

# Environmental impact assessment legislation in Lesotho, Swaziland and South Africa

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## **ABSTRACT**

Due to the global endeavour to conserve the environment and to ensure that development is undertaken in a sustainable manner, mechanisms have been developed across the world to protect the environment during the process of development. As a result, there are projects that require authorisation from the relevant environmental authorities before their commencement due to their likelihood of having significant impact on the environment. For this reason, it is necessary to determine the possible impacts that the proposed activity may have on the environment. An environmental impact assessment (EIA) has been considered as one of the tools that are employed to aid the decision-makers of environmental authorisation applications. EIA is a process of evaluating the potential impacts of the proposed project on the environment. The process is not only aimed at identifying the significant impacts but also ensuring that the said impacts are mitigated and the alternatives considered.

The aim of this dissertation is to determine the lessons that Lesotho can learn from Swaziland and South Africa with regard to EIA legislation. In order to achieve this aim, the paper critically discusses the EIA legislation of Lesotho, Swaziland and South Africa. It further highlights the weaknesses in Lesotho's legislation and the lessons that Lesotho can learn from its two sister countries.

South Africa is more developed than Lesotho and Swaziland and it has a long history of EIAs. South Africa has experienced vigorous evolution of its EIA legislation. On the other hand, Swaziland is a small and less developed country like Lesotho, but with a better EIA legislation.

This dissertation discusses the historical background of EIA legislation, different definitions ascribed to this concept, EIA principles and the generally accepted steps followed in undertaking an EIA. The dissertation then compares the EIA legislation of the three countries against the generally distilled accepted EIA steps.

Keywords: Environmental Impact Assessment Legislation, Lesotho, Swaziland and South Africa

## **OPSOMMING**

As gevolg van ewigdurende globale pogings om die omgewing te bewaar en om te verseker dat ontwikkeling op volhoubare wyse plaasvind, is meganismes wêreldwyd ontwikkel om die omgewing tydens die ontwikkelingsproses te beskerm. Weens die waarskynlikheid van 'n noemenswaardige impak op die omgewing, benodig sekere projekte magtigings van relevante omgewingsowerhede voordat hierdie aktiwiteite 'n aanvang kan neem. Om hierdie rede is dit nodig om die omvang van die impak van die voorgestelde aktiwiteit op die omgewing te bepaal. 'n Omgewingsimpakbepaling (hierna EIA genoem) word beskou as een van die sleutelinstrumente wat besluitnemers tydens omgewingsmagtigingsaansoeke gebruik. EIAs word beskou as die proses om moontlike omgewingsimpakte van die voorgestelde projek te evalueer. Die proses is nie net daarop gerig om die beduidende impakte op die omgewing te identifiseer nie, maar ook om toe te sien dat die voorgestelde impakte getemper word en alternatiewe metodes in dié verband gevind word.

Die doel van hierdie skripsie is om te bepaal watter lesse Lesotho by Swaziland en Suid-Afrika ten aansien van EIAs kan leer. Om hierdie doelwit te bereik, sal die EIA-wetgewing van hierdie lande bestudeer word om oplossings te identifiseer vir die gapings wat in Lesotho se wetgewing geïdentifiseer is.

Aangesien Suid-Afrika meer ontwikkel as Lesotho en Swaziland is, bestaan daar 'n lang geskiedenis van EIAs en het Suid-Afrika 'n lang evolusie van EIA-wetgewing ondergaan. Swaziland is, net soos Lesotho, 'n onderontwikkelde land, maar beskik oor beter EIA-wetgewing as Lesotho.

Die skripsie is daarop gerig om die historiese agtergrond rakende EIA-wetgewing, verskeie definisies van EIAs, asook die algemene aanvaarbare stappe om EIAs te onderneem, te bespreek. Hierdie skripsie sal dan die EIA wetgewing van dié drie lande van drie lande met hierdie algemeen aanvaarbare EIA stappe, vergelyk.

Sleutelwoorde: Omgewingsimpakwetgewing, Lesotho, Swaziland en Suid-Afrika

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## LIST OF ABBREVIATIONS

CMP	Comprehensive Mitigation Plan
DBSA	Development Bank of Southern Africa
DoE	Department of Environment
EA	Environmental Management
EAARR	<i>Environmental Audit, Assessment and Review Regulations, 2000</i>
EAP	Environmental Assessment Practitioner
ECA	<i>Environmental Conservation Act 73 of 1989</i>
ECC	Environmental Compliance Certificate
EIA	Environmental Impact Assessment
EIS	Environmental Impacts Statements
EISA	Electoral Institute for Sustainable Democracy in Africa
EMA	<i>Environment Management Act 5 of 2002</i>
EMI	Environmental Management Inspector
EMP	Environmental Management Plan
EMPr	Environmental Management Programme
I & AP	Interested and Affected Party
IEE	Initial Environmental Evaluation
IEM	Integrated Environmental Management
LEA	Lesotho Environmental Authority
MEC	Member of Executive Committee
MMA	<i>Mines and Minerals Act 4 of 2005</i>
NAP	National Action Plan
NEP	<i>National Environment Policy</i>
NEAP	National Environmental Action Plan



NEPA	<i>National Environmental Policy Act of 1969</i>
NES	National Environment Secretariat
S & EIR	Scoping and Environmental Impact Report
SADAC	South African Development Community
SAIEA	Southern African Institute for Environmental Assessment
SAPL	Southern African Public Law
SEA	Strategic Environmental Assessment
SEMA	Specific Environmental Management Act
ToR	Terms of Reference
UNDP	United Nations Development Programme
USA	United States of America

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# Chapter 1 Introduction

## 1.1 Problem statement

From time immemorial, the world has been undergoing development. Various measures have been employed to ensure that the development activities happen in a sustainable manner resulting in the common phenomenon of sustainable development.<sup>1</sup> The phenomenon of sustainable development seeks to ensure that in undertaking development, the environmental, social and economic factors are taken into account in the decision-making. The world has developed tools such as an EIA to ensure in particular that the integrity of the environment is not compromised when undertaking development activities.<sup>2</sup> This tool has been adopted and is being applied in many countries.<sup>3</sup> Lesotho, Swaziland and South Africa, being three SADC sister countries, have also undertaken steps to promulgate environmental legislation providing for EIAs.

In 2008, Lesotho adopted the *Environment Act* which is the country's environmental framework legislation.<sup>4</sup> This Act makes an EIA a requirement for authorisation of certain listed projects<sup>5</sup> which are likely to have a significant impact on the environment. The Act further makes provision for procedures to be followed prior to and in the undertaking of an EIA.<sup>6</sup> The Act vests power in the relevant Minister to issue EIA regulations<sup>7</sup> regarding the projects which must be subjected to an EIA while the Director of the Department of Environmental Affairs (DoE) has the power to formulate guidelines concerning the conduct of an EIA.<sup>8</sup> The *Environment Act*<sup>9</sup> has some shortcomings as regards an EIA process. These Guidelines have been published but several challenges remain. Lesotho

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- 1 Section 2 NEMA defines sustainable development as "the integration of social, economic and environmental factors in planning, implementation and decision-making so as to ensure that the development serves the present and future generations."
  - 2 Murombo 2008 *PELJ* 107. It has been suggested further that an EIA is "an important concept and procedure as it is one of the most effective tools or techniques" for ensuring that development activities are sustainable."
  - 3 This shall become observed in the definitions of an EIA drawn from different jurisdictions. See para 2.3. below.
  - 4 *Environment Act* 10 of 2008.
  - 5 The word "activity" is used interchangeably with "project."
  - 6 See Chapter 3 below.
  - 7 See para 3.6 below.
  - 8 See para 3.5 below.
  - 9 *Environment Act* 10 of 2008.

has drafted the Regulations<sup>10</sup> but to date they have not been formally passed, thus they remain Draft Regulations.

Swaziland has enacted the *Environment Management Act*<sup>11</sup> (EMA) which makes provision that the relevant Minister may make regulations with regard to EIA procedures on developmental projects that may have significant impact on the environment. Swaziland formulated the *Environmental Audit, Assessment and Review Regulations*<sup>12</sup> (EAARR) to regulate the process of EIA. The regulations give the Swaziland Environmental Authority (Authority) the power to identify undertakings which in its opinion may have significant impact on the environment and to demand that an EIA be undertaken.<sup>13</sup>

South Africa enacted the *National Environment Management Act*<sup>14</sup> (NEMA) which embodies comprehensive EIA provisions under section 24. NEMA makes provision for procedures that must be included in undertaking an EIA process.<sup>15</sup> NEMA vests power in the Minister to make regulations regulating the EIA process.<sup>16</sup> Pursuant to the said provisions, South Africa enacted the *NEMA EIA Authorisation Regulations* on 4 December 2014.<sup>17</sup> South Africa also promulgated guidelines and other regulations that are followed in the EIA process.<sup>18</sup>

Lesotho is a small land logged and less developed country with the key environmental impacts arising from such projects as road construction, mining, dam construction and smaller industries.<sup>19</sup> Lesotho has a long history of EIA legislation. Swaziland is a small, land logged, less developed country with a similar background to Lesotho with key environmental impacts arising from road construction and industry. Although Swaziland is small and less developed as Lesotho, its EIA legislation is more comprehensive as opposed to that of Lesotho.

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10 *Draft EIA Regulations*, 2006

11 *Environment Management Act* 5 of 2002.

12 *Environmental Audit, Assessment and Review Regulations*, 2000.

13 See para 4.5

14 *Environment Management Act* 107 of 1998.

15 See para 5.4 below.

16 Section 24 of NEMA.

17 GN R982-985 in GG 38282 of 4 December 2014.

18 See para 5.5 below.

19 Motsamai, Keatimilwe and Pomela *Lesotho*.

South Africa is a more developed country with a longer history of EIA implementation from which Lesotho may draw some lessons.<sup>20</sup> The South African EIA legislation is more extensive due to its large scale industry, road construction and mining activities, amongst others. Due to its longer extensive history and test and trial with EIA legislation and regulations,<sup>21</sup> it may provide learning points for Lesotho. Swaziland is not so developed as South Africa and its EIA legislation is not as comprehensive as the legislation of South Africa. However, both these countries' EIA legislation provides to a greater extent uniform procedures and detailed procedures as opposed to Lesotho.

Lesotho's EIA legislation provides for procedures for an EIA but the legislation is not as comprehensive as that of the other two countries and there are several deficiencies in the EIA legislation of Lesotho.<sup>22</sup> The lack of regulations in Lesotho may create challenges in the application of the EIA rules. This provides an opportunity for Lesotho to learn from the position in Swaziland and South Africa before the regulations are finalised. The deficiencies in the Act and the *Guidelines* may be addressed.<sup>23</sup> Some of the apparent deficiencies are that the Director in Lesotho has wide discretionary powers and that the EIAs are not done in the same manner. There are also discrepancies between the Act and the *Guidelines*. Thus it seems that Lesotho may draw lessons from the EIA legislation of Swaziland and South Africa.<sup>24</sup>

## **1.2 Research aim**

The aim of this study is therefore to determine the lessons that Lesotho can draw from Swaziland and South Africa's EIA legislation. In order to address this aim, sub-aims are formulated. The sub-aims of this study are to:

- (a) discuss the historical background, the objectives, principles of EIAs and the generally accepted steps of EIA procedures against which the EIA legislation of

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20 Murombo 2008 *PELJ* 106.

21 Murombo 2008 *PELJ* 106

22 See para 3.9 below.

23 See para 3.9 below.

24 Although the South African Development Community (SADC) Protocol requires harmonisation of legislation, it is not the focus of this study to discuss the EIA legislation frameworks in the regional context due to the scope of the mini-dissertation.

the three countries will be evaluated against. This aim will be addressed in Chapter 2,

- (b) evaluate the EIA legislation of Lesotho against the EIA principles and the generally accepted steps of EIA and to indicate the shortcomings of the Lesotho's EIA legislation. This aim will be addressed in Chapter 3.
- (c) discuss the EIA legislation of Swaziland evaluating it against the EIA principles and the generally accepted steps of EIA and determine the possible learning points for Lesotho. This will be discussed in Chapter 4.
- (d) discuss the EIA legislation of South Africa, evaluating it against the EIA principles and the generally accepted steps of EIA, comparing it with the EIA legislation of Lesotho and Swaziland in order to determine the possible learning points for Lesotho.<sup>25</sup>
- (e) make recommendations for Lesotho so as to improve its EIA legislation based on the findings of the comparison of the legislation of Lesotho, Swaziland and South Africa.<sup>26</sup>

### ***1.3 Research methodology***

This study is mainly based on literature review of the EIA legislation in Lesotho Swaziland and South Africa, case law, textbooks, journals and internet material relating to EIAs and EIA legislation. The study is a comparative study of the EIA legislation of Lesotho and Swaziland taking learning points from the South African legislation and regulations to make recommendations for Lesotho. A challenge with the study was that the author had difficulty in finding secondary materials on EIAs as well as the legal position of EIAs in Lesotho and Swaziland.

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25 See chapter 5 below.

26 See chapter 6 below.

In this study, the historical background of EIA which include the definitions is provided.<sup>27</sup> The study also discusses the objectives of EIA and the generally accepted steps or procedures for EIA. The EIA legislation in Lesotho is with reference to the historical background and the steps followed in EIA and the legislation is measured against the generally accepted EIA steps.<sup>28</sup> The dissertation deals with the EIA legislation of Swaziland<sup>29</sup> and South African legislation in a like manner. The South African legislation and literature are not discussed comprehensively as the focus is on Lesotho and to determine how the gaps in Lesotho's legislation may be addressed.

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27 See chapter 2 below in this regard.

