

# LEGAL MECHANISMS FOR COOPERATIVE GOVERNANCE IN SOUTH AFRICA: SUCCESSES AND FAILURES

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## ABSTRACT

South Africa's democracy is 10 years old. The Constitution of the Republic of South Africa, 1996 explicitly provides for cooperative governance between the different line functions and spheres of government. The new dispensation, however, inherited a fragmented bureaucracy, which divides government departments amongst the different environmental media (water, soil, environment, minerals etc.). The fragmentation of departments dealing with different elements of the environment resulted in fragmented application of environmental policies and legislation. Even 10 years into the new dispensation, these departments are still struggling to rid them of past practices of non-cooperation and turf wars.

The National Environmental Management Act of 1998 provides for integrated environmental management and prescribes certain sustainability principles that government should take into account in decision-making. The Department of Environmental Affairs and Tourism (DEAT), which is the responsible department for the enforcement of this Act, is however not regarded as a lead agent. Its role, vis-à-vis the other departments, is not clearly spelled out. The Act provides for cooperation between government departments with the institution of a committee for environmental cooperation between departments and spheres of government involved in environmental issues. Several inter-ministerial committees on both national and provincial levels are sometimes also involved in addressing environmental issues. Despite these mechanisms, fragmentation still occurs and departments are taking responsibility for their own decision-making on matters regarding the environment. The Department of Minerals and Energy's (DME) legislation, for example, indicates a strong trend in monopolizing issues regarding the environment within its own departmental sphere, excluding the final decision-making from the other departments. The DEAT, on the other hand, is proposing legislation (for example environmental impact legislation) which will provide it again with a say in energy and mining issues pertaining to the environment. This tug of war is in contrast with the Constitutional mandate of cooperative governance. To prevent this, parliament has introduced a positive obligation on government departments to draft cooperative agreements, for example, in the National Nuclear Regulator Act of 1999.

Although government departments do not always cooperate, applicants for development sometimes initiate informal gatherings to ensure cooperative governance in environmental matters creating new mechanisms to ensure the enforcement of environmental policies and legislation.

In this paper the different legal mechanisms creating opportunities for cooperative environmental governance in South Africa are investigated in the light of their successes and failures.

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## 1. Introduction

South Africa's Constitution<sup>2</sup> explicitly makes provision for cooperative governance. Despite this obligation, fragmentation, turf-wars and non-willingness of officials sometimes frustrate this ideal.<sup>3</sup> Legislation and policy in South Africa tend to strengthen cooperative governance and even more so in environmental matters, leading to some successes and some failures.

Section 24 of the Constitution states that everyone has a right to an environment that is not harmful to their health or well-being, which could be applied vertically and horizontally (*Drittwirkung*).<sup>4</sup> To ensure that this right is further given effect to, government must through reasonable legislation and other measures ensure that the environment is protected for present and future generations. This right is not an absolute right but must be weighed against the promotion of justifiable economic and social development.<sup>5</sup>

Since the introduction of democracy in South Africa during 1994, various environmental or environmentally related policy documents<sup>6</sup> have been

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<sup>2</sup> Constitution of the Republic of South Africa, 1996; hereafter refer to as the Constitution.

<sup>3</sup> South Africa inherited a fragmented system that is based on the environmental media - see also Bosman C, Kotzé L and Du Plessis W "The failure of the Constitution to ensure integrated environmental management from a cooperative governance perspective" 2004 *SA Public Law* to be published; Loots C "The Effect of the Constitution on Environmental Management" 1997 *South African Journal of Environmental Law and Policy* 223-225.

<sup>4</sup> Ferreira GM "Omgewingsbeleid en die fundamentele reg op 'n skoon en gesonde omgewing" 1999 *TSAR* 90-113.

<sup>5</sup> For an interpretation of section 24 see Ferreira (note 4 above) 90-113; Du Bois F and Glazewski J in *Bill of Rights Compendium* (Butterworths Durban) par 2B1-2B12.

<sup>6</sup> See e.g. the White Paper on Environmental Management Policy of 1998; the White Paper on Energy Policy of 1998; White Paper on Renewable Energy Policy of South Africa of 2004; the White Paper on Integrated Pollution Control and Waste Management of 1998; White Paper on National Water Policy of 1997; Green Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity 1996; White Paper on a Mineral and Mining Policy for South Africa of 1998; White Paper on Sustainable Forest Development in South Africa, 1998. A consultative process was followed in the formulation of most of these policies - see Peart R and Wilson J "Environmental Policy-making in the New South Africa" 1998 *South African Journal of Environmental Law and Policy* 237 249-261.

introduced and legislation<sup>7</sup> promulgated and others<sup>8</sup> are in the process of being promulgated. The legislation gives effect to section 24 of the Constitution. Some of the legislation specifically refers to co-operative governance while the concept is implied in others.<sup>9</sup>

The aim of the Department of Mining and Energy (DME) is to optimise the exploitation of minerals and to regulate energy matters.<sup>10</sup> On the other hand, the department or institutions under the auspices of the department<sup>11</sup> are also the final decision-makers on the environmental implications of their actions.<sup>12</sup> The purpose of the Department of Environmental Affairs and Tourism (DEAT), however, is to protect the environment for future generations. South Africa is in need of development and it is sometimes stated by government officials that environmental concerns hamper development.<sup>13</sup> South African legislation allows the DME to take responsibility for their own actions, but there is a tug of war between the two departments that is not conducive to cooperative governance.<sup>14</sup>

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<sup>7</sup> See e.g. the National Environmental Management Act 107 of 1998; National Water Act 36 of 1998; Water Services Act 108 of 1997; National Forest Act 84 of 1998; National Veld and Forest Fire Act 101 of 1998; Marine Living Resources Act 18 of 1998; National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management: Biodiversity Act 10 of 2004; Minerals and Petroleum Resources Development Act 28 of 2002; National Nuclear Regulator Act 47 of 1999; Gas Act 48 of 2001; Disaster Management Act 57 of 2002.

