fact that section 8 of the Constitution provides that the Bill of Rights applies to and binds both the State and private individuals. According to Kidd, although the Constitution does not specifically provide that the right to a safe and healthy environment applies horizontally, the inclusion of this right in the Bill of Rights imposes a duty on all persons including the state either not to harm the environment or to protect the environment.¹⁸

Currie and De Waal share Kidd's sentiments and argue that a direct horizontal application of the right to a safe environment to private individuals is a reality since private individuals are the worst culprits when it comes to environmental degradation.¹⁹ As an illustration of this fact, attention is drawn to the numerous cases that had over the years dealt with complaints of environmental degradation. The case of *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism*,²⁰ involved a group of people who erected shacks on environmentally sensitive coastal areas with the respondents' permission. The applicants applied for a mandamus compelling the Minister to take steps to enforce the provisions of Decree 9 (Environment Conservation) of 24 July 1992, which declared a coastal conservation zone on the Transkei Wild Coast.

In *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment*,²¹ the court held that the *audi alteram partem*²² rule which encompasses the process of public participation was applicable when an application for a mining licence is made to the Director in terms of the then Minerals Act 50 of 1991.²³ The reason for the application of the rule was the enormous damage that mining can cause to the environment and ecological systems.²⁴ It was held further that the respondents had a right to be heard before the mining license was granted to the Second Applicants.

The case *Barnet v Minister of Land Affairs*,²⁵ involved the demolition of 16 cottages constructed on a coastal conservation area which respondents alleged were built unlawfully without proper authority from the Department of Agriculture and Forestry. In *Hichange Investment (Pty) Ltd v Cape Produce Company (Pty)*

¹⁷Section 7(2) of the Constitution.

¹⁸Kidd *Environmental law: A South African guide* (1997) 39.

¹⁹Currie and De Waal (n 16) 524

²⁰*Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 (Tks).

²¹*Director of Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA).

²²'*Audi alteram partem*' is a Latin phrase meaning both sides of the story must be heard.

²³(N 21) para 718G-J.

²⁴*Id* para 719A-C.

²⁵*Barnet v Minister of Land Affairs* [2007] SCA 95 (RSA).

Ltd t/a Pelts Products,²⁶ in which the applicant was a neighbour to Pelt Products, it was ruled that the stench caused by the respondent industry was held to cause an adverse effect on the well-being of the applicant.

The above cases illustrate the amount of damage that individuals may cause to the natural environment and others health through industrial and development activities. The courts must be applauded for their role in attempting to ensure that the right to a safe and healthy environment receives the same cognisance as all other rights in the Constitution. In *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment*, Olivier J held that 'Our Constitution, by including environmental rights as justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country'.²⁷ Furthermore, section 24 of the Constitution indicates an individualistic and collective aspect in its application. This means that this right can be protected for the benefit of both individuals and the general public.²⁸

2.2 *The right of access to housing and section 27 rights*

Socio-economic rights are rights that require the State to take positive measures to enable people to access certain basic needs (resources, opportunities, and services) necessary for human beings to lead a dignified life.²⁹

Brand³⁰ states that socio-economic rights create entitlements to material conditions for human welfare. From the above it suffices to say that socio-economic rights are rights aimed at improving the people's quality of life. They have as their primary objectives the upliftment of the living conditions of the people and assurance of their survival.

According to Liebenberg and Goldblatt,³¹ socio-economic rights are intended, among other things, to bridge the social disparities between the privileged and the poor. Liebenberg and Goldblatt argue that:

An approach to the interpretation of equality and socio-economic rights that acknowledges the interrelationship between these rights is also more likely to be

²⁶*Hichange Investment (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (C).

²⁷(N 21) para 719C-D.

²⁸Section 38 of the Constitution; see also section 32 of NEMA, as amended.

²⁹Khoza (ed) *Socio-economic rights in South Africa: A resource book* (2007) (2nd ed) 20.

³⁰Brand 'Introduction to the socio-economic rights in the South African Constitution' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 3, see also Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) (2nd ed) ch 33- 1, para 3, in which Liebenberg defines socio-economic rights as entitlements concerned with the material dimensions of human welfare.

³¹Liebenberg and Goldblatt B 'The interrelationship between Equality and Socio-economic rights under the South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335, 335-361.

responsive to the reality that the most severe forms of disadvantage are usually experienced as a result of an intersection between group-based forms of discrimination and socio economic marginalisation.³²

Therefore, proper realisation of socio-economic rights will ensure the equal and full enjoyment of our democracy.³³ Furthermore, this entails that when interpreting socio-economic rights the courts must take into account the values that underlie our democracy³⁴. In other words, the interpretation of socio-economic rights cannot be based solely on the literal interpretation of the relevant constitutional provisions. Other extrinsic factors and conditions must be considered to ensure that no unnecessary impediments stand in the way of the realisation of these rights.

South African courts have, over the years, developed a threshold based on a number of factors to ensure that socio-economic rights such as the right of access to housing and health care services are fully realised and justiciable. This threshold is based on factors developing from international law, regional law, national law (legislation), past historical experiences and current prevailing circumstances.

2.2.1 The reasonableness test

Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. Section 26(2) of the Constitution provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. At first glance this provision would seem to state that the State must not ensure the provision of the right to housing, but rather establish the means and measures that will lead to the provision of this right. In other words, houses need not be constructed in order for the State to comply with section 26.³⁵ This interpretation is brought about by the framing of section 26 as a whole. In the *Oxford English Dictionary* the word 'access' is defined as 'a way of approaching or reaching or entering'. This means that there should be made available an enabling environment to assist citizens to acquire their constitutional entitlements.

In South Africa, the State has put measures in place in the form of legislation and policies to enable everyone within the Republic to realise their socio-economic rights. In the housing department, legislation such as the Housing Act 107 of 1997 was enacted to give effect to Section 26 of the Constitution by providing for the facilitation of a sustainable housing development process, and laying down general principles applicable to housing development in all spheres of government.³⁶

³²*Id* 339

³³For further discussion, see Liebenberg 'Socio-economic rights under a transformative Constitution: The role of the academic community and the NGOs' (2007) 8 *ESR Review* 3-9.