28 See chapter 3 below in this regard.

29 See chapter 4 below in this regard



## Chapter 2 Background

### 2.1 Introduction

The use of EIAs has a long history. An EIA has certain objectives and to adhere to these objectives, the writers have distilled generally accepted steps that an ideal EIA should follow.<sup>30</sup> In this chapter, the historical background of the development of the introduction of an EIA as an environmental management tool will be discussed in order to understand the evolution of the concept globally.<sup>31</sup> The concept of EIA shall be defined for the purposes of this study by referring to different definitions of EIAs.<sup>32</sup> The chapter will also discuss the objectives of an EIA.<sup>33</sup> The generally accepted principles and steps that are distilled as good EIA practice will also be discussed.<sup>34</sup> This discussion shall form the basis upon which the EIA legislation from the three countries will be discussed in order to discover possible lessons that could be learned.<sup>35</sup> The historical background shall be discussed first.

### 2.2 Historical background

The concept of an EIA or environmental assessment (EA) as was initially known was introduced in the United States of America (USA) through the *National Environment Policy Act*<sup>36</sup> (NEPA) and its origins dates back as far as 1969.<sup>37</sup> NEPA defined EA as a:

systematic interdisciplinary approach which will ensure the integrated use of natural and social sciences and environmental design arts in planning and in decision-making which may have an impact on man's environment.<sup>38</sup>

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30 See para 2.6 below.

31 See para 2.2 below.

32 See para 2.3 below.

33 See para 2.4 below.

34 See para 2.5 and 2.6 respectively below.

35 See para 6.2 below.

36 *National Environment Policy Act* of 1969.

37 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10. See also Benson 2003 *Impact Assessment and Project Appraisal* 261. The purpose of NEPA was to promote efforts that would avert damage to the environment and the biosphere. See also Lee and George *Environmental Assessment* 3.

38 Holder *Environmental Assessment; Regulation of Decision Making* 33.

Many countries followed in the steps of the USA thereby promulgating EIA legislation.<sup>39</sup> Benson<sup>40</sup> states that since the inception of the EIA in NEPA, the EIA has spread across the world in such a manner that the regulated EIA system can be found on every continent and in many countries. In Europe, the adoption of European Directives<sup>41</sup> on EIA in 1985 motivated the enactment of EIA legislation in several European countries in the late 1980s.<sup>42</sup>

As regards the developing countries, Makhele<sup>43</sup> states that EIA adoption into the developing countries was initially slow, however, the growth occurred largely since the 1980s following the Rio Earth Summit in 1992.<sup>44</sup> Another reason for the spread of EIAs in the developing countries is that most of the funding institutions such as the World Bank required an EIA as part of its funding approval process and as a result, EIAs spread faster in most of the developing countries.<sup>45</sup> Some international institutions also created EIA guidelines, including the European Bank for Reconstruction and Development in 1992 and Overseas Development Administration in 1996 which assisted countries which did not have EIA legislation.<sup>46</sup> Sometime around 1997, about 40% of the world's states had introduced the mandatory EIA procedures for development activities.<sup>47</sup> Various definitions have been ascribed to an EIA and it is now necessary to define this concept for purposes of this study.

### **2.3 Definition**

On international level, there are definitions which have been ascribed to EIA and some of these definitions are enshrined in international instruments. According to *Espoo*

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39 Glazewski *Environmental Law* 229.

40 Benson 2003 *Impact Assessment and Project Appraisal* 261.

41 European Directive 85/337/EEC and 97/11/EC.

42 Benson 2003 *Impact Assessment and Project Appraisal* 261.

43 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10.

44 See also Lee and George *Environmental Assessment* 3.

45 Munyazikwiye *EIA implementation in Rwanda* 9.

46 Munyazikwiye *EIA implementation in Rwanda* 9.

47 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10.

*Convention*,<sup>48</sup> an EIA is "a national procedure for evaluation of the likely impact of the proposed activity on the environment." According to Principle 17 of the Rio Convention, an EIA is an instrument that shall be conducted for the proposed activities that are likely to cause significant adverse impact on the environment and are subject to a decision of the competent authority.<sup>49</sup> Although the concept is defined in some international instruments, the description of an EIA differs from one jurisdiction to the other and that is dependent on the circumstances.<sup>50</sup> Sadler<sup>51</sup> states that the term is sometimes used interchangeably with the term environmental assessment (EA).<sup>52</sup> Although the terms are used interchangeably, EA has been defined by Sadler<sup>53</sup> to mean:

a systematic process and documenting information on the potentials, capacities and functions of natural systems and resources in order to facilitate sustainable development planning and decision-making in general, and to anticipate and manage adverse effects and consequences of proposed undertakings in particular.

Wood<sup>54</sup> defines an EIA as the "evaluation of the impact which is likely to arise from a project significantly affecting the natural and man-made environment." This definition extends the evaluation of the impact to the man-made environment. EIAs are also referred to as the systematic and integrative process of evaluating the impacts of the development actions on the environment that take place prior to the implementation of a project.<sup>55</sup> Canter,<sup>56</sup> takes a wider approach in defining an EIA by including the impacts of plans, programmes and legislative actions and states that an EIA is:

a systematic identification and evaluation of the potential impacts (effects) of proposed projects, plans, programmes or legislative actions relative to the physical-chemical, biological, cultural and socio-economic components of the total environment.<sup>57</sup>

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48 *Convention on Environmental Impact Assessment in a Transboundary Context*, 1991. See also Kidd *Environmental Law* 235. See also Glazewski *Environmental Law* 230 full discussion on *Espoo Convention*. See also Roux and Du Plessis "EIA legislation and the importance of transboundary application" 89. However, due to the scope of this mini-dissertation, the contents of the *Espoo Convention* will not be discussed in details.

49 Kidd *Environmental Law* 235. See also Lee and George *Environmental Assessment* 3.

50 Glazewski *Environmental Law* 230. See also Sadler *Environmental Assessment* 12.

51 Sadler *Environmental Assessment* 12.

52 See para 2.2 below.

53 Sadler *Environmental Assessment* 13. See also Glazewski *Environmental Law* 231.

54 Wood *Environment Impact Assessment* 1.

55 Wood *Environment Impact Assessment* 1.

56 Canter *Environmental Impact Assessment* 2. See also Glazewski *Environmental Law* 231.

57 The physical, chemical and biological can be regarded as part of the environment as per the definition of environment is section 1 of the NEMA.

What is new in Canter's definition and it also relates to Wood's definition is that they both refer to the cultural environment. Canter's definition brings strategic environmental assessment (SEAs) in to the scope of EIAs. SEAs have been defined as:

a process to ensure that significant environmental effects arising from policies, plans programmes are identified, assessed, mitigated to decision-makers, monitored and that opportunities for public involvement are provided.<sup>58</sup>

Some writers define an EIA in a narrow sense but link it to other disciplines, for example, as "a management tool for planners and decision-makers that serve to complement other project studies on engineering and economics."<sup>59</sup> Sadler has also defined EIA as:

process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of proposed projects and physical activities before any activity is undertaken.<sup>60</sup>

It can be observed from the foregoing definitions that the common denominator is the identification, prediction and assessment of the significant impact of the proposed project on the environment in a broad sense. However, if the elements of the different definitions are combined, an EIA for the purpose of this study can initially be defined as the systematic identification, prediction, and evaluation of the significant adverse socio-economic, cultural and environmental impacts of a proposed project or activity, the formulation of mitigation measures and alternatives to the proposed project or activity with the involvement of the public, the monitoring of the impacts and the reporting on the mitigation of the impacts to assist authorities in their decision-making.

The legislation in the three countries, Lesotho, Swaziland and South Africa subject to discussion has endeavoured to define an EIA. In Lesotho, an EIA is defined as the "systematic examination of a project or activity conducted to determine whether or not that project or activity may have adverse impact on the environment."<sup>61</sup> Project is

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58 Kidd *Environmental Law* 235. Retief, Jones and Jay 2007 *South African Geographical Journal* 44 for detailed discussion on SEAs. See also SEAs will due to scope of the study not form part of the discussions.

59 Roux *Comparison between South Africa, Namibia and Swaziland's EIA legislation* 13.

60 Sadler *Environmental Assessment* 13.

61 Section 2 of the *Environment Act* 10 of 2008. According to the *Guidelines for Environmental Impact Assessment*, 2008 para 1.2, EIA is both a process and a tool for a project planning and decision-making.

described as including "both project and policy that leads to projects which have or are likely to have an impact on environment."<sup>62</sup> The definition of "project" reveals that the investigation and assessment is not only limited to an activity or projects but includes policies which lead to projects that may have a significant impact on the environment just as in Canter's definition. Therefore, it seems that Lesotho's definition of EIA includes a SEA.

To understand the definition of an EIA in Lesotho, it is important to define the term "environment" in the context of Lesotho. The 2008 *Environment Act*<sup>63</sup> defines "environment" to mean:

the physical factors of the surroundings of the human beings, including, water, atmosphere, climate, sound, odour, taste, biological factors of animals and plants and social factors of aesthetics and includes both natural and built environment.

The *Guidelines for EIA in Lesotho*<sup>64</sup> define "environment" in a broader sense as:

the physical, biological, social, economic, cultural, historical and political factors of the surroundings of human beings, including land, water, atmosphere, climate, sound, odour, taste and the biological factors of flora and fauna. It includes both the natural and built environments. It also includes human health and welfare. Alternatively, the external circumstances, conditions and objects that affect the existence and development of an individual, organism or group. These circumstances include biophysical, social, economic, historical, and cultural and political aspects.

When the definition of an "EIA" is read with the definition of "environment", it becomes evident that the "environment" refers to both the natural and build environment and includes social, economic, political, cultural, historical and other factors. This implies that an EIA in Lesotho focuses not only on the significant environmental impacts on the activity or project, but also in biological, social, economic, cultural, historical and political factors of the surroundings of human beings. It also implies that the applicants will have to consider not only environmental policies, but also factors relating to services.

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62 Section 2 of the *Environment Act* 10 of 2008. The *Guidelines for Environmental Impact Assessment*, 2008 defines project as a development activity or proposal. Development, on the other hand has been defined as "the act of altering, modifying, or utilising resources in order to obtain potential benefits."

63 Section 2 of the *Environment Act* 10 of 2008.

64 *Guidelines*.

Swaziland defines an "EIA" in the EAARR<sup>65</sup> as the "process of predicting and evaluating the likely environmental impacts of a proposed project where the scale, extent and significance of the environmental impact cannot be determined." Thus, an EIA in Swaziland focuses on projects that are likely to have significant impact as opposed to those that may have insignificant impact.

"Environment" is defined as:

the whole or any component of, nature, including air, land, water, soil, minerals, energy other than noise, and living organism other than human; the interactions between the components of nature and between those components and humans; physical, aesthetic and cultural qualities or conditions that affect the health and well-being of people unless the context otherwise requires, refers only to the environment within the territory of Swaziland or over which Swaziland exercises rights of sovereignty, and "environmental" has a corresponding meaning.<sup>66</sup>

Following from the definition of an EIA of Swaziland, it is apparent that the EIA process is only limited to the projects and does not extend to the SEAs.<sup>67</sup> The definition of "environment" in Swaziland is also wider as that of Lesotho as it includes socio-economic and cultural factors and focuses on the well-being of humans. The "Project" is also defined to mean:

an enterprise, undertaking or activity or proposal or plan for a new enterprise or activity to significantly change an enterprise, an undertaking or a project, and includes a plan, operation, undertaking, construction, development, change in land use, alteration which may not be implemented without a permit, licence, consent or approval from authorising agency.<sup>68</sup>

The South African NEMA does not define an "EIA", but the *NEMA EIA Authorisation Regulations*<sup>69</sup> does. An "EIA" is a "systematic process of identifying, assessing and reporting environmental impacts associated with the activity and includes basic assessment and S & EIR.<sup>70</sup>

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65 Regulation 2 of EAARR.

66 Section 2 of the *Environment Management Act* 5 of 2002.

67 The SEAs are provided for in section 31 of EMA.

68 Regulation 2 of the EAARR.

69 Regulation 1 in GN R982 in GG 38282 of 4 December 2014.

70 The Regulations do not define basic assessment but instead defines basic assessment report as a report contemplated in regulation 9. S&EIR means scoping and environmental impact reporting process as contemplated in regulations 21 to regulations 24.

An "activity" is defined as "policies, programmes, processes, plans and projects."<sup>71</sup> South Africa also takes a wider approach in that it includes not only projects but also policies, programmes, processes and plans which create possibility of the introduction of SEAs.<sup>72</sup> NEMA defines "environment" as:

the surroundings within which humans exists and that are made up of –

- (i) of the land, water, and the atmosphere of the earth;
- (ii) macro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationship among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions that influence the human health and well-being.<sup>73</sup>

The definition of "environment" focuses more on the natural environment but refers to aesthetic and cultural properties and human health and well-being. It is not as clear as the definition of Lesotho and Swaziland that specifically refers to the social, economic and cultural properties of the environment.

An EIA has been described as one of the tools of integrated environmental management (IEM).<sup>74</sup> IEM has been defined as "adoption of NEMA principles and tools by other organs of state in line with duty of co-operative governance."<sup>75</sup> The definition of an EIA in South Africa reflects section 23 of NEMA which provides for integrated environmental management (IEM).<sup>76</sup> Section 23(2) states that general objective of IEM as:

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71 Section 1 of NEMA.

72 Glazewski *Environmental Law* 232.

73 Section 1 of NEMA.

74 Glazewski *Environmental Law* 230. An IEM is also defined as a procedure aimed at ensuring that the environmental impacts of developments are understood and sufficiently considered in the planning process. See also Nel and Kotzke "Environmental Management: An Introduction" 14.