<sup>8</sup> See for e.g. National Energy Bill of 2004; National Environmental Management: Coastal Zone Bill of 2003.

<sup>9</sup> Other reasons for the adoption of environmental policy include lobbying by environmental NGOs, internal and external pressures on South Africa to accede to international instruments, overseas funding, political commitment and the continuation of programmes initiated by government departments - see Peart and Wilson (note 6 above) 237-253.

<sup>10</sup> See also Swart E "A Regulatory Framework for Mining Environmental Management within SA and SADC" in Chamber of Mines of South Africa *Conference on Environmentally Responsible Mining in Southern Africa* Vol 2 (Chamber of Mines Johannesburg) 5A-41-5A-42; Le Quesne T "The Divorce of Environmental and Economic Policy under the First ANC Government, 1994-1999" 2000 *South African Journal of Environmental Law and Policy* 1 13.

<sup>11</sup> See 5 hereafter.

<sup>12</sup> See also Tucker C "The Department of Minerals and Energy's approach to environmental management as expressed in their environmental management plan" in Chamber of Mines of South Africa (note 10 above) 5A-28.-5A-40.

<sup>13</sup> The same conflict is to be found in other developing countries, such as Ghana - see Wereko-Brobby C "The case of Ghana" in Karekezi S and MacKenzie GA *Energy Options for Africa* (Zed Books London 1993) 23-30.

<sup>14</sup> See 5 hereafter.

In this paper co-operative governance and the Constitution will be addressed firstly as a framework for the discussion of the environmental cooperative governance mandate. A brief overview of environmental governance tools for cooperation is given. A discussion on the usurping of the environmental decision-making mandate is then discussed as an example of the failure of legislation to ensure cooperative governance. Some success stories are then discussed. Reasons for the failure and successes of cooperative governance are then discussed as well as possible initiatives that may be taken to enhance co-operative governance in order to come to a conclusion.

## 2. Co-operative governance and the Constitution

Three spheres of government are created by the Constitution, namely national, provincial and local. All three spheres of government are "distinctive, interdependent and interrelated"<sup>15</sup> and all of them have environmental responsibilities: national government (as all other spheres) in terms of the Constitution and the Bill of Rights, while provincial government has certain concurrent legislative and executive powers with national government on issues of the environment.<sup>16</sup> Local government is instructed to "promote a safe and healthy environment".<sup>17</sup>

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<sup>15</sup> See also Rautenbach IM and Malherbe EFJ *Staatsreg* 3<sup>rd</sup> ed (Butterworths Durban 1999) 294-299. According to the constitutional court in *Premier of the Province of the Western Cape v President of the RSA* 1999 4 SA BCLR 382 (CC) [50] "distinctive" relates to the provision for elected governments at the different spheres of government; "interdependent" and "inter-related" refer to the Constitution that allows for framework provisions that may be promulgated by national government. Provinces have to implement both national and provincial laws, and local governments have legislative authority with regard to specific matters - see following footnote.

<sup>16</sup> Section 104(1)(b) read with schedules 4 and 5; see also Haysom N "Federal features of the final Constitution" in Andrews P and Ellmann S (eds) *Post-apartheid Constitutions* (Witwatersrand University Press Johannesburg 2001) 504 506-509, who argues that the concept of federalism in the Constitution is "overlaid by an emphasis on cooperative governance". Provinces have, for example, only exclusive powers with regard to local government matters (schedule 5 of the Constitution). Currie I and De Waal J (eds) *The new Constitutional & Administrative Law Volume 1 Constitutional law* (Juta Cape Town 2001) 119-121 contrasts competitive and cooperative forms of federalism. See also *In re: Education Policy Bill No 83 of 1995* 1996 4 SA BCLR 518 (CC) par 34; *In re Certification of the Constitution of the RSA*, 1996 1996 10 BCLR 1253 (KH); 1996 4 SA 744 (CC) par 290 where cooperation is emphasised and Loots (note 3 above) 228-230.

<sup>17</sup> Section 152(1).

The new dispensation inherited a fragmented bureaucracy, which divides government departments amongst the different environmental media (water, soil, air, biota, minerals etc.). The fragmentation of departments dealing with different elements of the environment resulted in fragmented application of environmental policies and legislation.<sup>18</sup> South Africa does not have a single environmental authority, although the *White Paper on Environmental Management* of 1998<sup>19</sup> proposed such an authority. The bureaucratic reality at the time in South Africa seemingly made such a step impossible. Mackay and Ashton<sup>20</sup> state the following with regard to cooperation on national level:

At the level of national Government, the new principles, policies and legislative instruments in each sector appear to be aligned closely with and fully support, the key principles embodied in the Constitution ... However, the clear separation of line functions between different Government departments (e.g. water, agriculture, housing, etc.) makes it difficult to attain proper levels of alignment and coherence between these different functions, as each department operates independently within its area of mandate.

Chapter 3 of the Constitution deals with cooperative governance.<sup>21</sup> If related to environmental matters, departments dealing with various aspects of the environment should:<sup>22</sup>

- Co-operate with one another in mutual trust and good faith by -
- (i) fostering friendly relations;
  - (ii) assisting and supporting one another;
  - (iii) informing one another of, and consulting one another on matters of common interest;
  - (iv) co-ordinating their actions and legislation with one another;
  - (v) adhering to agreed procedures; and

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<sup>18</sup> Nel J, Kotze L and Snyman E "Strategies to integrate environmental policy at the operational level: towards an integrated framework for environmental authorizations" Paper read at Berlin Conference on the Human Dimension of Global Environmental Change 3-4 December 2004.

<sup>19</sup> Par 4.

<sup>20</sup> MacKay HM and Ashton PJ "Towards cooperative governance in the development and implementation of cross-sectoral policy: water policy as an example" 1 January 2004 *Water SA* 30(1):1-3.