³⁴See Liebenberg 'The value of freedom in interpreting socio-economic rights' (2008) *Acta Juridica* 149, 149-176 on how the value of freedom has been used by the courts to determine the 'reasonableness' of government policies and programmes.

³⁵*Government of RSA v Grootboom* 2001 1 SA 46 (CC) para 35.

³⁶Long title of the Housing Act 107 of 1997.

The objectives of the Act include giving priority to the needs of the poor in housing development, consulting meaningfully with individuals and communities affected by housing development, and ensuring that housing development is based on integrated development planning.³⁷

More recently, the Housing Development Housing Agency Act 23 of 2008 was enacted. The aim of the Act is to establish a body that will facilitate and accelerate housing delivery in South Africa.³⁸ Among some of its important objects,³⁹ the Act is designed to project manage housing development services for the purposes of the creation of sustainable human settlements and to monitor the provision of all infrastructure required for housing development.

Section 27(1) of the Constitution provides that:

Everyone has the right to have access to

- (a) Health care services, including reproductive health care;
- (b) Sufficient food and water; and
- (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Section 27(2) of the Constitution provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to health care. Hence, in the sphere of healthcare, the National Health Act 61 of 2004 was enacted to give effect to the State's obligation in terms of Section 7(2) of the Constitution and to provide a framework for a structured uniform health system thereby giving effect to section 27(2) of the Constitution and related health legislation in both the national, provincial and local spheres of government. The Choice on Termination of Pregnancy Act 92 of 1996 was enacted to give effect to reproductive healthcare.⁴⁰

The above-mentioned legislation and its ancillary policies and programmes give effect to the wording of sections 26(2) and 27(2) of the Constitution. Accordingly the proper implementation of these legislative measures will indicate whether or not the State has taken reasonable measures to fulfil its obligations in terms of sections 26 and 27 of the Constitution.

However, it is not an easy task to determine whether or not the legislative measures taken by the State are reasonable, as required by the internal limitation clauses. This intricate task is often left to the courts to decide if in any given situation, the State can be considered to have acted reasonably. In South Africa, the *Grootboom* test of reasonableness has become a benchmark in the determination of what can be considered reasonable government measures for the realisation of

³⁷Section 2 of the Housing Act 107 of 1997.

³⁸See section 4 and 5 of the Housing Development Agency Act 23 of 2008.

³⁹Section 4(b) and (d) of Act 23 of 2008.

⁴⁰See also Ngwena and Cook 'Rights concerning health' in Brand and Heyns (eds) *socio-economic rights in South Africa* (2005) 107-151.

socio-economic rights. An interesting feature in the *Grootboom* case is the way in which the Constitutional Court outlined the values that underlie the Constitution and linked these values to the past apartheid legacy and the present socio-economic plight.⁴¹ By so doing it appears that the Court, in its decision took into account values such as human dignity, equality, and freedom that underlie the Constitution and the historical experiences of the South African people.

Hence, the Court approached the *Grootboom* case with a contextual approach⁴² in order to arrive at a just and constitutionally acceptable decision. This means that the 'reasonableness test' as set out in the *Grootboom* case was thoughtfully and sensitively formulated.

The reasonableness test in *Grootboom* was developed in an attempt to ensure the justiciability of socio-economic rights in a more realistic and practical rather than a theoretical manner. In its interpretation of section 26 of the Constitution, the Court took into account the interrelatedness of all the rights entrenched in the Bill of Rights and held as follows:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom, and equality, the foundational values of our society, are denied those who have no food, clothing, or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁴³

The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.⁴⁴

A close analysis of the Court's decision reveals that in order to facilitate the right of access to housing all other constitutional rights must be taken into consideration, more especially the right of access to health care services and a safe and healthy environment. In other words, the environment or site where the houses are to be built must be habitable.⁴⁵

This is consistent with South Africa's international commitments. Article 60 of the Habitat Agenda provides that adequate shelter means more than a roof over

⁴¹*Grootboom* (n 35) paras 1-6.

⁴²*Id* paras 21-25.

⁴³*Id* para 23.

⁴⁴*Id* para 24.

⁴⁵*Id* para 35.

one's head. It also means adequate privacy, adequate space, physical accessibility, adequate security, security of tenure, structural stability and durability, adequate lighting, heating and ventilation, adequate basic infrastructure, such as water-supply, sanitation and waste-management facilities, suitable environmental quality and health-related factors, amongst others.

As a signatory to the Habitat Agenda, South Africa has over the years attempted to comply with its international commitments. In 2004, the Department of Housing compiled a progress report to the United Nations Commission for Sustainable Development indicating its implementation of housing policies and programmes.⁴⁶ Furthermore, the Court in *Grootboom* considered the importance of section 39(1)(b) of the Constitution which provides that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law and deliberate on the difference between the contents of section 26 and Article 11 of the ICESCR. The Court held that Article 11 of the ICESCR required that State parties provide basic shelter immediately, with minimum consideration of the prevailing budgetary and other administrative factors that the government may face.⁴⁷

According to the Court the wording of Article 11.1 imposes a minimum core obligation on the government to provide shelter to everyone who requires such shelter. The Court considered such an approach unsuitable for South Africa taking into account the framing of section 26 of the Constitution that provides for access to housing rather than the right to adequate housing. In other words, measures must be taken to realise the right in section 26 rather than provide housing as an outright entitlement. In *Grootboom* the minimum core argument could not suffice since South Africa has not ratified the ICESCR and cannot be bound by its provisions.

I now outline the principles that were set out in the *Grootboom* case that are required before a government policy or programme aimed at the realisation of socio-economic rights, in particular the right of access to adequate housing can be considered reasonable:⁴⁸

- A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.
- A co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution. This principle is vital since the implementation of socio-economic programmes take place within the local sphere of government.⁴⁹

⁴⁶South Africa's Progress Report on Human Settlements 14-20 April 2004 <http://www.info.gov.za/view/DownloadFileAction?id=70150> (accessed June 2009)

⁴⁷*Grootboom* (n 35) para 26-33.

⁴⁸*Grootboom* (n 35) paras 38-46.

⁴⁹See s 152 of the Constitution and Schedule 4(Part B) and Schedule 5 (Part B) of the Constitution.

