The lost opportunity to protect the environment - NEMA

By Vanessa Jacklin-Levin

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We all know that the natural environment is under growing threat as human populations increase. The case for protecting this common resource — one of the six capitals in modern-day governance frameworks like King IV — is well recognised but, as always, turning public policy into reality is not so easy.

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Our legislation requires, amongst other things, the law to develop good environmental management, to facilitate and promote public participation, and to secure the use of natural resources while promoting justifiable (and much needed) economic and social development. Putting good legislation in place is obviously an important first step, but ensuring that legislation is understood and adhered to is quite another.

At the most practical level, going to court to resolve environmental disputes is extremely expensive, in terms of time and effort as well as money. The end result is that those with the deepest pockets and the greatest patience often carry the day. This is particularly true when it comes to the environment because virtually every sphere of human activity has consequences for the natural world. NGOs, local communities and other interested parties often simply do not have the resources to see all these cases through the courts.

In other words, it's the age-old challenge of making legal remedies accessible to ordinary people.

A quicker, cheaper way to resolve disputes

What surprises me is that all those involved in matters pertaining to the protection of the environment seem to be ignoring provisions in the National Environmental Management Act, 107 of 1998 (NEMA) that clearly have been designed to provide a mechanism for the resolution of disputes without having to always resort to the courts. In so doing, it aims to provide a quicker, cheaper way to resolve disputes about environmental matters.

Chapter 4 (s 17) of NEMA introduces the notion of conciliation as a way for ministers, MECs or municipal councils to resolve disputes concerning the environment. It is phrased in rather an interesting way, saying that the minister, MEC or municipal council must “if he, she or it considers conciliation appropriate” refer the matter for conciliation either to the director-general or a nominated conciliator. If conciliation is not deemed appropriate, or it has failed, NEMA requires the minister, MEC or municipal council to make a decision. This section of NEMA also opens the doors for anyone to request the appointment of a facilitator to help the interested parties to reach an agreement with government or to undergo conciliation. In addition, a court or tribunal hearing a dispute regarding the protection of the environment may order the parties to submit the dispute to a conciliator.

Alternate dispute resolution techniques like this are becoming increasingly commonplace in business because they provide a way to resolve questions relatively quickly and easily — and avoid paying high legal fees. Indeed, King III and now King IV have made the ability to resolve disputes “expeditiously, efficiently and effectively”, to quote King IV, a hallmark of good governance.

Is there some other bottleneck?

As you trawl through the news media and the websites of environmental organisations, there are numerous instances across the country where mining, development, farming and other activities are challenged for environmental reasons. Many are in the courts, still more cannot be fought because the capacity does not exist. And yet, according to good information, the provisions of Section 17 have only ever been used once. One is forced to assume that all other matters have either been shelved or are before the courts.

While the Act stops short of making conciliation mandatory, it comes close. The question is whether this provision has escaped the notice of those who have disputes of an environmental nature, or whether there is some other bottleneck. Whatever the reasons, it’s a pity that a good remedy is not being used to its full potential.

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