<sup>21</sup> As stated by Watts RL *Intergovernmental relations* (Department of Constitutional Development and Provincial Affairs Pretoria 1999) 6-7: "Interdependence between governments and hence the need for effective intergovernmental relations and cooperation is a characteristic of all multi-sphere, multi-tier or multi-level forms of government, whether federal or constitutionally decentralized unitary in form. This is so because in such systems it is never possible to divide jurisdiction among governments in watertight exclusive compartments. Overlap and interpenetration of jurisdiction is inevitable".

<sup>22</sup> Section 41(1)(h).

- (vi) avoiding legal proceedings against one another.

The Constitutional Court in their decision of *National Gambling Board v Premier of KwaZulu-Natal*<sup>23</sup> indicated that government departments should not litigate against each other and that they should try to resolve disputes in the correct manner. The relevant government department should "re-evaluate its position fundamentally ... to consider alternative possibilities and compromises".<sup>24</sup> On the question of whether national government may prescribe to provincial departments as to how their administration should be structured,<sup>25</sup> the constitutional court found:<sup>26</sup> that such a provision does not infringe section 41(1)(g) of the Constitution.<sup>27</sup>

### 3. Environmental co-operative governance mandate

South Africa's environmental framework legislation,<sup>28</sup> the National Environmental Management Act 107 of 1998 (NEMA), includes tools to ensure co-operative

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<sup>23</sup> 2002 2 BCLR 156 (CC) [36]; *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 10 BCLR 1253 (CC) [291]. See also the case of *MEC for Health, KwaZulu-Natal v Premier of KwaZulu-Natal: In re Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1028 (CC) where the court said that political disputes should be resolved at a political level within the framework of cooperative governance [par 13]. In *Ukuthela District Municipality v President of the Republic of SA* 2002 11 BCLR 1220 (CC) the court again emphasised that it will not interfere with intergovernmental disputes that could be solved on a political level [14] and all existing mechanisms should be exhausted before a court may be approached [19]-[24]. In *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC) it was found that the Electoral Commission does not fall within the national sphere of government - it is an independent Chapter 9 institution and therefore the municipality did not have to comply with section 41(3) of the Constitution in that it had to make every reasonable effort to settle the dispute [17]-[31].

<sup>24</sup> [36]; see also Bosman, Kotzé and Du Plessis (note 3 above) to be published. Disputes between national and provincial government with regard to their legislative mandate are to be resolved by the Council of Provinces - section 146 of the Constitution.

<sup>25</sup> In this instance whether national government could prescribe that a director-general of a provincial department should deal with inter-governmental relationships [par 67]. It is argued that a province should be given the freedom to appoint the relevant functionary in this regard.

<sup>26</sup> *Premier of the Province of the Western Cape v President of the RSA* 1999 4 BCLR 382 (CC).

<sup>27</sup> [74]. Section 41(1)(g) states "All spheres of government and all organs of State within each sphere must ... exercise their powers and functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere".

<sup>28</sup> See also Du Plessis W and Nel J "An Evaluation of NEMA: Based on a Generic Framework for Environmental Framework Legislation" 2001 *South African Journal of Environmental Law and Policy* 1-38.

governance.<sup>29</sup> However, the Act is so widely formulated that certain government departments<sup>30</sup> "usurp" environmental decision-making, taking it away from the DEAT. The DEAT on the other hand, strives to regain decision-making on matters regarding the environment.

Section 2(4) of NEMA includes principles relating to sustainable development.<sup>31</sup> The principles include that the disturbance of ecosystems and loss of biological diversity be avoided or minimised, that waste is avoided, a risk-averse and cautious approach is applied taking into account the limits of current knowledge and that negative impacts on the environment are avoided or minimised. According to the principle, the use and exploitation of non-renewable natural resources should be responsible and equitable, it should take into account the consequences of the depletion of the resource and in the case of the exploitation of renewable resources and ecosystems, the development should not exceed the level beyond which their integrity is jeopardised. Responsibility should be taken for the environmental, health and safety consequences of a policy, programme, project, product, service or activity throughout its life cycle. Decisions regarding the environment should be taken in an open and transparent manner. There should be intergovernmental co-ordination and harmonisation of policies, principles and actions. Actual and potential conflicts of interest between organs of state should be resolved through conflict resolution mechanisms.

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<sup>29</sup> See also Bray E "Cooperative Governance in the Context of the National Environmental Management Act 107 of 1998" 1999 *South African Journal of Environmental Law and Policy* 1-12.

<sup>30</sup> See 4 hereafter.

<sup>31</sup> Section 2(2) also states that environmental management should place people and their needs at the forefront of its concern and their physical, psychological, developmental, cultural and social interests should be addressed equitably. Development should be socially, environmentally and economically sustainable (section 2(3)). Other section 2(4) principles include: integrated environmental management, environmental justice, equitable access to environmental resources, responsibility for health, decisions must take into account the interests, needs and values of interested and affected parties, community well-being and empowerment must be promoted through environmental education, the right of workers to refuse doing environmentally hazardous work; the right of access to environmental information, national interest, the environment is held in public trust for the people, the polluter pays principle and the role of women and youth.

These principles apply to all organs of state whose actions may significantly affect the environment.<sup>32</sup> The principles serve as a general framework within which environmental management and implementation plans should be formulated and also serve as guidelines that should be used when decisions are taken that may have an impact on the environment. The principles should also guide the interpretation, administration and implementation of NEMA or any other law that is concerned with the protection or management of the environment.