- Reasonable measures/programmes must be considered in their social, economic, and historical context.
- The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right.
- The programme must also be reasonably implemented.
- The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs. In other words it must cater for the socio-economic needs of the most vulnerable and poverty stricken members of the society. This means that those in dire need must be given priority in the realisation of socio-economic rights.⁵⁰
- A reasonable programme must be assessed within the available resources of the State.

The importance of the *Grootboom* test of reasonableness was revealed in the recent case of *Mazibuko v City of Johannesburg*.⁵¹ In arriving at its decision, the Constitutional Court followed the principles set out in the *Grootboom* case. More specifically the Court took into account the social, economic, and historical experiences of the Phiri residents.⁵² However, a very important feature in this case was set out in the determination of the reasonableness of the water policy as implemented by the City of Johannesburg.

The Court held that the argument based on the minimum core could not suffice as a result of the contents of sections 27(1) and (2) of the Constitution. The Court held further that the obligation imposed by section 27 requires the State to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. Therefore, there is no direct entitlement to claim "sufficient water" from the State immediately.⁵³

It is apparent from the above that the analysis of section 26 in the *Grootboom* case was employed in *Mazibuko*, with the effect that the same criterion used to determine the reasonableness of the housing programmes in *Grootboom* was directly applied.⁵⁴

2.2.2 The minimum core approach

Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. In the South

⁵⁰ *Grootboom* (n 35) paras 52-69.

⁵¹ *Mazibuko v City of Johannesburg* Case CCT 39/09 [2009] ZACC 28.

⁵² *Id* paras 10-18.

⁵³ *Id* para 57.

⁵⁴ *Id* paras 78-162.

African context it means international instruments such as the ICESCR, CEDAW, African Charter, including other international commitments such as the Millennium Declaration of 2000 and the Millennium Targets and Goals may be taken into consideration when handing down decisions regarding socio-economic disputes. This argument is based on the fact that the South African national laws and the Constitution fall short of international standards more specifically with regard to the government's obligations to provide the basic needs such as housing, food, water, and health services that people require to survive.

In terms of General Comment 3 of the CESCR,⁵⁵ the government has the duty to provide the basic essential levels of each of the socio-economic rights for all the people. Accordingly, an obligation is placed on the State to ensure that its entire population, rather those who lack the basic necessities of life, has the very minimum of those services to lead a dignified life.

Pieterse⁵⁶ argues that the basis of the minimum core is that no person should be allowed to live below the minimum levels of socio-economic subsistence regardless of the State's resources. He further states that the minimum core of a right represents a 'floor' of immediately enforceable entitlements from which progressive realisation should proceed.⁵⁷ Based on these arguments, I submit that the internal limitations included in the socio-economic provisions of the Constitution do not limit the obligation of the State to provide that which could be considered the content of basic socio-economic rights. In this instance, reference is made to sections 26(1) and 27(1) of the Constitution.

The literal interpretation of these provisions requires that the State should enable everyone within the Republic the services stated hereto.⁵⁸ Bilchitz argues that the entrenchment of constitutional rights is to protect the poor and vulnerable members of the society who lack basic services such as shelter, food and health services. Hence, the needs of these people must be given priority in the realisation of socio-economic rights.⁵⁹ He argues that the Constitutional Court's recognition that a reasonable government programme⁶⁰ must cater for the needs of the most poverty stricken and in desperate need of basic services, indicates that a minimum core approach to the realisation of socio-economic rights in South Africa is possible.⁶¹

⁵⁵See para 10 of 'The nature of States parties' obligations' (art 2 par 1): 14/12/90.CESCR General comment 3 (General Comments) [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenD](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenD) (accessed June 2009)

⁵⁶Pieterse 'Resuscitating Socio-economic Rights: Constitutional entitlements to health care services' (2006) 22 *SAJHR* 473, 481.

⁵⁷*Ibid.* see also Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1-26.

⁵⁸*Id* 480-484.

⁵⁹Bilchitz (n 57) 15-18.

⁶⁰*Grootboom* (n 35) para 44.

⁶¹Bilchitz (n 57) 16-17. See also Liebenberg 'Basic rights claims: How responsive is "reasonableness review"?' (2004) 5 *ESR Review* 7-11.

Although the *Grootboom* and *Mazibuko* cases represent a major triumph towards the justiciability of socio-economic rights, the refusal by the Constitutional Court to recognise the minimum core approach to section 26 and 27 rights does little to ensure the enjoyment of these rights by the most poverty stricken and vulnerable segments of society.⁶² The outcome of these decisions defeats the purpose for which socio-economic rights were included in the Constitution.⁶³ In conclusion, it is possible to apply the minimum core approach in South Africa. In *Minister of Public Works v Kyalami Environmental Association*⁶⁴ the government erected a transit camp for flood victims whose homes were flooded by the Jukskei River in Alexandra. The camp was erected near the Leeuwkop Prison. The respondents objected to the establishment of the camp because it affected the surrounding environmental features. The Court held that the government's action was lawful as it had acted in terms of its constitutional duty to provide relief to victims of disaster. Therefore this indicates that, having taken into account the intolerable and poor living conditions experienced by the Wallacedene and Phiri communities, nothing hinders the Court from ordering the immediate realisation of basic services in appropriate circumstances.

2.3 *The right to a safe environment as a socio-economic right*

Section 24 of the Constitution provides that everyone has the right:

- (a) to an environment that is not harmful to their health or wellbeing; 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.

Before I dwell on scholarly arguments that indicate that section 24 rights are socio-economic rights, I would like to draw attention to similarities between sections 24, 26 and 27 rights as entrenched in the Constitution.

The following are notable characteristics in both the right to a safe and healthy environment and the traditional socio-economic rights such as the right of access to adequate housing and healthcare services:

- The rights are human-centered; their protection is based on the fact that they are beneficial to human survival.

⁶²See Bilchitz 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* 2-6 for the benefits of a minimum core approach to socio-economic rights.

⁶³See Stewart 'Current Developments: Rights, Regulation and Resistance: The Phiri Water Campaign' (2008) 24 *SAJHR* 593, 597-601. See also Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) *Stell LR* 1, 5, 16-36.

⁶⁴*Minister of Public Works v Kyalami Environmental Association* 2001 3 SA 1151(CC).

- The rights place a negative obligation on the State not to hamper their realisation and a positive obligation to ensure their realisation by requiring that reasonable measures be enacted,⁶⁵
- The right to a safe environment contains aspects that are integral to the realisation of the right of access to housing and section 27 rights, namely, sustainable development and use of ecological resources.