75 Kidd and Retief "Environmental Assessment" 30.

76 Section 23(1) of NEMA provides that the purpose of the chapter is to promote the application of appropriate environment management tools in order to ensure the integrated environmental management of the activities.

the identification, prediction and evaluation of the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in this section.

IEM and EIA have been considered by some people as synonyms.<sup>77</sup> They are, however, two different concepts.<sup>78</sup> An EIA remains one of the tools that are used to promote IEM.<sup>79</sup> The South African definition of an EIA is therefore seen within the context of IEM, while the definitions of Lesotho and Swaziland focuses more on the project and activity itself. All three definitions, however clearly indicates an EIA should not only deal with environmental impacts, but should also investigate the social, economic, cultural and in the case of Lesotho, historical impacts of the project. South Africa includes the possibility of SEAs in the EIA definition. The South African definition providing the more holistic contexts IEM deals with the whole project life cycle and not only the initial construction phase of a project. Following the definition, it is now necessary to determine what the objectives of an EIA are.

#### **2.4 Objectives of EIA**

It is apparent from the definitions of EIA<sup>80</sup> that the objectives of an EIA are to investigate and assess the actual and the potential impacts of the proposed activities on the environment in order to assist in decision-making. It has been suggested that the main objective of EIA is to facilitate the systematic consideration of environmental issues during the phases of the development.<sup>81</sup> According to Glasson,<sup>82</sup> an EIA is an aid to be used by the decision-makers. Therefore the EIA report must be of such a nature that it actually provides information to the officials that they can make an informed decision on the proposed project.

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77 Nel and Du Plessis 2004 *SAPL* 182. See also Kidd and Retief "Environmental Assessment" 30

78 NEMA, in particular, section 23 thereof gives an impression that IEM and EIA mean the same thing and can be used interchangeably and some people have actually been of the opinion that the two mean the same thing. See Nel and Du Plessis 2004 *SAPL* 182. See also Kidd and Retief "Environmental Assessment" 973.

79 See Nel and Du Plessis 2004 *SAPL* 188.

80 See 2.3 above.

81 Abaza, Bisset and Sadler *Towards an Integrated Approach* 40.

82 Glasson et al *Introduction to Environmental Impact Assessment* 8.



An EIA should be undertaken before major decisions are taken and while feasible alternatives and options to a proposed action are still open.<sup>83</sup> An EIA is a process rather than a one-time activity which should extend throughout the life cycle of a project and be integrated within the project planning and decision-making process so that an EIA influences many stages over time and is not aimed only at producing a report for the final approval stage.<sup>84</sup> An EIA should therefore be relevant not only during the authorisation stage of the project but also for the operational and closure phases, that is, it should address the project life-cycle.<sup>85</sup>

An EIA may also assist in improving the relations between a developer and the local communities which are made up of interested and affected parties (I&APs), amongst others.<sup>86</sup> The I&APs are engaged during an EIA process and they are allowed to make representations. Public participation has several advantages. The public knows the local conditions, plant species and animal behaviour for example, and may inform the EIA process. It is also possible to determine negative opinions against the project and the reasons thereof and the developer would be able to mitigate these impacts and opinions if necessary and address them in the EIA report.

According to the International Association for Impact Assessment (IAIA),<sup>87</sup> an EIA has four objectives, to wit;

- (a) to ensure that environmental concerns are taken into account and are included in the decision-making process;<sup>88</sup>
- (b) to predict , avert, mitigate or offset the adverse significant biophysical, social and other impacts of the activity;<sup>89</sup>

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83 Abaza, Bisset and Sadler *Towards an Integrated Approach* 40.

84 Abaza, Bisset and Sadler *Towards an Integrated Approach* 41. Thus an EIA is aimed also at influencing the development though out the whole process.

85 Nel and Kotzé "Environmental Management; An Introduction" 14.

86 Glasson et al *Introduction to Environmental Impact Assessment* 9.

87 IAIA 2015 <http://www.iaia.org>.

88 IAIA 2015 <http://www.iaia.org>.

89 IAIA 2015 <http://www.iaia.org>.

- (c) to preserve the productivity and capacity of natural systems and the ecological processes which maintain their functions,<sup>90</sup> and
- (d) to encourage development that is sustainable and enhance the effectiveness of resource use and management opportunities.

It can be seen that the above mentioned objectives encompass the definitions of an EIA and further take a step to view an EIA as a tool. Generally, it can therefore be said that the objectives of an EIA are to ensure that the decision-making process takes into account and include all environmental concerns and should predict, avert where possible and mitigate the adverse impacts of the activity. An EIA is also aimed at preservation of the natural systems and ecological processes of the environment as a whole. An EIA is also aimed at ensuring public participation in the decision-making process. In attaining these objectives, the IAIA has formulated principles as the foundation of an EIA.

### ***2.5 International best practice principles***

The principles underlying the EIA process are divided into basic principles and operating principles.<sup>91</sup> Basic principles are applicable in all stages of the EIA while operating principles dictate the manner in which basic principles should be applied and to which activities of an EIA should be applied to.<sup>92</sup> An EIA must be in line with the following basic principles, namely that an EIA should be purposive, rigorous, practical, relevant, cost-effective, efficient, focused, adaptive, participative, interdisciplinary, credible, integrated, transparent and systematic.<sup>93</sup>

An EIA must be "purposive" in that it should inform decision-making.<sup>94</sup> According to Sadler,<sup>95</sup> an EIA must be decision-oriented by rendering "sound, tested practical information that is readily usable in planning and decision making." It must also be "rigorous" and "practical" in that it should ensure application of best practicable science

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90 IAIA 2015 <http://www.iaia.org>.

91 IAIA 2015 <http://www.iaia.org>.

92 IAIA 2015 <http://www.iaia.org>

93 IAIA 2015 <http://www.iaia.org>.

94 IAIA 2015 <http://www.iaia.org>.

95 Sadler *Environmental Assessment* 22.

which uses relevant methods that address the impacts and provide information which is necessary to address the impacts.<sup>96</sup> An EIA should be "relevant" so as to provide sufficient, reliable and provide information that can be used.<sup>97</sup> An EIA must also be "cost-effective" and "efficient" thereby meeting its aims within the limits of available information, time, resources and methods and should impose the minimum cost burdens with regard to time and finances.<sup>98</sup> An EIA must "focus" on the significant environmental impacts.<sup>99</sup> An EIA should be undertaken on all activities that are likely to cause a significant impact on the environment and must be a tool for environmental management so as to ensure minimising and avoidance or rehabilitation of the impacts of the activity.<sup>100</sup>

An EIA process must be "participative" in nature by involving all the I&APs thereby providing them with information and taking into account their inputs and concerns.<sup>101</sup> In addition, the process must be "interdisciplinary" by employing appropriate techniques and experts in the relevant disciplines and must be "credible" in that it should be undertaken with professionalism and shall be subjected to checks and verification.<sup>102</sup> The process must "integrate" various aspects such as social, economic, cultural, historical and biophysical aspects and must address such other factors as health risks and other long term impacts.<sup>103</sup> An EIA must ensure "transparency," that is access to information by the public and must consider all relevant information on the affected

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96 IAIA 2015 <http://www.iaia.org>. See also Sadler *Environmental Assessment* 23.

97 IAIA 2015 <http://www.iaia.org>. See also Sadler *Environmental Assessment* 23. Sadler states that an EIA must result in the information of about the "nature, likely magnitude, and significance of the potential effects, risks and consequences of the proposed undertaking" and relevant for the decision-making process.

98 IAIA 2015 <http://www.iaia.org>. According to Sadler, an EIA must enhance actions that lead to environmental protection at least cost to the society and must be undertaken in a timely manner. See Sadler *Environmental Assessment* 22.

99 IAIA 2015 <http://www.iaia.org>.

100 Sadler *Environmental Assessment* 23.

101 IAIA 2015 <http://www.iaia.org>. An EIA must be conducted so as to give an opportunity to the public to be involved as communities, groups, and parties that are directly affected by the activity and its environmental impacts.

102 IAIA 2015 <http://http://www.iaia.org>.

103 IAIA 2015 <http://http://www.iaia.org>. See also Sadler *Environmental Assessment* 23. See also para 2.3 above.

environment, the proposed alternatives and measures to be employed in monitoring and investigating residual effects.<sup>104</sup>

According to Sadler,<sup>105</sup> the basic principles which guide the EIA process in achieving their objectives are usually contained in the statutes and guidelines and most of these principles are long standing and widely held across jurisdictions, while operational principles focus on EIA good practice.

As regards the operating principles, IAIA<sup>106</sup> stated that the EIA process must be applied

- (a) in decision-making processes and throughout the life-cycle of the activity;<sup>107</sup>
- (b) to all proposed activities that may cause significant impacts on the environment;<sup>108</sup>
- (c) to biophysical impacts and all relevant socio-economic factors and must be consistent with the principles of sustainable development;<sup>109</sup> and
- (d) provide for public participation in line with internationally accepted measures and activities.<sup>110</sup>

The aforementioned principles indicate when, how and to which activities the EIA must be applied and what it must provide for. Sadler<sup>111</sup> further identified the principles for effective EIA practice which have been recognised by many EIA administrators and practitioners and summarised them in the key factors mentioned below. The effective EIA must be based on the legislation which has a clear purpose, specific requirements

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104 IAIA 2015 <http://http://www.iaia.org>. Sadler *Environmental Assessment* 23.

105 Sadler *Environmental Assessment* 20.

106 IAIA 2015 <http://http://www.iaia.org>.

107 IAIA 2015 <http://http://www.iaia.org>. See also Sadler *Environmental Assessment* 23 where he identifies the same principles as a principle for effective EIA practice and continues to indicate that it must be undertaken "as early as feasible in the concept design phase."

108 IAIA 2015 <http://http://www.iaia.org>. See also Sadler *Environmental Assessment* 23.

109 IAIA 2015 <http://http://www.iaia.org>. See also Sadler *Environmental Assessment* 23 where it is provided that the EIA process must address sustainability considerations inclusive of resources productivity and biological diversity.

110 IAIA 2015 <http://http://www.iaia.org>.

111 Sadler *Environmental Assessment* 23.

and prescribed responsibilities.<sup>112</sup> Further, there must be appropriate procedural controls in order to ensure that the level of evaluation, the range of consideration and timetables for completion are relevant to circumstances.

The effective EIA must be problem and decision-orientated in that it must be "concerned with the issues that matter, the provision of consequential information, and explicit linkage to approvals and condition-setting."<sup>113</sup> An EIA should also include follow-up and feedback capacity inclusive of compliance and effects monitoring, impact management and audit evaluation.<sup>114</sup> The principles compliment the definition of an EIA in that it links EIA to sustainable development and it emphasises the importance of the project life cycle. It also brings a new dimension namely auditing. The basic principles will assist the drafters of the statutes and policies to ascertain that their EIA legislation will provide for an effective EIA. Now that the principles have been identified, it is necessary to determine what the generally accepted steps are that could be included in EIA legislation.

## ***2.6 The generally accepted steps in EIA***

In order to give effect to the objectives of an EIA, there are generally accepted steps that have been identified that at least an EIA must contain. According to Aucamp,<sup>115</sup> an EIA is a process which has different steps and although each country may have its own EIA steps, there are certain typical steps that at least each EIA must have. It is not every EIA that goes through all the stages that have been identified. The initial stages of an EIA may be based on screening and scoping procedures<sup>116</sup> followed by impact prediction, evaluation, mitigation and follow up.<sup>117</sup> The steps are discussed below.

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112 Sadler *Environmental Assessment* 21.

113 Sadler *Environmental Assessment* 2.

114 Sadler *Environmental Assessment* 21.

115 Aucamp *Environmental Impact Assessment* 87.

116 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

117 See para 2.6.1 and 2.6.9.

### 2.6.1 Screening

Screening is considered as the initial step of an EIA process which identifies the activities that may be subjected to an EIA and excludes activities that do not need it.<sup>118</sup> This is the step that should identify the "level or to what extent EIA is warranted."<sup>119</sup> Screening focuses on projects which are likely to have an adverse significant impact or which the impacts thereof are not fully known.<sup>120</sup> Thus it can be deduced that an EIA will be undertaken for activities that have significant impact as opposed to an activity that will have insignificant impact on the environment. There are two approaches to screening, to wit; the use of thresholds and setting of thresholds.<sup>121</sup> The use of thresholds involves placing projects in categories while the setting of threshold involves setting of threshold based on project characteristics, anticipated impacts and location of the project.<sup>122</sup>

The common approach used in screening is to classify the proposed developments or projects into different types of impacts.<sup>123</sup> For instance, they may be classified as:

- (a) Category 1 - activities that are not likely to result in significant impact and may not require further studies;<sup>124</sup>
- (b) Category 2 - these are activities that are likely to cause limited significant adverse impacts upon failure to take mitigating measures. Such activities require "limited environmental study and the preparation of an appropriate mitigation plan;"<sup>125</sup>
- (c) Category 3 - the activities that are likely to cause significant adverse impacts which their magnitude cannot be identified save for detailed study.<sup>126</sup>

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118 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44. See also Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 89.

119 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

120 Glasson et al *An Introduction to Environmental Impact Assessment* 88.

121 Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 90.

122 Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 90.

123 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

124 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

125 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

126 Abaza, Bisset and Sadler *Towards an Integrated Approach* 44.

In some jurisdictions, the screening process is extended in relation to category 2 projects and this sometimes referred to as initial environmental evaluation (IEE).<sup>127</sup> The preliminary study or the IEE should also provide for public participation.<sup>128</sup> When the screening process has been completed, the step that may follow is scoping and preparation of the terms of reference (ToR).