#### **4. Environmental governance tools for cooperation**

There are several structures that in principle could enhance environmental governance. In the case of environmental legislation, the National Council of Provinces<sup>33</sup> has to coordinate and oversee national and provincial legislation.<sup>34</sup> During the parliamentary session of 2004, the NCOP, for example, referred the National Air Quality Management Bill of 2003 back to parliament for revision.<sup>35</sup>

Non-Constitutional structures were also developed to coordinate matters on an executive level. These structures could be used to facilitate joint or co-ordinated decision-making on the environment. De Waal and Currie<sup>36</sup> refer to the Inter-Governmental Forum (IGF),<sup>37</sup> the Ministerial Forums (MINMECS)<sup>38</sup> and the

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<sup>32</sup> Section 2(1).

<sup>33</sup> Instituted in terms of section 44(1)(b)(ii) the Constitution.

<sup>34</sup> See also Currie and De Waal (note 16 above) 121.

<sup>35</sup> PMG <http://www.pmg.org.za> [date of access 2004-11-15].

<sup>36</sup> (Note 16 above) 121-122. See also Brynard P and Malan L "Conservation Management and intergovernmental relations: the case of South African national and selected provincial protected areas" 2002 *Politeia* 21(2):101 105-107,112; Reddy PS "Intergovernmental relations in South Africa" 2001 *Politeia* 20(1):21 31-33.

<sup>37</sup> Premiers of provinces and representatives of national government, see the 1997 Report of the Chief Directorate: Cooperative Governance and Provincial Affairs [www.local.gov.za/DCD/dedlibrary/report/ar1b.html](http://www.local.gov.za/DCD/dedlibrary/report/ar1b.html) [date of access 2004-10-25]. The forum has been abolished due to its size, cost, lack of focus, no linkages with other fora and the fact that it was used as an "information sharing exercise" - see Reddy (note 36 above) 31.

<sup>38</sup> Meeting of national and provincial members of executive councils. The MINMEC is responsible for "harmonisation of legislation and programmes on a national level, division and employment of financial resources, consultation and negotiation relative to national norms and standards applicable to a specific function, transfer of information, undertaking of joint programmes/projects and formulation and implementation of strategies". Problems experienced are domination by national ministers, provincial MECs have no mandate from their executive committees,



Premier Forum.<sup>39</sup> These forums are assisted by technical committees consisting of the director-generals of government departments. The decisions of the forums are not binding but formulate guidelines for decision-making by government.<sup>40</sup> Several inter-ministerial committees on both national and provincial levels are sometimes also involved in addressing environmental issues. Despite these mechanisms, fragmentation still occurs and departments are taking responsibility for their own decision-making on matters regarding the environment.<sup>41</sup>

A committee for environmental coordination is established in terms of NEMA.<sup>42</sup> The committee consists of director-generals of government departments whose functions may affect the environment,<sup>43</sup> provincial heads of departments appointed by the minister of environmental affairs and tourism as well a local government representative.<sup>44</sup> The purpose of these committees is, amongst others, to align the policies, programmes and activities of government departments<sup>45</sup> as set out in their environmental implementation plans and environmental management plans.<sup>46</sup> Specialist sub-committees of the CEC were established. The sub-committees, however, experienced some problems ranging from a lack of decision-making power to the CEC not considering and evaluating their reports. Some of the sub-committees were restructured and were incorporated into working groups of the MINMEC meeting.<sup>47</sup>

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attendance, lack of communication, only information is shared, no monitoring of decisions - Reddy (note 36 above) 32. See also Peart and Wilson (note 36 above) 237 247-248 also refers to the political agenda of the MINMEC meetings as opposed to a focus on executive and procedural issues. The parliamentary portfolio committee on the environment deals with natural resource issues but is not really a tool for cooperative governance.

<sup>39</sup> Meeting of premiers of the nine provinces.

<sup>40</sup> Currie and De Waal (note 16 above) 122; see also Rautenbach and Malherbe (note 15 above) 294-295.

<sup>41</sup> Snyman E (ed) *An Integrated Environmental Management System for the North West Province – Final Report Phase II* (2004) 37-39.

<sup>42</sup> Sections 7-10.

<sup>43</sup> DEAT, Departments of Land Affairs, Agriculture, Housing, Trade and Industry, Water Affairs and Forestry, Transport and Defence, Provincial Affairs and Local Government, Health, Labour, Arts, Culture, Science and Technology.

<sup>44</sup> Section 8. See also Brynard and Malan (note 36 above) 116-117.

<sup>45</sup> Section 7.

<sup>46</sup> Compiled in terms of chapter 3 of the Act.

<sup>47</sup> Brynard and Malan (note 36 above) 117.

NEMA also refers to integrated environmental management. Unfortunately, this term is used mainly to describe environmental impact assessments (EIAs).<sup>48</sup> Chapter 3 of NEMA deals with integrated environmental management and promotes the application of appropriate environmental management tools.<sup>49</sup> Section 24<sup>50</sup> provides for environmental authorisations to be issued by the DEAT.<sup>51</sup> The minister may identify activities which may, for example, not commence before authorisation has been issued. Environmental authorisations may only be granted by the DEAT or a provincial department concerned with the environment.<sup>52</sup> The environmental authorisations are issued for the entire life cycle of an activity and provision is made for monitoring and auditing.<sup>53</sup> NEMA was amended in 2004 to exclude the possibility that other government departments may make their own EIA regulations - before the amendments the wording of NEMA created such a possibility.<sup>54</sup>

Section 35 of NEMA brought a new element to co-operative governance by making provision for environmental management cooperation agreements between organs of state and any person, legal entity or community to improve standards, set targets for fulfilling their undertaking, to provide for monitoring and

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<sup>48</sup> Nel J and Du Plessis W "Unpacking Integrated Environmental Management - a Step Closer to Effective Cooperative Governance" in *IAIAsa Conference Proceedings: Cooperative Governance in Southern Africa: the Search for the Holy Grail* (1-3 September 2003) 87-97. The activities for which an EIA needs to be done were listed in terms of the Environment Conservation Act 73 of 1989 - GN R1182-1183 in GG 18261 of 1997-09-05. Mining was not a listed activity but sometimes an EIA was required for non-mining related activities for example the construction of a road - see Mabiletsa M and Du Plessis W "Impact of environmental legislation on mining in South Africa" 2001 *South African Journal of Environmental Law and Policy* 185-213. New draft regulations were published for comment - see note 69.