In terms of NEMA, sustainable development is defined as follows: 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.⁶⁶

According to Stewart and Horsten⁶⁷ the concept of 'sustainability' (which is derived from sustainable development) refers to the ability of one or more entities either individually or collectively to exist and flourish (either unchanged or in evolved forms) for lengthy time periods. Therefore, sustainable development means an integration of social, economic, and ecological viability of a resource.⁶⁸ In view of the above I am inclined to support Stewart and Horsten's argument that the right of access to sufficient water is connected to section 24(a) of the Constitution because the right to a safe environment suggests that people should have access to clean water and that section 24(b) implies that water is a scarce commodity and as such must be preserved for future generations.⁶⁹

The two authors argue that sustainable development comprises of three interdependent and mutually reinforcing components, namely, environmental sustainability (which requires that natural capital remains intact), social sustainability (which requires that individual needs be met) and economic sustainability (which requires that both environmental and social sustainability be economically feasible).⁷⁰

This argument supports the notion that section 24 rights are anthropocentric in nature in that their protection is largely based on the fact that the natural environment is seen as of economic value to human interests, needs, and wants.⁷¹ Furthermore, the link between section 24 and traditional socio-economic rights supports the idea of interdependency of rights, in that the rights enshrined in the Bill

⁶⁵National Environment Management Act 107 of 1998 (NEMA), EIA Regulations of 2006 as amended, National Health Act of 2004, Development Facilitation Act 67 of 1995, Housing Act 107 of 1997 and the National Housing Code are among the various legislative measures aimed at realising these rights.

⁶⁶Section 1(xxix) of NEMA.

⁶⁷Stewart and Horsten D 'The role of sustainability in the adjudication of the right to access adequate water' (2009) 24 *SAPR/PL* 486, 489.

⁶⁸Bray (n 11).

⁶⁹Stewart and Horsten (n 67) 488.

⁷⁰*Id* 492-494.

⁷¹Carlson and Van Staden (n 3) 6.

of Rights cannot be read in isolation of each other.⁷² A point worth noting is that it is impossible to have sustainable realisation of socio-economic rights without considering the sustainability of the environment. This is so because sustainability of resources is vital in the improvement of the quality of life of the people and to ensure that the realisation of socio-economic rights is not short-lived.⁷³

Moreover, the improvement of peoples' living conditions cannot be achieved in a deteriorating environment.⁷⁴ As a result, an integration of economic, social, and environmental issues is of absolute necessity.⁷⁵

3 Nexus between the right to development and socio-economic rights

The right to development is an internationally developed concept which refers to a broad spectrum of rights that are entrenched in international law instruments and national laws. Article 1(1) of the Declaration on the Right to Development⁷⁶ (DRD) states that the right to development is an inalienable human right by virtue of which every individual and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development within which all human rights and fundamental freedoms can be fully realised.

From the wording of Article 1(1) of the DRD it is self-evident that the right to development is an umbrella concept for all the rights aimed at the improvement of the quality of life of people. In other words, the right to development is closely associated with improving the quality of life and living conditions of people.⁷⁷

3.1 Content of the right to development

In order to understand the right to development, the word 'development' must be

⁷²*Grootboom* (n 35) paras 23-25, See also Feris 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *SAJHR* 29, 34-49.

⁷³Stewart and Horsten (n 67) 493- 494.

⁷⁴*Fuel Retailers Association of SA v Director-General, Environmental Management, Mpumalanga Province* 2007 6 SA 4 (CC) para 44,59, 79-82, See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) para 144B and Paterson 'Fueling the sustainable development debate in South Africa' (2006) 123 *SALJ* 53, 53-62 for a full discussion of the concept of sustainable development as developed through case law 53-62.

⁷⁵Bradlow 'Differing conceptions of development and the content of international development law' (2005) 21 *SAJHR* 47, 74-76. See also Tladi 'Intergenerational equity: A new name for international environmental justice' (2003) 9 *Fundamina: A Journal of Legal History* 197, 197-202 and Tladi 'International monetary fund conditionality, debt and poverty: Toward a strong "anthropocentric" model of sustainability' (2004) 16 *SA Mercantile LJ* 31, 32.

⁷⁶Declaration on the Right to Development adopted by General Assembly Resolution 41/128 of 4 December 1986 <http://www.unhcr.ch/html/menu3/b/74.htm> (accessed June 2009)

⁷⁷Scheepers (n 5) 17-18. See also arts 11-20 of the United Nations Millennium Declaration <http://www.un.org/millennium/declaration/ares552e.htm> (accessed June 2009).

properly defined in the context of social and economic development. In the White Paper on Environment Management Policy for South Africa of 1998, development is defined as a 'process for improving human well-being through a reallocation of resources that involves some modification of the environment'. It addresses basic needs, equity, and the redistribution of wealth. Its focus is on the quality of life rather than the quantity of economic activity. Scheepers⁷⁸ defines development 'as a people-centred process of change depending for its ultimate success on the capacity of people to manage the process through a variety of critical steps and phases within the limits of an institutional and value framework that will guarantee meaningful and lasting improvement of quality of life for all in a peaceful, stable and well-governed environment'. Khoza⁷⁹ defines development in the context set out in the DRD and states that development is a comprehensive economic, social, cultural, and political process that aims to improve the well-being of communities and individuals. He defines human development as a process of enlarging a range of choices through expanding human functioning and capabilities. According to Khoza, development is concerned with ensuring access to the resources, services and opportunities necessary for a decent standard of living.

From the above it is clear that the right to development and socio-economic rights have common characteristics as both are aimed at the improvement of the living conditions and quality of life of people and are human-centered.⁸⁰ Bradlow⁸¹ recognises two views to the right to development, namely, the traditional view and modern view. In terms of the traditional view, development is viewed as an economic growth process that consists of identifiable projects such as the construction of a dam, road or school and specific economic policies.⁸² This view is restrictive and is more concerned with the betterment of material well-being regardless of other supervening factors. Factors such as environmental and social implications of a project are not at the core of this view.