Scoping is intended to identify the key issues and impacts that have to be addressed.<sup>129</sup> It is also meant to identify the information necessary for the decision-making, the significant impacts and alternatives to be considered and the content and scope of the EIA.<sup>130</sup> This helps in the preparation of the focused ToR.<sup>131</sup> During this phase in the EIA process, there is identification, prediction and evaluation of the potential significance of the risks, effects and consequence of the proposed project.<sup>132</sup> This phase of prediction and evaluation of the impacts is seen as the technical heart of the EIA process.<sup>133</sup> The scoping process is generally carried out in discussions between the developer, the competent authority and other agencies which may be the public.<sup>134</sup>

Scoping creates a platform for early and constructive public involvement which helps to ensure that critical issues and alternatives are considered.<sup>135</sup> Scoping is usually the first step of consultations and negotiations between the developer and other interested parties.<sup>136</sup> According Wood,<sup>137</sup> consultations with the environmental authorities and groups whose interest are affected may assist in the identification of the significant

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127 Abaza, Bisset and Sadler *Towards an Integrated Approach* 46. See chapter 3 below.

128 Abaza, Bisset and Sadler *Towards an Integrated Approach* 46.

129 Sadler *Environmental Assessment* 19. See also Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 91.

130 Abaza, Bisset and Sadler *Towards an Integrated Approach* 45.

131 Abaza, Bisset and Sadler *Towards an Integrated Approach* 47. See also Lee and George *Environmental Assessment* 77.

132 Sadler *Environmental Assessment* 19. See also Lee and George *Environmental Assessment* 77.

133 Abaza, Bisset and Sadler *Towards an Integrated Approach* 49. It is further stated that the impact prediction is undertaken against an environmental baseline, delineated by selected indices and indicators such as air or water quality, ecological sensitivity and biodiversity but to mention a few. At this stage, there is application of multi-disciplinary scientific approach where the information is gathered and analysed.

134 Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 91.

135 Abaza, Bisset and Sadler *Towards and Integrated Approach* 47.

136 Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 91.

137 Wood *Environmental Impact Assessment* 131.

impacts.<sup>138</sup> The importance of public participation is that it makes the environmental authorities and applicant to be aware of public concerns.<sup>139</sup> Public participation also helps to ensure that the "important issues and the alternatives are not overlooked" when preparing ToR and undertaking detailed EIA.<sup>140</sup> The comments from the community may be obtained by way of requesting written comments and the holding of public gatherings where necessary.<sup>141</sup>

This part of the EIA is also expected to cover issues of mitigation by specifying measures to prevent, minimise and compensate for the environmental degradation.<sup>142</sup> The scoping process is also expected to establish ToR for carrying out an EIA.<sup>143</sup> The ToR is a document that is prepared by the developer or applicant and should reflect the issues that should be assessed.<sup>144</sup> Although the contents of the ToR document differ within jurisdictions, the following are usually included:<sup>145</sup>

- (a) the proposed activity and reasonable alternatives;
- (b) the significant issues and impacts to be assessed;
- (c) the timelines for completion and submission of the report.

These steps are usually followed by undertaking EIA studies.

### *2.6.2 EIA studies*

The developer must predict and evaluate the impacts of the proposed project and the alternatives as identified in the ToR.<sup>146</sup> There are several methods that can be used to

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138 See para 2.4 above.

139 Wood *Environmental Impact Assessment* 131.

140 Abaza, Bisset and Sadler *Towards an Integrated Approach* 47.

141 Abaza, Bisset and Sadler *Towards an Integrated Approach* 48.

142 Sadler *Environmental Assessment* 19. It suggested by Sadler that the next step that will follow will be the review to ensure that the reports meets the requirements and the standards of EIA good practice which will be followed by the decision to approve or otherwise of the proposed development.

143 Abaza, Bisset and Sadler *Towards an Integrated Approach* 47.

144 Abaza, Bisset and Sadler *Towards an Integrated Approach* 49

145 Abaza, Bisset and Sadler *Towards an Integrated Approach* 49.

146 Abaza, Bisset and Sadler *Towards an Integrated Approach* 49.



predict and evaluate the impacts of the proposed project.<sup>147</sup> The assistance of a panel of professionals is usually very helpful at this stage in establishing the significance of the impacts.<sup>148</sup> When the EIA studies have been undertaken, the findings thereof must be contained in an EIA report.

### *2.6.3 Mitigation and EMP*

Mitigation is considered as the practical phase of the EIA process which is concerned with the proposed interventions to prevent or remedy the negative impacts.<sup>149</sup> When the adverse impacts have been identified, the emphasis should be on trying to mitigate the impacts by reviewing the alternatives and making changes in project design, location or operation."<sup>150</sup> The mitigation measures identified must be contained in the EMP detailing how they will be implemented for each impact.<sup>151</sup> When the significant impacts have been identified and evaluated and the mitigation measures have been identified, the developer must prepare an EIA report and the EMP that have to be submitted to the competent authority. The EIA report can at this stage also include comments from the public participation process which occurred during scoping process and contain an indication of how they are going to be addressed.<sup>152</sup>

### *2.6.4 EIA report and EMP*

The findings that have been made during the EIA process are contained in the EIA report. The EIA report should be composed of the information contained in the ToR or at least be in line with the ToR.<sup>153</sup> The information contained in the report, that relates to the magnitude of the impacts of the activity on the environment should be "precise,

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147 Abaza, Bisset and Sadler *Towards an Integrated Approach* 50. See also Glasson, Therivel and Chadwick Introduction to Environmental Impact Assessment 129 for further discussions on methods and models of prediction.

148 Wood *Environmental Impact Assessment* 148. See also Lee and George *Environmental Assessment* 85. It has been stated that this stage of the EIA requires the special technical skills and through understanding the environment. Multi-disciplinary team may be required for the projects with diverse impacts.

149 Abaza, Bisset and Sadler *Towards an Integrated Approach* 53.

150 Abaza, Bisset and Sadler *Towards an Integrated Approach* 53.

151 Abaza, Bisset and Sadler *Towards an Integrated Approach* 55. The EMP must contain the description of the mitigation action, time and place for implantation, expected results, responsibility of implementation and the monitoring strategy.

152 Abaza, Bisset and Sadler *Towards an Integrated Approach* 58.

153 Abaza, Bisset and Sadler *Towards an Integrated Approach* 56.

objective and value-free."<sup>154</sup> The EIA report should be aimed at providing the decision-makers with sufficient information on which the proposed project may be approved or rejected and that would enable the authorising authority to impose appropriate terms and conditions.<sup>155</sup> The EIA report must be a public document which describes the "findings of the proposal to all stakeholders prior to the final decision on a project" and should be subjected to review by the competent authority.<sup>156</sup>

### *2.6.5 Review of the EIA report*

The aim of the review is to ensure that the information collected in an EIA process is complete and adequate for the purpose of the decision-making.<sup>157</sup> This stage allows the groups with relevant expertise and the public to have an opportunity to scrutinise and table their concerns as regards the EIA report.<sup>158</sup> The comments of the public are considered as the essential part of the process.<sup>159</sup> Wood<sup>160</sup> states that the provision for public participation is crucial at this stage of an EIA and it is preferable if such participation would take place before requiring further information from the proponent. The applicant may be required to provide further information at this stage before the report can be considered as part of the application for authorisation.<sup>161</sup>

The competent authority should take into account the comments expressed by the community.<sup>162</sup> It follows that the public participation takes place on different occasions. The first public participation process takes place at the scoping process and the second occasion is where the EIA report is subjected to public review it. The competent authority will thereafter make a decision as regards whether to grant the environmental authorisation or not as the following step.

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154 Wood *Environmental Impact Assessment* 146.

155 Abaza, Bisset and Sadler *Towards an Integrated Approach* 56.

156 Abaza, Bisset and Sadler *Towards an Integrated Approach* 56.

157 Abaza, Bisset and Sadler *Towards an Integrated Approach* 58.

158 Wood *Environmental Impact Assessment* 162.

159 Abaza, Bisset and Sadler *Towards an Integrated Approach* 58.

160 Wood *Environmental Impact Assessment* 165.

161 Abaza, Bisset and Sadler *Towards an Integrated Approach* 58. See also Wood *Environmental Impact Assessment* 165.

162 Wood *Environmental Impact Assessment* 146.

### 2.6.6 Decision-making

Although decisions are made at several stages of the application, is suggested by Wood<sup>163</sup> that the main decision revolves around whether the proposed project must be approved or not.<sup>164</sup> In making the decision, the competent authority must consider the comments made by consultants<sup>165</sup> and the public.<sup>166</sup> The decision-maker may require modification, impose terms and conditions or reject the proposed project, "which is the ultimate sanction against the proponent."<sup>167</sup> When the application has been approved, the project will be undertaken and the impacts thereof shall be monitored.

### 2.6.7 Implementation and follow up

The mitigation measures that were identified must be implemented through the process of impact management as outlined in the EMP.<sup>168</sup> This, may occur throughout the project from commencement, continue to the operational phase and then to the decommissioning phase of the project.<sup>169</sup> There must be follow up in a form of monitoring and auditing. Monitoring shall look into the activities that are being undertaken that are in line with the terms and conditions and should correspond with the terms in the EMP.<sup>170</sup> It has been suggested that "impact management forms part of a larger process of EIA follow up."<sup>171</sup>

Monitoring can take different forms. The first type of monitoring is implementation monitoring which is the verification that the project is being undertaken in line with the approved mitigation measures and that the conditions imposed by the authority are met.<sup>172</sup> The monitoring is carried out by the applicant. The other type of monitoring is impact monitoring. The impact monitoring relates to the measurement of the

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163 Wood *Environmental Impact Assessment* 181.

164 Wood *Environmental Impact Assessment* 181.

165 In some other jurisdictions, the consultants are referred to as experts who must file experts' reports, for instance, in South African case.

166 Glasson et al *An Introduction to Environmental Impact Assessment* 181.

167 Wood *Environmental Impact Assessment* 183.

168 Abaza, Bisset and Sadler *Towards and Integrated Approach* 59.

169 Abaza, Bisset and Sadler *Towards and Integrated Approach* 59.

170 Sadler *Environmental Assessment* 19. EMP is also referred to as EMPr in South Africa.

171 Abaza, Bisset and Sadler *Towards and Integrated Approach* 59.

172 Wood *Environmental Impact Assessment* 198. Implementation monitoring can be undertaken pursuant to the provisions of various sets of legislative requirements.

environmental impacts that resulted from the implementation of the project.<sup>173</sup> This type of monitoring is also carried out by the applicant.

Impact auditing is aimed at reviewing predicted environmental impacts in order to achieve proper management of risks.<sup>174</sup> Impacts auditing becomes highly relevant where the uncontrolled impacts arise which were not anticipated at the time of decision-making thereby being a tool used to modify or develop mitigation measures.<sup>175</sup> Another form of auditing is to ensure that there is compliance with the conditions in the authorisation or the undertakings in the EMP. Auditing can be undertaken by an enterprise to ensure that it complies with the terms and conditions of the authorisation or EMP. The enterprise or the government can appoint an independent auditor to determine the compliance. The figure below demonstrates the generally accepted steps of an EIA.

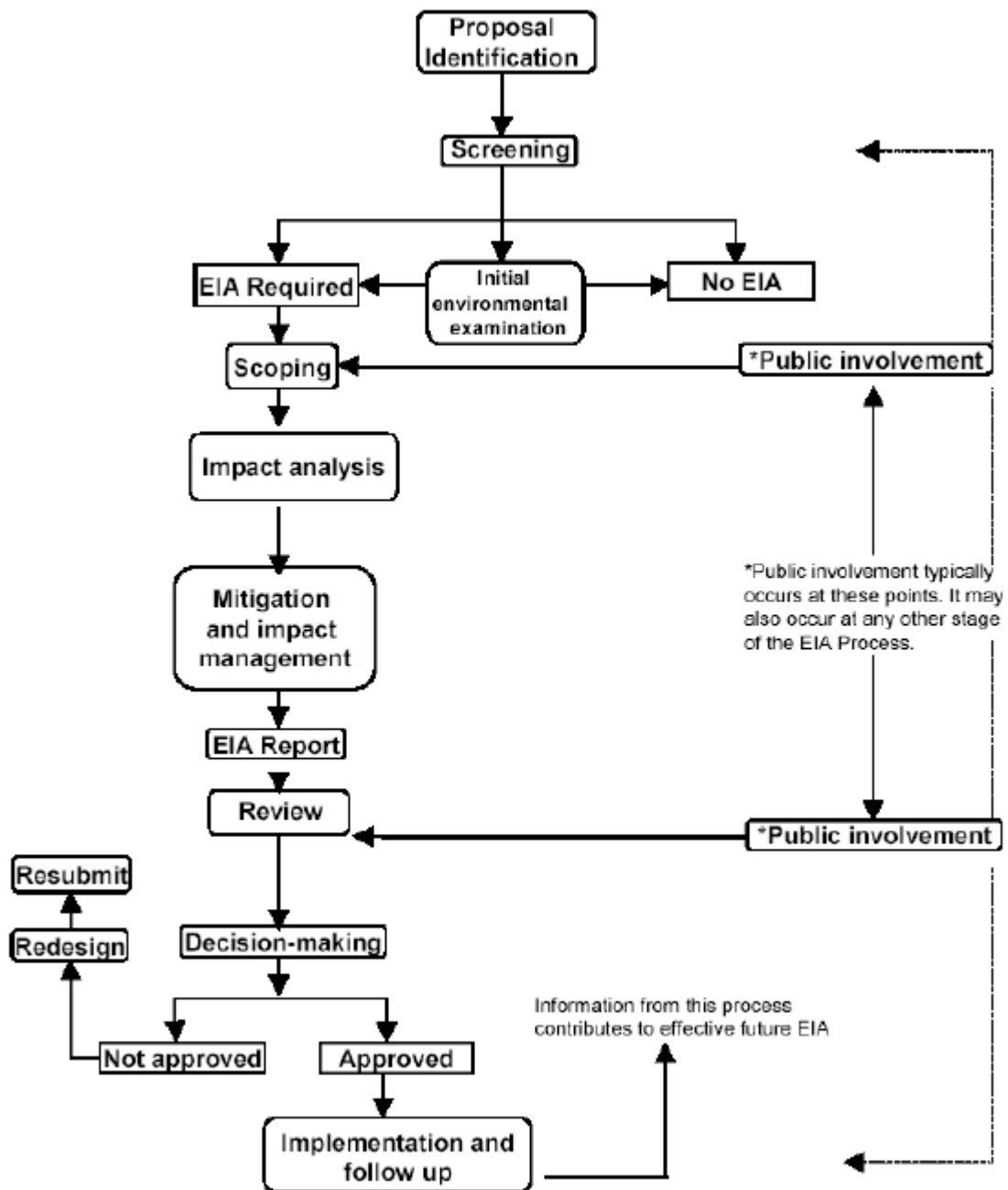
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173 Wood *Environmental Impact Assessment* 198.