<sup>49</sup> According to section 23(2) integrated environmental management entails the promotion of the integration of section 2 principles into decision-making, the identification of impacts, its mitigation and compliance, promotion of adequate opportunity for public participation and consideration of environmental attributes in management.

<sup>50</sup> As amended by the National Environmental Management Amendment Act 8 of 2004.

<sup>51</sup> According to the *White Paper on Environmental Management* of 1998 DEAT was to be a lead agent but it was not politically acceptable and accordingly not included in the final Act - see Peart and Wilson (note 6 above) 237 244.

<sup>52</sup> Section 24(1).

<sup>53</sup> Section 24(5).

the measures to be taken in the event of non-compliance. A public participation process must be followed and all relevant stakeholders must be involved in the negotiations.<sup>55</sup>

Parliament introduced a positive obligation on government departments to draft cooperative agreements, for example, in terms of the National Nuclear Regulator Act of 1999.<sup>56</sup> All organs of state that have functions in terms of the Act dealing with the monitoring and control of radioactive material or exposure to ionizing radiation must co-operate with each other to ensure coordination of their activities, to monitor and control nuclear hazards effectively, to minimise the duplication of their functions and procedures and to promote consistency in the exercise of their function. The National Nuclear Regulator must also conclude cooperative agreements with the relevant organs of state.<sup>57</sup>

A Draft Energy Efficiency Strategy of the RSA was published in April 2004.<sup>58</sup> The purpose of the strategy is to link energy sector development with socio-economic development plans and to ensure the implementation of low cost or no-cost interventions. The vision of the strategy is to minimise the effect of energy usage on human health and environment.<sup>59</sup>

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<sup>54</sup> See Nel and Du Plessis (note 48 above) 93-94; Glazewski J *Environmental Law in South Africa* (Juta Cape Town 2000) 295. See also 5 hereafter.

<sup>55</sup> See also Hanks J "Achieving Industrial Sustainable Development in South Africa: What role for 'Self-regulatory' and 'Co-regulatory'" 1998 *South African Journal of Environmental Law and Policy* 298-354; Scholtz W "Cooperative Governance through Section 35 of NEMA" in IAIAsa (note 48 above) 269-276.

<sup>56</sup> Section 5. Regulations on cooperative governance in respect of the monitoring and control of radioactive material or exposure to ionizing radiation published for comment (Government Notice 709 in *Government Gazette* 23428 of 2002-05-24). Within 6 months - cooperative agreements with government departments (health, mining and energy, minerals development, electricity and nuclear, environmental affairs and tourism and water affairs and forestry have to produce a draft cooperative agreement. During August 2004 a draft cooperative agreement was published for comment - General Notice 1826 in *Government Gazette* 26732 of 2004-08-27 (comments had to be provided before 2004-09-27). At the time of writing of the paper, the final draft has not been published.

<sup>57</sup> Section 5(2).

<sup>58</sup> <http://www.dme.gov.za> [date of access: 2004-10-25].

<sup>59</sup> No mention is made of cooperative governance but the list of output activities lists some other government departments as having responsibilities to ensure energy efficiency in their various sectors.

## 5. Usurping the environmental decision-making mandate

The Department of Minerals and Energy's (DME) legislation, for example, indicates a strong trend in monopolizing issues regarding the environment within their own departmental sphere, excluding the final decision-making from other departments. The DEAT, on the other hand, is proposing legislation (for example, environmental impact legislation) which will provide them again with a say in energy and mining issues pertaining to the environment. This tug of war is in contrast with the Constitutional mandate of cooperative governance.<sup>60</sup>

In the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) that was put into operation at the end May 2004, the Department of Minerals and Energy is the main decision-maker regarding matters pertaining to mining. The definition of "environment" is the one used in NEMA. Provision is made that in certain instances an environmental management plan<sup>61</sup> and in others an environmental management programme<sup>62</sup> must be prepared. The holders of permits or permissions must at all times give effect to the general objectives of integrated environmental management as set out in Chapter 4 of NEMA.<sup>63</sup> EIAs must be prepared in accordance with the procedures set out in NEMA - the final decision-maker, is however, the DME.<sup>64</sup> The environmental principles set out in section 2 of NEMA<sup>65</sup> are made directly applicable to prospecting and mining operations and it is stated specifically that the principles serve as guidelines in the interpretation, administration and implementation of the environmental requirements of the 2002 Act.<sup>66</sup> The incorporation of the sustainability and the

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<sup>60</sup> See 2 above.

<sup>61</sup> Section 1: it is "a plan to manage and rehabilitate the environmental impact as a result of prospecting, reconnaissance, exploration or mining operations conducted under the authority" of a valid permission or permit.

<sup>62</sup> Section 39.

<sup>63</sup> Section 38(1)(a).

<sup>64</sup> Section 38(1)(b).

<sup>65</sup> See 3 above.

<sup>66</sup> Section 37.

general integrated environmental management principles into the 2002 Act as well as the EIA procedures at least hopefully ensure the same level of decision-making. The MPRDA, however, ensures that the mining industry is "subject to the same norms, standards and requirements that are applicable to the rest of South African industry".<sup>67</sup>

The only co-operative governance provisions in the MPRDA relate to the closure certificate that is issued after closure of mining operations. According to section 43 of the Act, a closure certificate may only be issued when the Chief Inspector, Mining and the Department of Water Affairs and Forestry have confirmed in writing that health, safety and water pollution have been addressed adequately.<sup>68</sup>

The DEAT responded in the 2004 Draft EIA regulations<sup>69</sup> by listing the different mining activities as activities for which an EIA needs to be done and for which the approval of the DEAT is necessary. The DME reacted negatively to this proposal and at the time of writing of this paper,<sup>70</sup> the two responsible ministers were still negotiating a solution in this dispute.