In South Africa, the traditional view is sometimes apparent in government policies aimed at improving the citizens' quality of life.⁸³ The vision of the RDP is to meet basic needs, develop human resources and democratise the State and society.⁸⁴ The purpose of the RDP was to improve the quality of life of all South

⁷⁸Scheepers (n 5) 8.

⁷⁹Khoza 'The link between development, and social and economic rights: Are socio-economic rights developmental rights?' http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-poverty-and-development/ser_and_developmental_rights.pdf (accessed June 2009).

⁸⁰See discussion above in paragraph 2.2 of this article.

⁸¹Bradlow (n 75) 52.

⁸²*Id* 53-66.

⁸³Reconstruction and Development Programme (1994) and Growth, Employment and Redistribution Strategy (1996).

⁸⁴RDP para 1.4.

Africans especially the most poor and marginalised sections of society.⁸⁵ The RDP programme was aimed at realising socio-economic rights, which encompass the right to development.

The modern view of development, describes development as an economically, politically, socially and environmentally integrated process.⁸⁶ Development is viewed holistically with the economic aspects of development being considered together with the social, political, environmental, and cultural aspects.⁸⁷ Bradlow⁸⁸ states that in conducting development projects the harmful nature of such projects and the ability of the environment to sustain human societies must be carefully considered. This view leads one to the concept of 'sustainable development'⁸⁹ which is central to social and economic development.

In this instance I distinguish between three types of sustainability, namely:⁹⁰

- Social sustainability: social justice and equity – this principle measures community participation and social justice, paying particular attention to the most vulnerable people in society. Value is attached to social capital, social networks and improving quality of life. It supports the use of appropriate technology and meeting basic needs without degrading ecological systems.
- Ecological sustainability: the conservation of biodiversity and the maintenance of ecological integrity – through this principle the use of natural resources is limited to a level that allows nature to regenerate and minimises the use of non-renewable resources. It aims to reduce the amount of waste and pollution that is released into the system, and so does not overextend the carrying capacity of global sinks, such as the oceans and atmosphere. It recognises the intrinsic value of the natural environment.
- Economic sustainability: economic viability and integrity -- this principle focuses on economic growth that is viable and fair, and which occurs at a rate that does not exceed the ability of natural and social systems to support this growth. It also considers how wealth is distributed, and questions the inequality of the current neo-liberal global economic system.

⁸⁵RDP para 2.2.3.

⁸⁶Bradlow (n 75) 67.

⁸⁷*Ibid.*

⁸⁸*Id* 67-68.

⁸⁹Sustainable development is defined as '(a) The concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority must be given; and (b) the idea of limitations imposed by the state of technology and social organisation on the environments ability to meet present and future needs'. Report of the World Commission on Environment and Development: Our Common Future published as General Assembly document A/42/427 http://en.wikipedia.org/wiki/Brundtland_Commission_ch_2_para_1 (accessed June 2009). The WCED definition of sustainable development represents the three core principles of sustainable development, namely, the principle of intergenerational equity, intragenerational equity, and integration.

⁹⁰IMIESA April 2004 55.

Taking into consideration the above definition of sustainable development it is clear that in order to realise the right to development, sustainability must be a determining factor to ensure sustainable living conditions of people and long-term improvement of their quality of life. In South Africa, the modern view of development is entrenched in legislation. Section 2(3) of NEMA provides that development must be socially, environmentally, and economically sustainable. The Local Government: Municipal Systems Act 32 of 2000 defines the concept of 'environmentally sustainable' as the provision of a municipal service in a manner aimed at ensuring that –

- (a) the risk of harm to the environment and to human health and safety is minimised to the extent reasonably possible under the circumstances;
- (b) the potential benefits to the environment and human health and safety are maximised to the extent reasonably possible under the circumstances;
- (c) legislation intended to protect the environment and human health and safety is complied with.

This draws attention to the fact that, as with socio-economic rights, the right to development is not self-executing and requires a proper integration of social, economic, and environmental factors to be realised.⁹¹ Therefore, taking into account the contents of the rights entrenched in sections 24, 26 and 27 of the Constitution and the content of the right to development, it is apparent that these provisions and the right to development have common characteristics. Further, that central to these provisions and the right to development lies a need to ensure that the improvement of the quality of life through development projects takes place in a sustainable environment, which takes cognisance of the need to balance the improvement of the quality of life and the proper use of ecological resources. Therefore, in my view the right to development should be considered a protected right in terms of the Constitution since it is indirectly entrenched through sections 24, 26 and 27 of the Constitution.

3.2 Importance of the right to environment in housing development: A case study

Although it is generally accepted that all rights are based on the principles of indivisibility, universality and interdependence,⁹² this notion is often disregarded when there are competing interests between the right to a safe environment and other socio-economic rights such as the right of access to adequate housing. This argument is based on the fact that the importance of the right to a safe environment is given little regard in development projects, despite the fact that all development projects, especially infrastructural projects, require a sustainable environment in order to be properly carried out.

⁹¹Stewart and Horsten (n 67) 491.

⁹²See Mubangizi 'Towards a new approach to the classification of human rights with specific reference to the African context' (2004) 4 *African Human Rights LJ* 93, 93-107.

Principle 1 of the Stockholm Declaration⁹³ provides that man has the fundamental right to freedom, equality, and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. On the other hand, Principle 8 of the Stockholm Declaration provides that economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

These principles reflect the core elements of sustainable development and the importance of protecting the environment in order to advance human economic development. An obligation is imposed on governments to ensure that development projects are carefully planned.⁹⁴

In South Africa, the principles of the Stockholm Declaration are reflected in the National Environment Management Act 107 of 1998 (NEMA) as amended and the White Paper on National Environment Management Policy of 1998 (The White Paper).⁹⁵ Section 2(3) provides that development must be socially, environmentally and economically sustainable.⁹⁶ This subsection incorporates the concept of sustainable development into environment rights and reveals the fact that NEMA is based on the principles set out in the World Commission on Environment and Development Report of 1987.⁹⁷

The White Paper is the foundation of NEMA and all the principles contained in the Act. In the past few years the Constitution, together with the NEMA, ECA and other environmental laws, have been used to determine whether development projects are environmentally 'friendly'. The White Paper which preceded NEMA also contained the concept of sustainable development and its principles. According to its vision, the White Paper sought to achieve integrated sustainable development as set out in the WCED Report. The definition of sustainable development as defined in the WCED Report was incorporated into the White Paper. The White Paper contained its own definition of sustainable development which read as follows: 'in the context of this policy sustainable development is defined as development which seeks to integrate environmental, social, and economic concerns, now and in the future and to keep within the carrying capacity of the

⁹³Declaration of the United Nations Conference on the Human Environment <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed June 2009)

⁹⁴Preamble to the Stockholm Declaration para 6; see also principles 2, 4, 8 and 12 which makes provision for the integration of economic development and environmental management.