174 Wood *Environmental Impact Assessment* 199.

175 Roux *Comparison between South Africa, Namibia and Swaziland's EIA legislation* 33. The auditing may also be used to determine the accuracy of the impact prediction that were previously made and test the effectiveness of the mitigation measures.

**Figure 2-1: The generally accepted steps of an EIA**



## 2.7 Conclusion

This chapter has provided with the general background of the EIA and its evolution. EIA has been defined for the purposes of this study as the systematic identification, prediction, and evaluation of the significant adverse socio-economic, cultural and environmental impacts of a proposed project or activity, the formulation of mitigation measures and alternatives to the proposed project or activity with the involvement of

the public, the monitoring of the impacts and the reporting on the mitigation of the impacts to assist authorities in their decision-making. The objectives of an EIA have also been discussed and they include facilitating the systematic consideration of environmental issues as part of the decision making and providing for public participation.

The EIA principles that should be taken into account in EIA legislation are as follows:

#### 2.7.1.1 Basic principles

The basic principles are purposive, rigorous, practical, relevant, cost-effective, efficient, focused, adaptive, participative, interdisciplinary, credible, integrated, transparent and systematic.

#### 2.7.1.2 Procedural principles

The procedural principles dictate that an EIA process must be applied in the decision-making to all proposed activities that may have significant impact on the environment and it must provide for public participation in line with internationally accepted measures and activities.

The following general steps should at least be included in the EIA legislation:

- (a) Scoping;
- (b) screening and preparation of ToR;
- (c) EIA studies;
- (d) mitigation and EMP;
- (e) EIA report and EMP;
- (f) review of the EIA report;
- (g) decision making; and
- (h) implementation and follow up.

## Chapter 3 Lesotho

### 3.1 Introduction

Lesotho is a small landlocked country in the Southern Africa.<sup>176</sup> Lesotho has a long history of the environmental law with reference being made to the EIA legislation in particular and it has evolved over the years.<sup>177</sup> In this chapter, the focus will be placed on Lesotho's EIA legislation and its evolution. In doing so, the chapter will provide a brief historical background of the environmental legal framework of Lesotho from which EIA legislation is derived. The chapter will also discuss the steps followed in the EIA process in Lesotho. The said discussion will be made against the EIA principles and the generally accepted steps of EIA discussed in the previous chapter.<sup>178</sup> The chapter will also highlight some shortcomings that are evident in the EIA legislation of Lesotho.

### 3.2 Historical background

The history of an EIA in Lesotho dates as far as 1988 when an EIA was first introduced during an International Conference on Environment and Development organised by Lesotho in collaboration with the World Bank.<sup>179</sup> Lesotho is one of the first countries that took a leading role in Africa in 1989 when it prepared a National Environmental Action Plan (NEAP).<sup>180</sup> The main aim of the NEAP was to promote sustainability and it provided that all the activities that were likely to have a significant impact on the environment had to be subjected to an EIA and that the polluters had to pay for the pollution.<sup>181</sup>

During 1993, Lesotho amended its Constitution to incorporate environmental protection in section 36:

Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of the present and future generations and shall

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176 Lubbe "Lesotho's Environmental Framework Law and the Balancing of Interests" 197.

177 See para 3.2 below.

178 See para 2.6 above. The principles shall be discussed when the conclusion and recommendations are made in para 6.1-6.2.

179 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11.

180 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11, Walmsley and Patel *Handbook on Environmental Assessment* 122. See also Chakela *State of the environment in Lesotho* 191.

181 *Constitution of Lesotho*, 1993.

endeavour to ensure to all citizens a sound and safe environment adequate for their health and well-being.<sup>182</sup>

This is still the position as the Constitution has not been amended and protection of the environment is still provided for under section 36 of the Constitution.<sup>183</sup> Therefore, in terms of section 36, the government is obliged to adopt policies which are aimed at protecting and enhancing the environment in a sustainable manner and must promote a sound and safe environment for the health and well-being of the citizens.

In 1994, the NEAP was substituted by the National Action Plan (NAP) which came about as a result of the Earth Summit in Rio de Janeiro that was held in 1992 and was aimed at implementing Agenda 21.<sup>184</sup> The NAP's objectives were to improve on the foundation laid by the NEAP and to integrate national plans for implementing international conventions.<sup>185</sup>

The NAP contained a recommendation that an EIA should be mandatory for activities which were likely to result in a significant impact on the environment.<sup>186</sup> In 1994, the government of Lesotho, in collaboration with United Nations Development Programme (UNDP), established the National Environment Secretariat (NES) with a mandate to oversee an EIA process for the major projects in Lesotho.<sup>187</sup> It had to ensure among others that public participation and technical reviews were conducted.<sup>188</sup>

The NES also followed the recommendation made in the NEAP of 1989 to create an "institutional framework for the management of environmental issues."<sup>189</sup> At the time of its establishment, NES fell under the office of the Prime Minister but was later moved to

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182 See para 3.3 below.

183 The courts of Lesotho have not had an occasion to deal with section 36 of the Lesotho *Constitution*. See in this regards Chakela *State of the environment in Lesotho* 195.

184 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11.

185 SAIEA 2015 [http://www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

186 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11. See also Walmsley and Patel *Handbook on Environmental Assessment* 122.

187 For instance, major roads construction and dams constructed by the Lesotho Highland Water Project.

188 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11. See also SAIA 2015 [http://www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

189 Walmsley and Patel *Handbook on Environmental Assessment* 123. This institution is currently known as Department of Environment (DoE) which is responsible for administering an EIA in terms of the new *Environment Act* 10 of 2008. See para 3.4 below.



the Ministry of Environment, Gender and Youth Affairs and subsequently to the Ministry of Tourism, Environment and Culture.<sup>190</sup>

The NES played a proactive role in spearheading the EIA process. The functions of the NES included organising meetings with developers at the commencement stage, the approval of an EIA consultants, the approval of a public participation process which would be proposed by an EIA consultant, to decide if an EIA was needed and to conduct environmental audits of the implementation of the activity and compliance.<sup>191</sup>

A National Environmental Policy (NEP) was adopted in 1996 and revised in 1998.<sup>192</sup> It was aimed at, amongst other things, to develop a system of guidelines and procedures of an EIA, audits, monitoring and evaluation with the aim of reducing adverse environmental impacts and enhance environmental benefits.<sup>193</sup> NEP was to be enforced by the Lesotho Environment Authority.<sup>194</sup>

The 2001 *Environment Act*<sup>195</sup> was formulated although it was never passed by parliament. That notwithstanding, all the governmental institutions and the environmental practitioners voluntarily operated within the ambit of the provisions of this proposed Act.<sup>196</sup> Section 33 of that Act provided that "no person shall operate, execute or carry out a project or activity specified in the schedule" without an EIA license issued by the NES (as the erstwhile authorisation authority).<sup>197</sup> The proposed Act made the carrying out of an EIA mandatory for the activities listed in that Act. Section 114<sup>198</sup> made it an offence if an applicant failed to submit project brief or failing

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190 SAIEA 2015 [http://www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

191 SAIEA 2015 [http://www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf). See also para 3.8.4 below. This demonstrates the discretionary power on the part of the NES.

192 Walmsley and Patel *Handbook on Environmental Assessment* 123.

193 Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 11.

194 This was in terms of the *Environment Act* 15 of 2001. However, the *Environment Act* 15 of 2001 was never passed by parliament. Due to voluntary observance of the provisions of the Act, NEP was implemented.

195 *Environment Act* 15 of 2001.

196 SAIEA 2015 [http://www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

197 *Environment Act* 15 of 2001.

198 Section 114 of the *Environment Act* 15 of 2001.

to prepare an environmental impact statement (EIS).<sup>199</sup> These sanctions could however, as stated before not be enforced as the Act was never formally passed as law.

The proposed Act also provided for the establishment of the Lesotho Environmental Authority (LEA).<sup>200</sup> LEA has been described as;

the principal agency for the management of the environment and for the supervision, coordination and monitoring all sectoral activities in the field of environment and indeed is responsible for the implementation of the national environmental policy.<sup>201</sup>

In the subsequent year, NES issued the *Draft Guidelines for EIA in Lesotho*.<sup>202</sup> The draft guidelines outlined the steps that are to be taken to conduct an EIA. The draft guidelines were aimed at assisting the developers to comply with the EIA requirements.<sup>203</sup> The draft guidelines were to be applicable to projects which required an EIA, irrespective of who the developer was, whether public sector or private sector.<sup>204</sup>

In 2008, Lesotho promulgated a "second" *Environment Act*<sup>205</sup> being the current environmental legal framework making provision for an EIA.<sup>206</sup> Following the enactment of the "second" *Environment Act*,<sup>207</sup> final guidelines for EIAs also were issued and shall be discussed later.<sup>208</sup>

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199 Section 24 of the Act provided for submission of the project while section 29 and 34 provided for the preparation and submission of environmental impact statements.

200 *Environment Act* 15 of 2001. See also Peete S "Lesotho".

201 Peete S "Lesotho". It follows therefore that one of the functions of LEA was to implement the NEP. See also note 13 above.

202 SAIA 2015 [http:// www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

203 SAIA 2015 [http:// www.saia.com/dbsa\\_book/lesotho.pdf](http://www.saia.com/dbsa_book/lesotho.pdf).

204 *Draft Guidelines for Environmental Impact Assessment* 2002.

205 *Environment Act* 10 of 2008.

206 See para 3.4 below where the provisions of the Act shall be discussed briefly.

207 Hereinafter referred to in the text as the 2008 *Environment Act*.

208 See para 3.5 below. The 2008 final *Guidelines for Environmental Impact Assessment* still pose problems because in as much as they are regarded as final guidelines, they are not up to date as they make reference to the sections of the *Environment Act* 15 of 2001 and some institutions which the 2008 *Environment Act* abolished and established new ones in their place, for instance, NES and LEA instead of the newly established DoE.

Against this background, it is important to discuss the current legislation that provides the framework for the EIA process in Lesotho. The *Constitution of Lesotho*<sup>209</sup> will be referred to firstly.

### **3.3 Constitution of Lesotho, 1993**

As indicated,<sup>210</sup> in 1993 Lesotho amended its *Constitution* to provide for the protection of the environment for the benefit of the present and the future generations and to ensure that all citizens should have a sound and safe environment adequate for their health and well-being.<sup>211</sup> Although this may seem to be a good step forward towards environmental protection, the section is a principle of State policy and thus remains unenforceable on its own. Section 25 of the Constitution<sup>212</sup> titled "application of the principles of the State policy" states that:

the principles contained in this Chapter shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

Following from the aforementioned section, it becomes apparent that protection of environment in Lesotho's *Constitution* is a mere principle which is not justiciable in the courts of law on its own.<sup>213</sup>

That notwithstanding, Lesotho took steps to ensure environmental protection which includes but not limited to the enactment of the 2008 *Environment Act*<sup>214</sup> which creates rights in relation to the environment and strengthens the requirement for an EIA prior to commencement of listed activities. One may argue that such measures are based on

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209 *Constitution of Lesotho*, 1993

210 See para 3.2 above.

211 Section 36 of the *Constitution of Lesotho*, 1993. See also para 3.2 above.

212 *Constitution of Lesotho*, 1993.

213 Principles of State are considered as Instruments of Instruction and they are not justiciable but have ramifications on the ground level reality. See Saha "Constitution of Lesotho" 164. This was also reaffirmed in the case of *khathang Tema Baitsokoli and Another v Maseru City Council and Others* LAC 2005-2006 where the court stated that principles of State policy are merely principles attainable progressively by legislation in tune with the prosperity of the nation and hence they do not create any justiciable right.

214 The 2008 *Environment Act*.

section 36 of the Constitution, namely to adopt policies designed to protect and enhance the environment of Lesotho. Therefore the 2008 *Environmental Act*<sup>215</sup> shall be discussed below.

