Part 5

New wine in old skins

The New Testament advises us not to put new wine in in old skins. Its good advice that speaks to practical experience learnt over millennia. It is often ignored. This is true even to this day.

Environmental laws are based on the idea of sustainable development. The Constitutional Court has described sustainable development in these terms: "Development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."

Sustainable development represents a paradigm shift in thinking about our relationship with planet Earth. We have thought of human health and wellbeing in terms of a struggle against nature for millennia. It is only very recently that we have come to realise that our environment during the last 10 000 years (the Holocene) has enabled us to develop in ways that now threaten the planetary systems (Ecosystem Services) that sustain human health and wellbeing and perhaps threaten even human life itself.

It is important to note that this paradigm shift is pre constitutional. It was introduced into our law through the 1988 Nature Conservation Act (NCA) by the old nationalist government. Consequently, although the idea of environmental management is thoroughly modern and forward looking, there was nothing modern about the nationalist government intended introducing sustainable development. The Nats believed that effective government was achieved by forcefully imposing their will on the people. They called this Kragdadigheid - the Afrikaans word for effective.

1994 brought another paradigm shift, this time in political thinking. The idea that government must impose its will on the people gave way to the idea that people had rights and that effective government was achieved by respecting these rights and allowing people to participate in government. Power was required to give way to principle.

This paradigm shift saw the NCA being replaced by the 1998 National Environmental Management Act (NEMA). This law in turn introduced the idea that environmental management and thus sustainable development would be achieved through the application of environmental principles. These principles would be introduced into law through a system of participatory and co-operative government that integrated environmental management into the fabric of government.

The trouble is that no one explained what this meant to South Africa's environmental authorities. It was business as usual for them, albeit with a bigger budget. They carried on with what they were doing, much as they had done since the NCA became law. Kragdadidheid still applies.

Thus the application of environmental principle has become a case of choosing those principles that supported Kragdadigheid and ignoring the rest. Participation became a tick box exercise of holding meetings at which officials tell the public what is going to happen rather than explaining why this is

necessary in order to give effect to the environmental principles. Integration and participatory government is a case of establishing Environmental Affairs up as a super department in government.

But section 2 of NEMA says the environmental principles must be considered in decision and law making. For the most part this means all the environment principles must be considered and not just some of them.

It follows that if people are to participate in the law making process, they must be given information about how these principles are going to be applied. After all, while very few of us know much about science, we are all pretty good about arguing the toss on matters of principle! Participation is assured in principle based law making. The opposite is true of science based law making. In fact kragdadig science based law is self-defeating as it makes people distrust science.

Notwithstanding this, environmental authorities still prefer a kragdadig science based approach over one based on the application of environmental principles.

This is unlawful. Think what happens if you try to retrench your workers without first giving them a retrenchment notice containing all the prescribed information they need to consult. The process is deemed unlawful and the dismissal is automatically ruled to be unfair.

The same rules apply in environmental rule making. If government doesn't give the proper notice the law making process is deemed to be unlawful and the law can be set aside as void.

A lot of environmental laws have been introduced without this proper notice. A lot of those laws are consequentially at risk of being set aside. That is why it is not a good idea to put new wine in old skins.