⁹⁵The White Paper on National Environment Management Policy of 1998 <http://www.environment.gov.za/PolLeg/WhitePapers/EnvMgmt.htm> (accessed June 2009)

⁹⁶See Paterson 'Fueling the sustainable development debate in South Africa' (2006) 123 *SALJ* 53, 54.

⁹⁷WCED Report (n 81) annexe 1, principle 7 provides that states shall ensure that conservation is treated as an integral part of the planning and implementation of developmental activities and provide assistance to other States, especially to the countries of the global South, in support of environmental protection and sustainable development.

environment'. An overall analysis of the White Paper reflects principles such as good governance, public participation, sustainable resource use, the precautionary principle, the polluter pays principle and the principle of integration are all at the heart of the concept of sustainable development. These principles have been incorporated into the Local Government: Municipal Systems Act 32 of 2000. Section 26 provides that an integrated development plan must reflect the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation, and a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality.

Section 25 of the Local Government: Municipal Systems Act provides that an integrated development plan adopted by the municipality must be compatible with the national and provincial development plans and planning requirements binding on the municipality in terms of the legislation.

Sections 25 and 26 of the Local Government: Municipal Systems Act reflect the integrated environmental management principles set out in chapter Five of NEMA, which have as its purpose to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of development activities.⁹⁸

To illustrate the importance of the right to environment in development activities with reference to housing development, the Diepsloot Township will be used as a case study.

3.2.1 Background

The Diepsloot Township situated south of Pretoria and north of Johannesburg was established in the early 1990s when people who settled in a certain plot in the Zevenfontein area (now commonly known as Honeydew) were moved to Diepsloot. The plight of the Diepsloot settlers (then Zevenfontein squatters) was recorded in three cases.⁹⁹ The cases reveal that the establishment of Diepsloot Township was greatly opposed by the Diepsloot residents and landowners. The core issues brought before the court by the Applicants were that the establishment of a township would bring about;¹⁰⁰

- (a) Public nuisance, namely an increase in crime.
- (b) Air pollution and other forms of pollution.
- (c) Diminution in the value of properties adjacent to the Diepsloot site and result in economic loss for the Diepsloot residents.

⁹⁸Section 23(1) of NEMA.

⁹⁹*Diepsloot Residents' and Landowners v Administrator, Transvaal* 1993 1 SA 577 (T); *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 3 SA 49 (T), 1994 3 SA 336 (A).

¹⁰⁰*Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 3 SA 49 (T) paras 52I-53A-F.

The government (Respondent) argued that the above issues could be avoided or abated by doing, amongst others, the following,¹⁰¹

- (a) A proper town planning scheme.
- (b) The establishment of roads.
- (c) The supply of fresh water.
- (d) Proper sewage facilities.

The Appellate Division (now Supreme Court of Appeal) finally resolved the dispute between the Diepsloot residents and the government. As a result, the government settled between 400-500 individuals in the Diepsloot site.¹⁰² The squatter camp was known as the Rhema squatter camp with reference to the Rhema Church that provided food and other relief to the settlers. Save for the provision of electricity, the government fulfilled its promises by providing water taps, removal bucket toilets, and constructing proper gravel roads.¹⁰³

Four years later in 1999, the first low-cost houses were constructed. Today Diepsloot boasts thousands of these houses. In addition, a number of schools, clinics, community halls, a metro police depot, libraries and a shopping mall have been constructed. A police station is on the verge of completion.¹⁰⁴ Although the development in Diepsloot is most welcome and appreciated by the residents, its environmental sustainability was overlooked.

3.2.2 Analysis of the Diepsloot project in light of applicable legislation

As stated above, the Diepsloot Township was established around 1995 and the first low-cost houses were built around 1999.¹⁰⁵ At the time, the government had already enacted a number of legislative measures that had to be followed in housing development. In this instance reference is made to the Development Facilitation Act 67 of 1995, Housing Act 107 of 1997, National Housing Code, Environment Conservation Act 73 of 1989 and its regulations¹⁰⁶ and NEMA and its regulations.

¹⁰¹*Diepsloot Residents' and Landowners v Administrator, Transvaal* 1993 1 SA 577 (T) paras 582I-583A.

¹⁰²The shacks in Diepsloot have increased to thousands. This is because of the removal of Alexander residents affected by floods between 2000 and 2001 to Diepsloot and the settlement of other homeless individuals. This has further resulted in the existing water and sewage systems being burdened. The health and environmental hazards in the Diepsloot squatter camp are appalling.

¹⁰³Personal observation.

¹⁰⁴Personal observation.

¹⁰⁵See also Himlin, Engel and Mathoho *Land use management and democratic governance in the city of Johannesburg, case studie: Kliptown and Diepsloot* <http://web.wits.ac.za/NR/rdonlyres/D9482826-056C-4B02-948A-504CC398EE83/0/05CASESTUDYKLIPTOWNANDDIEPSLOOT.pdf> (accessed June 2009)

¹⁰⁶The Environment Conservation Act EIA Regulations of 1997 were repealed by the EIA Regulations promulgated under the NEMA in 2006 as amended in 2009.

Although some of these legislative measures came into operation when the Diepsloot housing project had already commenced, the developers had an obligation to comply with the existing measures. On the other hand, the local government had an obligation to ensure compliance with the existing environmental and developmental laws.

In terms of the White Paper on Local Government of 1998, the local government is tasked with ensuring that communities are provided with basic essential services including infrastructural development.¹⁰⁷ In Section B, paragraph 2, the White Paper sets out the developmental outcomes of local government which includes *inter alia*:

- Provision of household infrastructure and services.
- Creation of liveable, integrated cities, towns, and rural areas.
- Local economic development.
- Community empowerment and redistribution.