### **3.4 Environment Act 10 of 2008**

The 2008 *Environment Act* is aimed at providing for the protection and management of the environment and the conservation and sustainable use of the resources of Lesotho.<sup>216</sup> Another objective of the Act is to introduce the phenomenon of an EIA and audits and the monitoring of projects. The Act suggests that the EIAs help to know about the environmental degradation before the project is implemented.<sup>217</sup>

Section 4 of the *Environment Act* provides for right to a clean and healthy environment.<sup>218</sup> This section further permits any person whose right to a clean and healthy environment is threatened, to bring an action to court of the competent jurisdiction against the person whose activity or omission is causing or is likely to violate the aforementioned right.<sup>219</sup> The complainant may seek any of the following remedies:<sup>220</sup>

- (a) discontinuance of the activity or omission;
- (b) request that the activity be subjected to an environmental audit;
- (c) request that the activity be subjected to monitoring; and

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215 *Environment Act* 10 of 2008.

216 *Statement of Objects and Reasons of the Environment Act*, published in Government Notice of 237, 2008.

217 *Statement of Objects and Reasons of the Environment Act*, published in Government Notice of 237, 2008. The statement further states that an EIA "minimises environmental degradation." It is provided that an EIA is carried out for the following reasons;

"to integrate environmental considerations in development planning;"

"to ensure that the potential adverse effects are foreseen and addressed at an early stage in the project cycle;"

"to ensure participation of all the interested and affected people."

218 Section 4(1) provides that: "every person living in Lesotho

(a) has a right to scenic, clean and healthy environment; and

(b) has a duty to safeguard and enhance the environment including the duty to inform the Director of all activities and phenomena that may affect the environment significantly."

219 Section 4(2) of the *Environment Act* 10 of 2008.

220 Section 4(3) of the *Environment Act* 10 of 2008.

(d) request that measures be taken to protect the environment.

This is the section through which section 36 of the *Constitution* of Lesotho can be enforceable as it creates the enforceable right to clean and healthy environment although it is not contained in the Bill of Rights as the case in South Africa.<sup>221</sup>

The 2008 *Environment Act* establishes the Department of Environment (DoE). Section 9(1) provides that the DoE shall be responsible for administering the Act.<sup>222</sup> The DoE is under the supervision of the Director of the DoE (Director).<sup>223</sup> Some of the functions of the Director include the duty to initiate the legislation proposals, standards and guidelines on the environment.<sup>224</sup> The Director is also vested with the duty to review, and approve EIAs and environmental impact statements (EIS) submitted to the DoE.<sup>225</sup> The Director identifies the projects, activities, policies and programmes or types of projects for which an EIA must be undertaken.<sup>226</sup> The Act does not make any reference to the principle of EIA. The Act further provides for the steps that shall be followed in conducting an EIA and shall be discussed in details in the subsequent paragraphs.<sup>227</sup> As indicated, the steps are also referred to in the guidelines.

### **3.5 Guidelines for EIA in Lesotho, 2008**

The *Guidelines for EIA in Lesotho*<sup>228</sup> are aimed at facilitating participation in and compliance with Lesotho's EIA requirements by the developers.<sup>229</sup> They are also aimed at "integrating environmental concerns and economic development from the earliest

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221 See para 5.4 below.

222 Section 9(1) of the *Environment Act* 10 of 2008.

223 Section 9(2) of the *Environment Act* 10 of 2008.

224 Section 10(1)(e) of the *Environment Act* 10 of 2008.

225 Section 10(1)(f) of the *Environment Act* 10 of 2008.

226 Section 10(1)(1) of the *Environment Act* 10 of 2008. The reading of the functions of the DoE, it can be safely concluded that DoE replaces LEA which was established in terms of the 2001 *Draft Environment Act*. This institution is sometimes referred to as NES.

227 See para 3.7 below.

228 See note 33 above.

229 *Guidelines for EIA in Lesotho*, 2008 para 1.1. The *Guidelines* are said to be applicable to all projects and activities, whether undertaken by public sector or the private sector for which an EIA is required. The *Guidelines* define an EIA as both a process and tool for project planning and decision making. Although *Environment Act* 15 of 2001 was never passed into law, the *Guidelines* make reference to the said Act and the LEA which has been replaced by DoE. As has been indicated earlier, the *Guidelines* were never updated which may confuse the developers and any other person who may use the guidelines. However, for this purposes, the LEA will be referred to as DoE.

stages of the project development."<sup>230</sup> According to the *Guidelines*, the objectives of an EIA in Lesotho are to;<sup>231</sup>

- (a) integrate environmental considerations into development planning, thereby promoting sustainable livelihoods;<sup>232</sup>
- (b) ensure that the environmental and socio-economic costs and benefits of economic development projects are properly accounted for;<sup>233</sup>
- (c) ensure that unwarranted negative impacts are avoided or mitigated at an early stage in the planning process;<sup>234</sup>
- (d) ensure that potential benefits are identified and enhanced;<sup>235</sup>
- (e) carry out environmental and socio-economic studies of projects in parallel with analysis of engineering and economic feasibility;<sup>236</sup>
- (f) ensure that decision-makers are provided with information on environmental costs and benefits to complement information on its technical and economic feasibility at key decision points in the development of a project;<sup>237</sup>
- (g) ensure that all the affected and interested groups (local communities, government authorities, developers, NGOs, CBOs, etc.) participate in the process;<sup>238</sup>
- (h) set up a system to carry out mitigation, monitoring, auditing, and enforcement.

These objectives correspond to the objectives of EIA as discussed in the previous chapter.<sup>239</sup> These objectives also reflect the basic and procedural principles which must

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230 *Guidelines for EIA in Lesotho* 2008 para 1.1.

231 *Guidelines for EIA in Lesotho* 2008. Hereinafter referred to as *Guidelines*.

232 *Guidelines* para 1.3.

233 *Guidelines* para 1.3.

234 *Guidelines* para 1.3.

235 *Guidelines* para 1.3.

236 *Guidelines* para 1.3.

237 *Guidelines* para 1.3.

238 *Guidelines* para 1.3.

239 See para 2.4 above.

be adhered to in undertaking an EIA.<sup>240</sup> It is of paramount importance to highlight that on the basis of the above mentioned objectives, an EIA in Lesotho does not only focus on the natural environment, but it also considers the impact of the activity on the socio-economic components. The *Guidelines* further prescribe requirements for the EIA consultants who undertake an EIA.<sup>241</sup> The *Guidelines* establish 11 steps towards EIA licensing and shall be discussed later with reference to the 2008 *Environment Act* and the Draft Regulations.<sup>242</sup> The said Draft Regulations are briefly discussed hereunder.

### **3.6 Draft EIA Regulations 2006**

The 2008 *Environment Act* provides that the Minister may make regulations prescribing the category of projects or activities which may only require a project brief and the category of projects or activities which require an EIA as a result of their nature, scope, scale and location. Pursuant to the said provision, Lesotho has drafted regulations which have not been published as stated before. The regulations are aimed at regulating the EIA procedures and processes that must be followed. Although the regulations have not been formally published, they will be referred to in discussing the steps to be followed in an EIA process.

### **3.7 Steps in the Lesotho's EIA process**

There are several steps which an applicant or developer must follow in undertaking an EIA process in Lesotho. The 11 steps are discussed as they appear in the *Guidelines*, but with reference to the Act and the Regulations:

#### **3.7.1 Screening**

The developer must first make a determination whether the proposed activity or project requires an EIA license. Section 19 of 2008 *Environment Act* provides that an EIA or

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240 See para 2.5 below.

241 *Guidelines* para 1.5. See also section 21(7) of the 2008 *Environment Act* which provides that an EIA must be undertaken by the experts who have been approved by the Director. Environmental consultant described in the *Guidelines* as a person or organisation appointed by the applicant to conduct the environmental planning, assessment or auditing of the project or activity.

242 See para 3.7 below.

project brief shall be undertaken for the activities listed in Part A of the First Schedule.<sup>243</sup> The Act further provides that the relevant Minister may prescribe the category of projects which may require a project brief only and those that may require a full EIA.<sup>244</sup> Therefore the developer must first consider Part A of the First Schedule to determine if the proposed activity is listed as an activity requiring the license. Therefore an EIA in Lesotho is in line with the EIA principle of "focus" in that it is focused on the activities that may have significant impact on the environment. In the event that the activity is listed in the First Schedule, the scoping process will then follow.

### *3.7.2 Scoping and preparation of terms of reference (ToR)*

The developer in person or through the consultant is advised to consult with the DoE and the relevant Line Ministries which are likely to be affected by the proposed project or activity for the information and comments.<sup>245</sup> The discussions with the relevant authorities are informal and the discussion includes, amongst others, identifying relevant policy, legal or administrative issues.<sup>246</sup>

When the proposed project or activity is listed in Part A of the First Schedule in 2008 *Environment Act*, the developer must prepare a project brief.<sup>247</sup> The project brief must be submitted to the DoE and the identified Line Ministries.<sup>248</sup> A developer must seek the assistance of a professional EIA consultant who has been approved by the DoE.<sup>249</sup> The requirements for one to qualify as the consultant are set by the DoE in the *Guiding*

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243 Section 19(1) of the 2008 *Environment Act*. Part A of the First Schedule lists a set of activities that are likely to have a significant impact on the environment. However, it is worth noting that although the Schedule contains a long list of activities; it does not specify which activities will require an EIA or just a project brief. The discretion is left in the hands of the Director. This is brought about by the fact that the Minister has not formulated the regulations that prescribe which activities or projects that may require a project brief or full EIA as per section 19(3) of the 2008 *Environment Act*. See also section 25(1) of the 2008 *Environment Act*.

244 Section 19(3)(b) of the 2008 *Environment Act*. To date, the Minister has not prescribed the activities that require a project brief or a full EIA save, for the list of projects and activities listed in Part A of the First Schedule to the 2008 *Environment Act*.

245 Step 1 in the *Guidelines*.

246 Step 1 in the *Guidelines*.

247 Section 20(1) states that prior to undertaking the listed activities, the developer must prepare the project brief. The section further indicates the contents of the project brief.

248 Step 2 in the *Guidelines*.

249 Step 2 in the *Guidelines*. See also para 1.5 of the *Guidelines*.



*principles on minimum requirements for EIA lead consultants and consultants for undertaking environmental impacts studies in Lesotho.*<sup>250</sup>

The consultant must identify the I&APs.<sup>251</sup> In the event that there are no clearly identifiable I&APs, notification of the public through advertisements is required. The *Guidelines* do not define which groups of people may constitute I&APs. The project brief must state the I&APs identified and consulted and the environmental issues raised from such consultation. However, the *Guidelines* do not state how the consultant should conduct the public participation process. It is left to the consultant to state how he or she<sup>252</sup> will conduct the public participation.<sup>253</sup> In terms of the Regulations, special attention must be given to the method of notifying the rural and disadvantaged communities to participate in the public participation.<sup>254</sup>

The Regulations also provide that relevant authorities and Local Councils of Non-Governmental Organisations should be consulted.<sup>255</sup> The study must also identify alternatives as they can change the nature, design, allocation and direction of the project or activity at an early stage.<sup>256</sup> During this stage mitigation measures must also be identified.<sup>257</sup> The developer or consultant must also ensure that the I&APs are invited to comment on the project brief.<sup>258</sup>

The developer must then submit the project brief to the Director who has to ensure that all relevant Line Ministries receive copies thereof in order for them to comment on

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250 Department of Environment 2015 <http://www.environment.gov.ls/documents/eia.php>. See also step 7 in the *Guidelines* which stipulates that the EIA must be undertaken by the expert who is approved by the DoE.

251 Step 2 in the *Guidelines*. The Guidelines provide that for certain proposals, there are no clearly definable groups of groups of I&APs. The notification of I&APs of the project or activity is dependent on case by case.

252 "He" shall also include she for the purposes of this study.

253 Regulation 7(k) of the *Draft EIA Regulations*, 2006.

254 Step 4 in the *Guidelines*. See para 3.7.7 for detailed discussions on public participation, public hearing and access to information.

255 Step 4 in the *Guidelines*.

256 Step 2 in the *Guidelines*. See also reregulation 7(g) of the *Draft EIA Regulations*, 2006.

257 Regulation 7(1) (c) of the *Draft EIA Regulations*, 2006.

258 Step 4 in the *Guidelines*

the project brief.<sup>259</sup> If the Director is of the view that further information must be submitted, the Director may require such information.<sup>260</sup> Before decision-making, the DoE should ensure that public views are invited on the submitted project brief where the Director is of the view that the project or activity will have significant impacts.<sup>261</sup> Thus, at this stage, the submission of comments is not mandatory but dependent on the discretion of the Director. Further, it does not become clear when the I&APs are expected to submit their comments in terms of timeframes and how they will submit their comments in relation to the project brief. But as has been stated, DoE is mandated to ensure that public participation occurs although legislation does but make express provisions on the details of the process.

When the Director is of the view that the project will not cause significant impact on the environment or that the project brief discloses sufficient mitigation measures, the Director may approve the proposed project and may impose any condition as he deems fit.<sup>262</sup> In terms of the Draft Regulations, the Director will issue a certificate of approval of an EIS to be found in the Form B of the First Schedule.<sup>263</sup>

This part of the scoping process correlates with the scoping process in chapter 2<sup>264</sup> in that there are studies which are undertaken to determine the information that is relevant for decision-making, identification of I&APs, public participation process and mitigations measures. It also lays a foundation for formulation of the ToR.<sup>265</sup>

In the event that the Director is of the view that an activity or project will have a significant impact, the Director may direct that a full EIA be undertaken. The developer

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259 Step 3 in the *Guidelines*. See also section 20 of the 2008 *Environment Act*. The developer shall submit application form and the projects brief pursuant to regulation 8(1) of the *Draft EIA Regulations*, 2006.