The National Environmental Management: Biodiversity Act 10 of 2004 also places the responsibility for the protection of biodiversity on the DEAT. It is specifically mentioned that the Act binds all organs of state in all spheres of government.<sup>71</sup> The Act, however, makes specific provision for an integrated, co-

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<sup>67</sup> Swart (note 10 above) 5A-46. She is of the opinion that "duplication of effort would not result". Before the MPRDA problems existed between DEAT and DME as both required of mines to do EIAs, sometimes resulting in two different public participation processes taking place - see in this regard Mabiletsa and Du Plessis (note 48 above) 185-205.

<sup>68</sup> Where a mining operation is to be scaled down or where employees will be retrenched, consultation must be effected by the Minister of Minerals and Energy with the Minister of Labour regarding the socio-economic and labour implications of the matter - section 52.

<sup>69</sup> General Notice R64 in *Government Gazette* 26503 of 2004-06-25.

<sup>70</sup> November 2004.

<sup>71</sup> Section 4. A similar clause than the one in the MPRDA is included, stating that in the case of conflict between this Act and any other Act, the provisions of the National Environmental Management: Biodiversity Act would prevail - section 8.

ordinated and uniform approach to biodiversity management by all spheres of government.<sup>72</sup>

The "usurping" of power relating to matters dealing with the environment is more apparent in the new energy policy and legislation. The *White Paper on Renewable Energy* of 2004<sup>73</sup> indicates that the DME will co-operate with other national government departments to implement the policy and will form partnerships with provincial and local government in this regard. It is, however, clearly stated that the DME will be the lead agent. The *White Paper on Energy* of 1998 is less clear. It does, however, refer to the integration of energy issues with health, safety and the environment and that "(t)here is clearly a need for improved communication and co-ordination between national, provincial and local government".<sup>74</sup>

From the energy legislation it is apparent that decision-making on environmental matters is either usurped by the DME or an independent regulator, created in terms of these Acts.<sup>75</sup> Several of the Acts also state that applicants for licenses must indicate their ability to comply with all labour, safety, health and environmental legislation.<sup>76</sup> Some legislation even mentions sub-ordinate legislation. In the Petroleum Pipelines Act 60 of 2003 it is specifically stated that the regulatory authority should consult with other government departments where necessary.<sup>77</sup>

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<sup>72</sup> Sections 39-48.

<sup>73</sup> Par 10 General Notice 513 in *Government Gazette* 26169 of 2004-05-14.

<sup>74</sup> Par 8.10.

<sup>75</sup> The Electricity Regulation Bill (*Government Gazette* 1861 of 2002-10-11) creates a National Electricity Regulatory Authority that has *inter alia* regard to health, safety and environmental issues when issuing licenses (clauses 4-5). The Gas Act 48 of 2001 creates a Gas Regulator (sections 3-4). The National Petroleum Pipelines Act 60 of 2003 creates a National Petroleum Pipelines Regulator that will issue licenses for the construction and operation of petroleum pipelines. In 2004 an Energy Regulator Bill [B9-2004] was published to consolidate the mentioned regulators and to provide for a single national energy regulator that will issue licenses for electricity, piped gas and petroleum pipelines. No mention is made with regard to cooperative environmental governance.

<sup>76</sup> Section 16 of the National Petroleum Pipelines Act 60 of 2003; section 16 Gas Act 48 of 2001.

A Draft National Energy Bill was published in 2004. The objectives of the Bill amongst others are to provide for the proper, appropriate and sustainable development and use of energy resources for the benefit of all residents of South Africa and to provide for safety, health and environment matters that pertain to energy that are not contemplated in other legislation. The Bill seems to serve as a catch-all to ensure that all matters relating to energy are dealt with by the Department of Minerals and Energy. A National Advisory Committee is established to advise the minister on energy policy by means of an annual report and to consider any other energy related matter to be referred to the minister.<sup>78</sup> The forum consists of experts (legal, technical, business, economic, environmental, social, etc.) who are able to demonstrate their impartiality and objectivity. No mention is made of the inclusion of officials from other government departments into the forum. The *White Paper on Renewable Energy* of 2004,<sup>79</sup> however, states that the DME takes overall responsibility for the renewable energy policy in South Africa, but that the department will "establish the appropriate enabling environment to ensure that activities undertaken by other stakeholders are coordinated, uniform and effective".

A national energy database is to be created to record information for purposes of the development, implementation and monitoring of a national energy policy, to provide reliable information for planning purposes and to provide information to integrate the national energy policy with macro-economic, environmental and fiscal policy.<sup>80</sup> Although no mention is made of the availability of this information outside the Department of Minerals and Energy, it could be a useful tool to effect informed policy and decision-making by other government departments, ensuring some form of cooperative governance. The Minister of Minerals and Energy may

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<sup>77</sup> Section 4(e).

<sup>78</sup> Clause 3.

<sup>79</sup> (Note 76 above) par 10 mentions cooperation with the DEAT, Departments of National Treasury, Trade and Industry, Arts, Science and Technology, Housing, Provincial and Local Government, Water Affairs and Forestry, Agriculture and Transport.