However, core to any development process and planning of the local government is the concept of environmental sustainability.¹⁰⁸

Du Plessis¹⁰⁹ defines 'environmental rights' as basic rights to a qualified environment beneficial to human life and well-being that belong to members of existing and future generations. Environmental rights are rights of action and rights of reciprocity that consider: the state of the environment; the relation and interaction between people and their environment; as well as the dependency of human life on the natural resource base.

Taking into consideration the definition of sustainability by Stewart and Horsten above and Du Plessis's definition of environmental rights, one is inclined to conclude that a development process that takes place within a viable environment¹¹⁰ is sustainable. In any development project planning is the primary step. Van Wyk¹¹¹ states that land use planning is divided into two separate and independent processes, namely, forward planning (also known as plan creation, planning of land use, or integrated development planning), and development control (also known as the management of changes to the use of land, or land use management)¹¹². She

¹⁰⁷See section B of the White Paper on Local Government <http://www.finance.gov.za/legislation/mfma/guidelines/whitepaper.pdf> (accessed June 2009)

¹⁰⁸White Paper on Local Government, section B para 2.2.

¹⁰⁹Du Plessis (2008) 2 'Public participation, Good environmental governance and fulfilment of environmental rights' *PER* 1, 4.

¹¹⁰The word 'environment' refers to the definition contained in NEMA.

¹¹¹Van Wyk 'The impact of development on the environment as part and parcel of integrated development planning?' (2007) 11 *Law, Democracy and Development* 57, 59-60.

¹¹²In the Land Use Management Bill, published in GG no 30979 of 2008-04-15, 'land development' includes any measure aimed at, or likely to have the effect of, commencing, establishing or maintaining improvements on land; 'land use management' means to establish or implement any measure to regulate the use, or a change in the form or function, of land and includes land development.

further states that the planning process is within the functional area of the local authority and that environmental issues are significant in land use management.¹¹³ In Diepsloot the development control process was not properly performed. This is so because the final product of the project (the established township) is a far cry from what can be considered a sustainable human settlement. Article 29 of the Habitat Agenda provides that human settlements shall be planned, developed and improved in a manner that takes full account of sustainable development principles and all their components, as set out in Agenda 21 and related outcomes of the United Nations Conference on Environment and Development.

Article 17 of the Rio Declaration provides that an environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority. When Diepsloot was originally established the old regulations under the Environment Conservation Act 73 of 1989 were still operative.¹¹⁴ Therefore, the developers had an obligation to adhere to the said regulations during the construction of the Diepsloot low-cost houses.

Diepsloot is situated in a wetland and, as a result, a proper Environmental Impact Assessment (EIA) was required.¹¹⁵ Chapter 5 of NEMA, as amended, makes provision for an Integrated Environment Management system (IEM system).¹¹⁶ The aim of the IEM system is to ensure that the implementation of developmental activities are harmonised with the needs of the environment. This places an obligation on developers to follow the legislative framework aimed at minimising damage to the natural environment in conducting development activities.

In 2006, the Minister of Environmental Affairs and Tourism, acting in terms of section 24(5) of NEMA, promulgated the EIA Regulations¹¹⁷ to assist in implementing the provisions of the Act. The purpose of the regulations was to assist developers in executing development projects in order to ensure the sustainability of such projects and the protection of the environment.

In terms of the Housing Act 107 of 1997, housing development means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to –

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

¹¹³*Ibid.*

¹¹⁴The EIA Regulations R1182 to R1184 of 1997-09-05 promulgated under the ECA were repealed by the EIA Regulations GN 385-387 as amended of 2006-07-03 promulgated under NEMA.

¹¹⁵(N 105) 34.

¹¹⁶See ss 23 and 24 of NEMA.

¹¹⁷EIA Regulations, GN: 385, GN: 386 and GN: R387, GG 28753 (2006-04-21).

- (b) potable water, adequate sanitary facilities and domestic energy supply.

On the other hand the Development Facilitation Act 67 of 1995 makes provision for land development objectives and the procedures relating to the manner in which the public and interested parties shall be consulted in the setting of land development objectives. Section 28(1) of the DFA provides that land development objectives shall relate to –

- (a) the objectives of the relevant authority in relation to access to and the standard of services for land development, including public transport and water, health and education facilities;
- (b) the objectives (with reference to local circumstances, including demographic circumstances and prevailing spatial patterns) relating to urban and rural growth and form in the relevant area, including objectives in relation to, amongst others, the integration of areas settled by low-income communities into the relevant area as a whole, the sustained utilisation of the environment and the provision of bulk infrastructure for the purpose of land development.

Having regard to the provisions of the Housing Act, the DFA and the IEM system as set out in chapter 5 of NEMA and the EIA Regulations, the fact that in Diepsloot the houses were constructed before the construction of roads, the installation of stormwater drainage and sewage systems, an electricity system, streetlights and other facilities that are usually required before a housing project¹¹⁸ is implemented indicates this projects's non-compliance with the relevant developmental and environmental legislative measures.

The lack of proper planning including the failure to comply with the existing EIA system in the Diepsloot project has led to a waste of public funds as the government is now trying to rectify the mistakes of the project. The upgrading of the existing infrastructure is fruitless as there are too many entrenched informal social housing activities taking place.¹¹⁹

In a recent case of *Fuel Retailers Association of SA v Director-General, Environmental Management, Mpumalanga Province*, Ngcobo J held that the Constitution and environmental legislation introduce new criteria for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations.¹²⁰

¹¹⁸Interview S Mlotywa, Housing Officer, Diepsloot Regional Office (Region A) 2008-07-15.

¹¹⁹See Paschke and Glazewski 'Ex Post Facto authorization in South African Environmental Assessment Legislation: A Critical Review' (2006) 1 *PER* 1, 1-32 on the difficulties of conducting an EIA *after* the completion of a development project.

¹²⁰(N 74) paras 79-82.

This indicates an improvement from the traditional view of development which is more anthropocentric in favour of the modern view, which complements the sustainable development principle of integration as embodied in South African environmental laws and in international environmental instruments.