260 Step 5 in the *Guidelines*. See also section 20(2) of the 2008 *Environment Act*.

261 Section 20(4) of the 2008 *Environment Act*. See also step 4 in the *Guidelines*.

262 Section 20(3) of the 2008 *Environment Act*. Regulation 9 of the *Draft EIA Regulations*, 2006 provides that the Director must take into account the comments from the Line Ministries. See also regulation 10(1) and (2) of the *Draft EIA Regulations*, 2006. Section 3(3) of the 2008 *Environment Act* 10 of 2008. The Line Ministries are defined as Ministry, Department, parastatal or agency in which law vests functions for the protection, conservations, or management of any segment of the environment or whose activities may have an impact on the environment as defined in the Act.

263 Regulation 10(2) of the *Draft EIA Regulations*, 2006.

264 See para 2.6.2 above.

265 See para 2.6.2 above.

must prepare the ToR for the EIA study<sup>266</sup> after consultation with the Line Ministry, local authority and I&APs.<sup>267</sup> The Director must approve the ToR before the developer may commence with the EIA study.<sup>268</sup>

The ToR shall indicate the relevant environmental issues, the consultant team and their expertise, the proposed public participation process and the timeframes.<sup>269</sup> After the Director approves the ToR, the developer will have to submit to the Director the names of the environmental practitioners and their qualifications.<sup>270</sup> The developer shall bear the costs of an EIA.<sup>271</sup>

### *3.7.3 EIA report and the EMP*

The developer must undertake an EIA and prepare the EIS, otherwise known as EIA report in other jurisdictions and it must include EMP. The EMP describes how the proposed activity will be implemented and the controls over the implementation, how the mitigation measures will be carried out, and matters of rehabilitation of the environment at the decommissioning or termination of the activity.<sup>272</sup> The developer shall submit the EIS to the Director and the relevant Line Ministries. The information contained in the EIS must be in line with the information reflected in the ToR.<sup>273</sup> The EIS and the EMP must be submitted and subjected to review.

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266 Regulation 10(1) of the *Draft EIA Regulations*, 2006.

267 Regulation 11(1) of the *Draft EIA Regulations*, 2006.

268 Step 5 in the *Guidelines for EIA in Lesotho*. See also draft regulation 11(1) of the draft regulation 10(1) of the *Draft EIA Regulations*, 2006. The terms of reference may include the following:

- (a) Environmental issues of relevance, for instance; change of land use, impact on water bodies, air, soil and ground, socio-economy and cultural effects;
- (b) Consultant team and expertise including approval of lead consultant;
- (c) Process of collecting data or other information; modelling or calculations.
- (d) Public participation process by way of advertising, public hearing.
- (e) Timeframe and expected submission date for the EIS.

269 Step 6 in the *Guidelines*. See also regulation of the *Draft EIA Regulations*, 2006.

270 Regulation 12(1) of the *Draft EIA Regulations*, 2006.

271 Step 6 in the *Guidelines*. See also section 21(3) of the 2008 *Environment Act*.

272 Step 6 in the *Guidelines*.

273 Section 20 of the 2008 *Environment Act*. See also step 8 in the *Guidelines*.

### 3.7.4 Review of the EIA report

The developer must submit copies which shall contain all relevant annexes, maps or photos.<sup>274</sup> The Director shall then issue a notice of acknowledgment of the receipt of the EIS.<sup>275</sup> The *Guidelines* are silent on who should comment on the EIS and how they should comment. However, the Draft Regulations provides that a Line Ministry must comment on the EIS and transmit them to the Director.<sup>276</sup> The Director should ensure that the developer invites all I&APs including the affected community to comment on the project brief or an EIS if it has been required.<sup>277</sup> The documents must be placed at the places determined by the Minister.<sup>278</sup> When the Director has received comments from the general public, he must invite the comments from persons who are specifically affected by the project within the prescribed period.<sup>279</sup> The Director then considers the EIS and the comments received, and make a determination whether a public hearing should be held.<sup>280</sup> The *Guidelines* are silent on whether amended information of the project brief or EIS must be subjected to review.

Similar as in the case of the project brief,<sup>281</sup> the Director may hold a public hearing if he deems it necessary or if the developer decides to hold public meeting.<sup>282</sup> The developer must inform the DoE of the hearing and how the I&APs have been invited and invite the DoE to such public hearing.<sup>283</sup> The developer must appoint a facilitator who will conduct the public hearing and compile the reports which have to be submitted to the Director. The Director considers the outcome of the hearing and implement or review the opinion

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274 Step 8 in the *Guidelines*. See also regulations 20 and 23(1) of the *Draft EIA Regulations*, 2006.

275 Step 8 in the *Guidelines*.

276 Regulation 24(2) of the *Draft EIA Regulations*, 2006.

277 Sections 20(4) and 22 of the 2008 *Environment Act*. See also step 4 in the *Guidelines*. Regulation 18 of the *Draft EIA Regulations*, 2006 provides that the developer is responsible for the public participation process to ensure that all I&APs are given an opportunity to participate in all the relevant procedures. See also regulation 25(1) of the *Draft EIA Regulations*, 2006 that provides that the Director must invite the general public to make written the comments on the EIS.

278 Section 21(3) and section 22(a) of the 2008 *Environment Act*.

279 Regulation 26(1) of the *Draft EIA Regulations*, 2006.

280 Section 22(c) and (d) of the 2008 *Environment Act*. See also Regulation 27 of the *Draft EIA Regulations*, 2006.

281 See para 3.7.2 above.

282 Step 4 in the *Guidelines*. See also regulation 27 of the *Draft EIA Regulations*, 2006.

283 Step 4 in the *Guidelines*.

of the public.<sup>284</sup> The developer bears the cost of the public hearing. The Director must consider an EIS report and all the comments made therein and decide with the relevant Line Ministry whether the report provides adequate information to make a decision.<sup>285</sup> In the event that the Director is of the view that the report does not contain sufficient information, he may request more information.<sup>286</sup> In the event that the Director is satisfied with the EIS submitted, he will then make a decision.<sup>287</sup>

### 3.7.5 Decision-making

When the Director has reviewed the reports and all comments made, the Director may approve the project or activity in consultation with the relevant Line Ministry or may direct that the developer make some changes to the project.<sup>288</sup> The Director may also reject the project if he is of the view that it may have significant impact on the environment.<sup>289</sup> If the Director is satisfied that the proposed project or activity will not result into significant impact on the environment, he may approve the project or activity and thereafter issue an EIA license.<sup>290</sup> The decision of the Director must be communicated to the developer.<sup>291</sup> The Director shall issue a record of decision which shall include a copy of the EIA license.<sup>292</sup> The license may contain certain terms and conditions which will promote sound environmental management practices and will include a period of validity.<sup>293</sup> The legislation does not impose on either DoE or the developer a duty to inform the I&APs and the public that made comments of the decision. Once the EIS is approved or rejected, an opportunity for appeal is given to any person who may be affected by such a decision.

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284 Step 4 in the *Guidelines*.

285 Step 9 in the *Guidelines*.

286 Step 9 in the *Guidelines*. See also section 22 provides that the Director may if he deems it fit; invite the comments of the public and the persons who are mostly likely to be affected by the proposed project or activity. The Director may consider the EIS and the comments made therein and require the holding of the public hearing for the persons mostly likely to be affected.

287 Step 10 in the *Guidelines*.

288 Section 22(e) and Section 22(f) respectively of the 2008 *Environment Act*. See also regulation 31(1) of the *Draft EIA Regulations, 2006*.

289 Section 22(g) of the 2008 *Environment Act*. See also regulation 31(1)(d) of the *Draft EIA Regulations, 2006*

290 Section 22(e) of the 2008 *Environment Act*. See also section 25(2) of the 2008 *Environment Act*.

291 Regulation 31(2) of the *Draft EIA Regulations, 2006*.

292 Section 25(3) of the 2008 *Environment Act*. See also regulation 33 of the *Draft EIA Regulations, 2006*.

293 Step 10 in the *Guidelines*. See also regulation 32 of the *Draft EIA Regulations, 2006*.

### 3.7.6 Appeal

Any person who has been adversely affected by the decision of the Director may request in writing within 30 days of being informed of the decision that the Director reconsiders his decision and such request shall set forth the reasons for such request.<sup>294</sup> The said appeal is directed to the Director despite the fact that the Director is the *functus officio*. The Director must within 30 days of receipt of the request, issue a record of decision affirming, modifying or reversing its earlier decision.<sup>295</sup> The option of appeal is open to both the developer and the I&APs.<sup>296</sup> This step is a prerequisite before an aggrieved party may proceed to Environmental Tribunal<sup>297</sup> or to High Court.<sup>298</sup> When the environmental license has been issued, there must be implementation and follow up.

### 3.7.7 Implementation and follow up

The mitigation measures identified in the EMP must be implemented and there must be a follow up. The follow up process is constituted of monitoring and auditing. The Director has a duty to monitor the operations of the project or activity in order to determine its immediate and long-term impacts on the environment.<sup>299</sup> The Director may request the developer to take remedial measures in such a manner that the Director may determine.<sup>300</sup> The Director is entrusted with the responsibility of carrying out periodic environmental audits of projects that may cause adverse impacts on the environment.<sup>301</sup> The Draft Regulations mandates the developer to also undertake

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294 Step 11 in the *Guidelines*. This option is open for both the developer and the I&APs. See also section 25(6) of the 2008 *Environment Act*.

295 Step 11 in the *Guidelines*. See also section 25(6) of the 2008 *Environment Act*.

296 Step 11 in the *Guidelines*.

297 The Environmental Tribunal is established in terms of section 98 of the 2008 *Environment Act*

298 Section 98 of the 2008 *Environment Act*. The Environmental Tribunal shall be independent and consist of the chairperson who is a legal practitioner, a person who holds a degree in law and another person who has knowledge in environmental issues.

299 Section 23(b) of the 2008 *Environment Act*. See also regulation 47(1) of the Draft EIA Regulations, 2006. The Draft Regulations provide the methodology of conducting the environmental audit under regulation 44 of the *Draft EIA Regulations*, 2006.

300 Section 23(2) of the 2008 *Environment Act*.

301 Section 24(2) of the 2008 *Environment Act*. The *Guidelines* does not, however, stipulate how this process of conducting periodic environmental audits have to be done but draft regulation 37 stipulates that the manner of auditing must be set out in the EMP.

monitoring on a continuous basis.<sup>302</sup> Where the developer has undertaken the monitoring, he has to submit the report to the Director.<sup>303</sup> The Director must institute remedial action in the event of non-compliance to the conditions of the license.<sup>304</sup>

As regards auditing, the developer shall undertake environmental audits in the manner and within the periods and such intervals prescribed in the EMP.<sup>305</sup> The Director may request that the holder of the EIA license, developer for whom an EIA has been made for or any person who holds rights in the land on which the activity is being run, to keep and submit all reports to the Director.<sup>306</sup> The report must indicate the extent to which the project or activity complies with the terms and conditions attached to the environmental license.<sup>307</sup>

The developer or any person who has a legal right in the land used for the project shall ensure that he takes reasonable measures to mitigate adverse impacts that were not anticipated in the EIS.<sup>308</sup> The developer must also take all measures to ensure the implementation of the EMP by conducting self-audits and preparing environmental audit reports.<sup>309</sup> The developer must prepare an environmental audit report which shall be submitted to the Director.<sup>310</sup> Having studied the environmental audit report, the Director may direct that the developer put in place mitigation measures he deems necessary.<sup>311</sup> The Director may also undertake environmental auditing himself by confirming that the EMP is being adhered to and by verifying the adequacy of EMP to mitigate the adverse environmental impacts.<sup>312</sup> The legislation is silent on whether the environmental audit report is open for review by I&APs or not. Further, the legislation does not provide auditing by the enterprise of an independent environmental auditor as indicated in chapter 2.

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302 Regulation 47(2) of the *Draft EIA Regulations*, 2006.

303 Regulation 48(1) of the *Draft EIA Regulations*, 2006.

304 Regulation 47(3) of the *Draft EIA Regulations*, 2006.

305 Regulation 37 of the *Draft EIA Regulations*, 2006.

306 Section 24(2) of the 2008 *Environment Act*. See also regulation 40 and 43 of the *Draft EIA Regulations*, 2006.

307 Section 24(2) of the 2008 *Environment Act*.

308 Section 24(4) of the 2008 *Environment Act*.

309 Regulation 45 of the *Draft EIA Regulations*, 2006.

310 Regulation 45 of the *Draft EIA Regulations*, 2006.

311 Regulation 47 of the *Draft EIA Regulations*, 2006.

312 Regulation 42 of the *Draft EIA Regulations*, 2006.

### 3.7.7.1 Mitigation

The Director may, after studying the audit report request the developer to take certain measures to ensure compliance with the environmental license or the EMP.<sup>313</sup> Upon failure to implement such measures, the environmental inspector<sup>314</sup> may issue an environmental restoration order<sup>315</sup> and may institute criminal and civil proceedings.<sup>316</sup> Lesotho EIA legislation is silent on what may be done in relation to the activities that commenced without environmental license save to declare such conduct as illegal. However, it can safely be inferred that such activities may be discontinued, be subjected to environmental audit or environmental monitoring in terms of section 4(3) of the 2008 *Environment Act*. The Lesotho EIA procedures as provided for in the legislation is summarised in the figure below.<sup>317</sup>

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313 Regulation 46(1) of the *Draft EIA Regulations, 2006*. The said mitigations measures must be communicated in writing by the Director to the developer.

314 The environmental inspectors are the public officers who are designated by the Minister within a particular area to perform duties which they were designated to perform. Some of the duties of the environmental inspectors include but are not limited to ensuring compliance with the 2008 *Environment Act*.