<sup>80</sup> Clause 4. See also the international experience MacKenzie GA and Christensen JM "Tools and methods for energy-environmental planning" in Karekezi and MacKenzie (note 13 above) 154 166-172.

require mandatory provision of any data or information reasonably required and the database may be linked with any other database of information system outside public administration.<sup>81</sup>

The Bill makes provision for integrated energy planning<sup>82</sup> which must incorporate energy supply, transformation, transport, storage and demand in such a manner that it takes into account, amongst others, sustainable development, environment, health and safety impacts and development impacts in SADC.<sup>83</sup> Again no reference is made to cooperation with other government departments. The minister may also regulate the use of renewable energy and energy efficiency.<sup>84</sup> To ensure energy efficiency the minister may publish targets, prescribe minimum levels of energy efficiency measures from particular sectors of the economy, prescribe codes and guidelines for energy efficiency measurement standards, manufacturing processes, testing procedures and verification marks, prescribe certifications necessary for the application of such technologies, regulations with regard to energy efficiency labelling and may prohibit the manufacture or import, sale of electrical and electronic products and fuel-burning appliances. Although the Bill states that it only deals with matters not regulated by other legislation, a problem may occur in the case of fuel-burning appliances. In the Atmospheric Pollution Prevention Act 45 of 1965<sup>85</sup> the chief atmospheric pollution control officer under the auspices of the DEAT controls and issues licenses for fuel-burning appliances. The Bill makes no specific reference to cooperation or consultation with other government departments. The minister may establish a programme to minimise the negative safety, health and environmental aspects of energy carriers not contemplated in other legislation.

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<sup>81</sup> Clause 14. The provision of false data is an offence and a person/legal entity may refuse to provide information - clause 15.

<sup>82</sup> Clause 16.

<sup>83</sup> Southern African Development Cooperation.

<sup>84</sup> Clauses 17-18.

<sup>85</sup> To be replaced by the National Environmental Management: Air Quality Management Bill of 2003 once it is enacted. The Atmospheric Pollution Prevention Act is under the supervision of the DEAT.



## 6. Other environmental cooperation tools

Although government departments do not always cooperate, applicants for development sometimes initiate informal gatherings to ensure cooperative governance in environmental matters creating new mechanisms to ensure the enforcement of environmental policies and legislation.<sup>86</sup>

Government departments conclude memorandums of understanding (MOUs). An example of such a memorandum is the one between the DEAT and the Department of Water Affairs and Forestry. The MOUs does not always function well as they are concluded at a high political level without buy-in from officials on the ground and the meetings where these MOUs are discussed are too short to really have an in-depth discussion. The more detail information is also not always relayed to the relevant officials.<sup>87</sup>

On 15 November 2004 the South African cabinet approved a Draft Intergovernmental Relations Framework Bill. The aim of the bill is to provide an institutional framework for the different spheres of government to facilitate coherent government, co-ordination in the implementation of policy and legislation, effective provision of services and the monitoring of the implementation of policy and legislation (clause 3). The Bill creates various structures on national, provincial and local level as well as on interdepartmental and inter-sphere level to give effect to cooperative governance. The structures include a president's coordinating council consisting of the president, ministers, premiers of the provinces and the chairperson from the organized local government structures (clause 9). Provision is also made for the establishment of national intergovernmental forums to discuss matters of national interest and to deal inter alia with coordination and alignment of functional areas (clause 10). The provincial intergovernmental forums include the premier, relevant members

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<sup>86</sup> 373-374.

<sup>87</sup> Snyman (note 41 above) 207.

of the provincial executive council and mayors of district and metropolitan municipalities (clause 16). Similar structures may be established on local government level (part 4). Provision is also made for intergovernmental technical support structures consisting of officials or any other person who might be useful to the relevant forum (clause 27). The forums are to be used for intergovernmental consultation and discussion and are not decision-making bodies. They may make recommendations and adopt resolutions (clause 29). In terms of clause 33 provision is made that the different government departments must coordinate their actions where policy needs to be implemented or where a power is exercised or a function or provision of services depend on the participation of the other department. They may do so by entering into an implementation protocol.

## **7. Reasons for failures and successes**

There are some success stories and some failures in environmental co-operative governance. There are many reasons for the successes and failures. Reasons for successes include, amongst others, the following.<sup>88</sup>

- The Constitution places an obligation on government to cooperate.
- Co-operative governance is enforced by the Constitutional court.
- Nearly all environmental policy documents includes co-operative governance as one of the concepts of the policy. Some place stronger emphasis than others.
- In environmental legislation provision is made for cooperative governance again to a greater or lesser extent.
- Institutional forums are created by legislation and informally to ensure environmental cooperative governance at the various spheres of government.
- Government departments conclude memorandums of understanding to ensure effective governance.

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<sup>88</sup> See discussion above.

- The initiative to ensure cooperative governance is sometimes furthered by both individual government officials and the private sector.

Despite the policy, legislation and structures created by legislation, government officials are still sometimes unwilling to cooperate with one another. Various reasons are given for the lack of co-operative governance at the different levels of government:<sup>89</sup>

- No comprehensive policy and legislative agenda - new initiatives are taken independently.
- Developmental, economical and environmental issues are dealt with separately.
- Lack of implementation of policies, principles and legislation.
- The mandate of different government departments in legislation overlaps or contradicts each other.
- Misinterpretation or misunderstanding of policy and legislation.
- The roles and responsibilities of role players are not clearly spelt out.<sup>90</sup>
- Efficiency and effectiveness of decision-making.
- Bureaucracy.
- It is not clear which legislation takes precedence, for example, water legislation or mining.
- Confusion between government officials interferes with decision-making on developmental issues.<sup>91</sup>
- The consequences of policy/legislation are not always taken into account - for example the provision of domestic water supply to an informal settlement is not always complemented with sanitation or refuse removal services, which

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<sup>89</sup> See MacKay and Ashton (note 20 above) 3-4, 8; Nel J "Unsustainable EIA Partnerships: Poorly-defined rights, roles, responsibilities and duties of EIA Stakeholders" 2001 *SAJELP* 103-118; Reddy (note 36) 21-39; Peart and Wilson (note 6 above) 262-265; Bray (note 39 above) 10-12.

<sup>90</sup> See also the Australian example Lipman Z "Environmental Management in a Multi-jurisdictional System: an Australian Perspective" 1996 *South African Journal of Environmental Law and Policy* 105 125-126.