3.2.3 Analysis of the Diepsloot project in the light of existing case law

In South Africa, the government is divided into three spheres of government – national, provincial and local.¹²¹ The national and provincial spheres have concurrent legislative competence in the functional areas listed under Part (A) of Schedule 4 which include environmental protection and housing. However, the implementation of government policies and legislative measures takes place within the local sphere (local government) to the extent provided in Schedules 4 and 5 Part (B) through municipalities.¹²² In other words, the local government is tasked with the provision of basic services to the community.¹²³

Section 152(1)(a) of the Constitution provides that local government must ensure the provision of services to communities in a sustainable manner. Section 152(1)(d) provides that the local government must promote a safe and healthy environment. A purposive interpretation of the relevant provisions in the Constitution and section 152 indicates that in the provision of basic services, the local government officials must ensure that such services are long-term and lead to the improvement of the quality of life of people. In short, the services must be sustainable.

Section 153(1)(a) of the Constitution provides that a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community. In terms of the Municipal Systems Act, a municipality determines its developmental goals through its Integrated Development Plan (IDP). The IDP encompasses not only the realisation of 'basic needs' by a municipality but also includes the spatial development framework¹²⁴ in terms of which the provision of such 'basic needs' must take place. Having discussed the role of the local government in the provision of basic needs, I deem it fit to analyse a few cases to support the argument that the local sphere of government is the backbone of any government and that failure on its part to implement government policies effectively leads to unsustainable and short-lived improvement in the living conditions of its communities.

¹²¹Sections 40-41 of the Constitution.

¹²²Van Rooyen and Naidoo 'Utilising environmental management systems to address municipal sustainable development' (2008) 43/4.1 *Journal of Public Administration* 736, 736-748.

¹²³White Paper on Local Government section B, para 1. See also Preamble to the Municipal Systems Act para 3.

¹²⁴See The White Paper on Spatial Planning and Land Use Management (2001) on the importance of the SDFs in land development.

In the *Grootboom* case, Mrs Irene Grootboom and most of the other respondents lived in an informal squatter settlement called Wallacedene, which lies within the jurisdictional area of the Oostenberg municipality within the Cape Town Metropolitan municipality. The conditions under which most of the residents of Wallacedene lived were deplorable. Most of the respondents were poor and unemployed. About half the population were children; all lived in shacks. The settlement had no water, sewage or refuse removal services and only a few shacks had electricity, and the area was prone to flooding. The respondents moved to a vacant piece of land which had better drainage due to the fact that they had been on the low-cost housing waiting list for years.

In the *Mazibuko* case, Mrs Mazibuko and other applicants were residents of Phiri in Soweto. Most the applicants were impoverished state pensioners. They approached the High Court to request that the City of Johannesburg be interdicted from installing prepaid water meters. They argued that since they were unemployed the installation of such meters will be tantamount to denying them their right of access to sufficient water as entrenched in section 27 of the Constitution. In the case of *Modderklip*,¹²⁵ a group of 400 people had moved onto private land owned by the respondent due to overcrowding and shortage of land in the Daveyton and Chris Hani informal settlements. There is a plethora of case law dealing with poor service delivery in South Africa, the scope of which is too extensive for this article. The reason I chose the above three cases is that a pattern exists across these cases which points to the inability of the local government to fulfil its constitutional mandate of providing the most vulnerable and poor communities of our country with the minimum basic requirements for human health and survival, or rather its failure to provide sustainable services.

In the *Grootboom* and *Modderklip* cases the government could have provided properly serviced land with electricity, proper sanitation, and running water to enable the two communities to at least live a dignified life while waiting for proper housing. This would have fallen within the meaning of the right of access to adequate housing as entrenched in section 26 of the Constitution.¹²⁶

Similarly, in Diepsloot, although the township boasts significant infrastructural development, most of it is unsustainable. This is so because only the main roads are tar roads and this leads to severe erosion of the remaining roads when it rains. Sand is washed from the untarred streets into the main roads. As a result, the main roads are damaged and have developed many large potholes. The lack of storm water systems aggravates the erosion and damage to the untarred roads. Diepsloot is overpopulated because of the informal structures and backrooms that have been constructed by homeowners. The sewage and

¹²⁵*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

¹²⁶See para 8 of 'The right to adequate Housing' (art 11(1)): 13/12/91. CESCR General comment 4 (General Comments) [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenD](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenD) (accessed June 2009).

drainage systems are frequently blocked leading to waste water flowing into the little stream that runs through the township, creating a serious health hazard.¹²⁷

Taking into account the definition of sustainable human settlements as set out in housing policies and other legislative measures and international instruments, the Diepsloot housing project falls short of the definition.

4 Conclusion

The concept of sustainable development is at the core of the right to development and the right to environmental protection. The principles of sustainable development and more specifically, the principle of integration, intergenerational equity, and intra-generational equity are vital to the optimal achievement of a long-term, sustainable quality of life and the improvement of the citizens' living conditions. Sustainable development harmonises developmental issues and environmental issues by moving away from the traditional view of development, which is anthropocentric and people-centered towards the modern view, which is environment tolerant. The adoption and enactment of environmental laws and policies including the adoption of international environmental instruments ensures the integration of environmental factors into social and economic development.

In South Africa, the National Environment Management Act 107 of 1998 (NEMA) was enacted to ensure that, in implementing development projects, developers and government authorities take cognisance of the natural environment. This means that theoretically the natural environment is catered for in the implementation of development processes in South Africa.

Accordingly, proper implementation of the rights to development and environmental protection through the Environmental Management System may lead to the realisation of the 'RDP priority areas'.

In view of the conclusions set out above, it is recommended that the government should enhance the skills and knowledge of its environmental practitioners in order to ensure proper implementation of these laws, since it is apparent that local government officials lack the necessary skills and knowledge to implement and ensure compliance with environmental and developmental laws and policies. A further recommendation is that the government should employ practitioners who are conversant with international environmental instruments and, further, conduct workshops in order to improve the skills of its current practitioners. Furthermore, local government officials must ensure that the local communities are involved in the planning of development projects, which may have adverse effects on the environment.

¹²⁷Personal observation.

A further recommendation is that the government, and specifically the local government, must promote environmental awareness among citizens through educational programmes and public participation programmes in their areas.

Finally, the national and provincial governments must ensure that public participation procedures as contemplated in the EMS are complied with by the local government authorities and developers in the implementation of development projects. This is in line with their constitutional mandate in terms of sections 100 and 139 respectively of the Constitution.