<sup>91</sup> See also Mol N and Mbalo B "South African Legislation: the First Step in the Right Direction" in Chamber of Mines (note 10 above) 5B17 5B-26.

poses a health risk. Water provided to a community to water poor agricultural land may lead to further environmental and economic degradation.

- A lack of communication of policy matters both to government officials and other stakeholders.
- Quite a number of environmental and environmentally-related legislations are still in the pipeline and not all have been implemented as yet - as a result no coordination takes place.
- There is a lack of capacity at certain levels of government to implement the new policies, legislation and programmes of government.
- Lack of trained personnel with the necessary capacity.
- Lack of infrastructure.
- Lack of financial resources and equipment.
- Unwillingness to cooperate.<sup>92</sup>

## **8. Possible solutions**

According to Watts,<sup>93</sup> the "establishment of a political culture of cooperation, mutual respect and trust" is a prerequisite for effective government relations. According to him "(t)his is far more important than legal structures, procedures or technicalities provided by a constitution or legislation". Although this is true, it has been indicated above that government officials have no notion of what the concept of "cooperative governance" entails or if they know how to implement it.<sup>94</sup> The Draft Intergovernmental Relations Framework Bill of 2004 is already a step in the right direction. The question remains, however, to the acceptance of such structures to the officials on the ground.

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<sup>92</sup> See also Karekezi S and Ranja T *Renewable Energy Technologies in Africa* (Zed Books London 1997) 145-146 that discussed the lack of cooperation between NGOs and government resulted in the failure of several energy-related projects in the rest of Africa.

<sup>93</sup> (Note 21 above) 25.

<sup>94</sup> See 7 above.

The South African government released a policy document, *Batho Pele*,<sup>95</sup> on the relationship between government officials and the public and effective service delivery. Although this document was published in 1997, not all government officials have taken ownership of the document. The document does not refer to inter-governmental relations, but rather to the relationship between officials and the public. What it does illustrate is that government officials need to take ownership of policy documents.

The question remains, however, how government officials will take notice of the concept. There are various routes, namely control and coordination; the creation of a "culture of cooperation, mutual respect and trust," capacity building<sup>96</sup> and the formulation of policy or working guidelines.<sup>97</sup>

If the last route is taken, such a policy or working document pertaining to cooperative environmental governance should ideally include the following:<sup>98</sup>

- An agreement on what the priorities are.
- A shared understanding of how the policy or working document will affect stakeholders.
- Clearer exposition of the roles of the different formal and informal government committees and meetings.
- The role and responsibilities of each of the lead agents and government officials.
- A decision on whether government departments may take the final decision on matters pertaining the environment or whether a watchdog is needed.
- Provision for informal or formal pre-application meetings with developers and all relevant government officials.

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<sup>95</sup> *Batho Pele* means "People First". White Paper on Transforming Public Service Delivery <http://www.info.gov.za/whitepaper/1997/18340.pdf> [date of access 2004-11-15].

<sup>96</sup> Reddy (note 36 above) 22-23.

<sup>97</sup> MacKay and Ashton (note 20 above) 6.

<sup>98</sup> See also MacKay and Ashton (note 20 above) 6; Sokona Y "Training and Human Resource Development" in Karekezi and MacKenzie (note 13 above) 39-50; Peart and Wilson (note 6 above) 261.

- Communication between the different government departments.
- Continuous training of existing and new personnel.
- Monitoring and auditing of the implementation of the policy on all levels of government.
- Review of policy in two-year intervals and updating or amendment of policy.

Cooperation should not only be effected on the government level, but the public should also be involved in the formulation of policies and legislation.<sup>99</sup> To ensure the success of the policy or working document, enough human, financial and technical resources should be made available. The success of such a policy or working document will depend on the level of participation by the role-players, the extent of participation and the nature of the cooperation.<sup>100</sup>

## 9. Conclusion

In South Africa, cooperative governance is a Constitutional imperative. The concept is taken further in environmental policy and legislation providing for cooperative environmental governance. Various formal and informal structures have been created to ensure co-operative governance - some of them dealing with environmental matters. Some of these structures are more successful than others.

Despite the Constitution, environmental policies and legislation, developers do not experience cooperative governance on the operational level. Government

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<sup>99</sup> Davidson O and Karekezi S "A new, environmentally sound energy strategy" in Karekezi and MacKenzie (note 13 above) 8 14-16 state that an energy option should include *inter alia* review of the existing institutional framework, policy research analysis and project implementation, "formulation of simple and transparent regulatory and fiscal measures" with the participation of all stakeholders and "strengthening of institutional memory, awareness creation and pro-active advocacy".

<sup>100</sup> Brynard and Malan (note 36 above) 101 103; see also Kidd M "The National Environmental Management Act and Public Participation" 1999 *South African Journal of Environmental Law and Policy* 21-31.

officials do not agree with each other on conditions in permits or licenses and sometimes developers are, for example, forced to do more than one EIA.

The DME took the NEMA mandate seriously by incorporating environmental considerations into their decision-making, but in the process ensuring that they are the lead agent on environmental matters regarding mining and energy. The question is whether a government department should be allowed to "usurp" decision-making on the environment and not make any clear provision for cooperative governance. On the other hand, NEMA allows this to happen. What is at least clear is that environmental considerations have been taken into account in decision-making in new legislation and policies in South Africa since 1994, where they were previously more or less ignored.

However, for cooperative environmental governance to succeed, political buy in and leadership are needed. A policy or working document should be formulated with the participation of all role players. To succeed in the implementation of the policy, the necessary human, financial and technical resources should be provided. As MacKay and Ashton<sup>101</sup> state:

Co-operative government needs to be moved beyond principles into reality if South Africa's urgent development imperatives are to be met within a realistic time-frame.

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<sup>101</sup> (note 20 above) 8.