315 This is issued in terms of section 90 of the 2008 *Environment Act*.

316 Regulation 46(3) of the *Draft EIA Regulations, 2006*.

317 Walmsley and Patel *Handbook on Environmental Assessment* 136.



**Figure 3-1: EIA process in Lesotho**



### **3.8 Conclusion**

In the foregoing discussion, the historical background of Lesotho's EIA legislation was provided. The study further discussed various pieces of legislation that provides for EIA process. Lesotho has endeavoured to improve its EIA legislation over a period of years thereby formulating policies, proposing 2001 *Environment Act*, promulgating 2008 *Environment Act* and formulating the *Guidelines*. However, despite the efforts, there are several challenges that arise from Lesotho's EIA legislation and they are as follows:

- (a) The environmental protection is not a justiciable right in the *Constitution*.
- (b) Although the interrogation of the definitions of both an "EIA" and "environment" reveal that an EIA is not only focused on natural environment, Lesotho's definition fall short of the definition provided for this study. Thus it needs to be amended.
- (c) There are gaps that are found in the current applicable EIA legislation which are filled by the *Draft Regulations* which have not been formalised as yet. For instance, the 2008 *Environment Act* and the *Guidelines* do not make provision for time frames on which various steps should be completed. Further, the legislation does not clearly indicate who is I&AP. This goes against the principle of effective EIA which provides that an EIA must be based on legislation which has clear purpose, specific requirements and prescribed responsibilities.<sup>318</sup> The public participation process may not be meaningful due to the vagueness in this regard. Further, further information or amended reports, are not subjected to a public participation process.
- (d) There exist inconsistencies as the 2008 *Environment Act* provides a discretionary power to the Director to allow public participation during the screening process while the *Guidelines* and *Draft Regulations* make it mandatory that there should be a public participation process. Although the *Draft Regulations* provide the manner in which a public participation process should be conducted, there are deficiencies in that it is not clear when the comments raised during the process

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318 See para 2.5 above.

have to be submitted and how they should be submitted to the DoE. The applicant or developer is left to make a determination of how the public participation will be held and to decide on which information to release.

- (e) The current applicable legislation is not up to date as the *Guidelines* makes reference to the non-existent institutions like LEA. It makes reference to 2001 *Environment Act*. This can be very confusing to the developers who are not conversant with the laws of Lesotho.<sup>319</sup>
- (f) The legislation does not provide extensively how the EIS reports must be availed for review which goes against transparency and access to information. The legislation does not provide for the communication of the decision to the I&APs. Furthermore, the environmental audit report is not subjected to public review.
- (g) Lesotho's legislation does not provide for integrated environmental authorisations.
- (h) The legislation does not provide extensively the appeal procedures. Further, the aggrieved party appeals to the very same decision-maker.
- (i) Auditing is conducted by the developer or DoE as opposed to being done by the enterprise of qualified environmental auditor.

Notwithstanding the above shortcomings, Lesotho's EIA legislation to some greater extent corresponds with the generally accepted steps of EIA which are as follows;

(a) Screening

Lesotho provides for a screening process. This has been made evident by section 19 of the 2008 *Environment Act* which provides for listed activities which require a project brief or a full EIA. This is in line with the basic principle that an EIA process must focus on activities that will have significant impacts. However, the challenge with the screening process of Lesotho is that it is not clear which activities require a project brief or a full EIA as opposed to South Africa where the listing of activities is such that an applicant is able to identify which activities only require basic assessment and which

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319 Walmsley and Patel *Handbook on Environmental Assessment* 129.

activities requires EIA.<sup>320</sup> This goes against the basic principle of "cost-effective" in that it does not save time by indicating which activities must be subjected to a full EIA from the onset. Furthermore, the Director has wide discretionary powers due to the fact that he is the one who determines which activities require either a project brief or a full EIA.

(b) Scoping and preparation of ToR

Lesotho's EIA legislation provides a scoping process in which the developer submits the project brief. The project brief is aimed at achieving the outcomes of the scoping process as set out in chapter 2 in that, amongst other, it indicates the anticipated environmental impacts, it identifies the I&APs and there is a public participation process. This is in line with the basic principle that an EIA must be participative. When a full EIA is required, the applicant is expected to prepare the ToR after conducting the scoping process.

(c) Mitigation and EMP

Lesotho's EIA legislation provides that the developer must include in his project brief, the mitigation plan. The legislation also provides the developer must identify the alternatives, how the activity will be implemented, mitigation measures that will be taken, environmental restoration after construction phase and rehabilitation at decommissioning phase. The abovementioned issues must be contained in the EMP. It is not clear whether the project brief is accompanied by separate EMP or the contents that must be reflected in the EMP are included in the project brief.

(d) EIA report and EMP

Lesotho provides that the developer must prepare an EIS and EMP which must indicate the information in the preceding paragraph. This information must be sufficient to assist the decision-making. This is manifested in figure 3-1 which demonstrates that when the information is sufficient, the developer will be required to furnish further information.

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<sup>320</sup> See Chapter 5 below.

This is in line with the basic principle of an EIA being purposive<sup>321</sup> thereby informing the decision-making.

(e) Review of EIA report

Lesotho's EIA legislation corresponds in this regard with the chapter 2 requirements in that it provides for the review of project brief by I&APs, the relevant Line Ministry and the public before the DoE makes a decision. However, the problem in this regard relates to public participation as highlighted above under scoping and preparation of ToR.

(f) Decision-making

Lesotho's EIA legislation demonstrates good decision-making phase in that it provides for appeal against the decision of DoE to the DoE, Environmental Tribunal and to competent court of law which is something that is not provided for in chapter 2. However, the challenge is that the developer and the DoE are not mandated to communicate the decision to the I&APs and to inform them of the option to appeal.

(g) Implementation and follow up.

As regards follow up, Lesotho's EIA legislation corresponds with accepted step in chapter 2 that provides for monitoring and auditing by both the DoE and the developer. It also provides monitoring by environmental inspectors. Having discussed the EIA legislation of Lesotho, is important to discuss the legislation of Swaziland in the next chapter.

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321 See para 2.5 above.

## Chapter 4 Swaziland

### 4.1 Introduction

Swaziland, similar to the other countries has taken part in the conservation of the environment by putting relevant legislation in place and in particular, the provisions relating to an EIA process.<sup>322</sup> Swaziland has a "strong national obligation to ensure that her natural resources and environment are used sustainably for future generations" in pursuit of a healthy environment.<sup>323</sup> Swaziland has made it mandatory that certain projects cannot be undertaken unless an EIA has been undertaken and proper authorisation has been granted.<sup>324</sup> The government through legislation has indicated the types of projects that require an EIA and the processes that must be followed prior, during and after the undertaking of an EIA. This chapter focuses on Swaziland and its EIA legislation. The chapter shall discuss a brief historical background of Swaziland's EIA legislation, addresses legislation which provides for EIAs in Swaziland, to wit; the *Constitution of Swaziland*,<sup>325</sup> *Environment Management Act (EMA)*<sup>326</sup> and the EAARR. The chapter shall also discuss the steps followed in EIA.

### 4.2 Historical background

Swaziland practiced environmental conservation from time immemorial in terms of Swazi law and custom.<sup>327</sup> The present environmental conservation is regulated by legislation developed at a later stage.<sup>328</sup> It has been contended that due to the weak implementation and enforcement of environmental laws, the environment in Swaziland

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322 Bray "Development and the balancing of interests in environmental law: Swaziland" 460. See also Bray 2006 *CILSA* 528. The article discusses the environmental law of Swaziland in detail. Due to the scope of this study, detail of the historical background will not be provided.

323 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=46>.

324 See para 4.6.6 below.

325 *Constitution of Swaziland*, 2005.

326 *Environment Management Act* 5 of 2002.

327 Bray "Development and the balancing of interests in environmental law: Swaziland" 460

328 Bray "Development and the balancing of interests in environmental law: Swaziland" 460.

remains vulnerable.<sup>329</sup> The history of EIA legislation in Swaziland can be traced as far as 1992 when Swaziland enacted the now repealed *Swaziland Environment Authority Act*.<sup>330</sup> Section 4 of the Act established the Swaziland Environmental Authority (SEA).<sup>331</sup> The Act gave powers to the Minister of Natural Resources and Energy to make regulations and the said regulations were formulated.<sup>332</sup> During its existence, the erstwhile SEA attempted to move towards being an autonomous body even though it remained to a great extent dependent on the government.<sup>333</sup>

It was only in 1996 that EIAs became a legal requirement. Before the said date, EIAs were required for donor-funded projects only.<sup>334</sup> In 1996, the Government of Swaziland promulgated the EAARR.<sup>335</sup> In 1997, Swaziland formulated a *Swaziland Environmental Action Plan* (SEAP).<sup>336</sup> In 2002, the 1996 EAARR were revised though they remained under the same name.<sup>337</sup> A *National Environment Policy* was formulated in 2000.<sup>338</sup>

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329 Bray "Development and the balancing of interests in environmental law: Swaziland" 460.

330 *Swaziland Environment Authority Act* 15 of 1992.

331 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=46>. See also Bray "Development and the balancing of interests in environmental law: Swaziland" 462. The Swaziland Environmental Authority is the body that was in charge of the environmental affairs of Swaziland. Some of the functions of SEA included establishment standards and guidelines relating to pollution of water, land air and noise. The other function of SEA related to "development of economic measures to enhance environmentally sound and sustainable activities and promotion of training and education programme in the field of environment." The SEA was also aimed at initiating measures for coordination enforcement of environmental protection legislation. See also [http://www.saiea.com/dbsa\\_book/swaziland.pdf](http://www.saiea.com/dbsa_book/swaziland.pdf).

332 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=46>. See note 14 below.

333 Walmsley and Patel *Handbook on Environmental Assessment* 375. The SEA, however, became autonomous when the new legislation, EMA came in place in 2002. The SEA was made a body corporate with perpetual succession. According to the EMA, the SEA is managed by its Management Board. The Management Board comprises of the Chairperson, the Principal Secretaries, members who are representatives of non-governmental organisations, two citizens and the Director of the SEA.

334 SAIEA 2015 <http://www.saiea.com/saiea-book/Swaziland1.pdf>.

335 SAIEA 2015 [http://www.saiea.com/dbsa\\_book/swaziland.pdf](http://www.saiea.com/dbsa_book/swaziland.pdf). The regulations were aimed at establishing the guidelines and requirements of an EIA. See also Walmsley and Patel *Handbook on Environmental Assessment* 380.

336 SAIEA 2015 [http://www.saiea.com/dbsa\\_book/swaziland.pdf](http://www.saiea.com/dbsa_book/swaziland.pdf). The SEAP set out the environmental issues that pertain to sustainable development in Swaziland, and recommends steps to be taken towards achieving sustainable development. SEAP also outlines the principles of harmonisation of environmental legislation, the usage of environmental guidelines and procedures, and EIA and creations of sectoral policies.

337 Walmsley and Patel *Handbook on Environmental Assessment* 380. The regulations required among other things, the submission of an initial environmental evaluation with a comprehensive mitigation plan for activities that are likely to cause a significant impact on the environment.

338 Walmsley and Patel *Handbook on Environmental Assessment* 377.

In an attempt to refine the *Swaziland Environment Authority Act*,<sup>339</sup> Swaziland promulgated EMA in 2002 and the Act came into operation in September 2003.<sup>340</sup> Among the major changes brought about by the new EMA, was that the Authority became "a corporate body with powers to sue and be sued."<sup>341</sup> EMA is said to be:

intended to provide and promote the enhancement, protection and conservation of the environment, sustainable management of natural resources and matters incidental thereto.<sup>342</sup>

It is through this evolution of Swaziland's environmental law that an EIA process in Swaziland has been made mandatory and had to be undertaken under the authority of the SEA.<sup>343</sup> Swaziland considers an EIA as primarily aimed at identifying the impacts of certain specified activities and to come up with mitigation plans.<sup>344</sup> It is therefore important to discuss the legislation providing for an EIA in Swaziland. The *Constitution* will be discussed first.

### **4.3 Constitution of Swaziland, 2005**

The history of the *Constitution of Swaziland* dates as far back as 1968 when the *Constitution* came into effect.<sup>345</sup> The said *Constitution* was later repealed and was substituted by the *Swazi Administration Order*<sup>346</sup> of 1998.<sup>347</sup> Swaziland then enacted the current *Constitution of the Kingdom of Swaziland* in 2005 (the *Constitution*).<sup>348</sup> Chapter 3 of the *Constitution* provides for the protection and promotion of fundamental rights and freedoms.<sup>349</sup> The *Constitution* has not included a right in relation to environment

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339 *Swaziland Environment Authority Act* 15 of 1992.

340 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=54>.

341 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=54>. The Authority is aimed at promoting the integrated management of the environment and natural resources.

342 SAIEA 2015 [http://www.saiea.com/dbsa\\_book/swaziland.pdf](http://www.saiea.com/dbsa_book/swaziland.pdf).

343 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=12>.

344 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=12>. An EIA in Swaziland is considered as an effective tool for decision-making which is aimed at averting the environmental problems which has been made a requirement under EMA. See also para 2.2 above.

345 EISA 2015 <http://www.content.eisa.org.za/old-page/swaziland-constitution>.

346 *Swazi Administration Order* 6 of 1998.

347 EISA 2015 <http://www.content.eisa.org.za/old-page/swaziland-constitution>.

348 *Constitution of Swaziland*, 2005. The *Constitution* has, however, been enacted several years after other pieces of environmental legislation, that is *Swaziland Environment Authority Act* 15 of 1992, *Environment Management Act* 5 of 2002 and the EAARR were in place. See also Bray 2006 *CILSA* 529 for further discussions on Swaziland *Constitution*.

349 *Constitution of Swaziland*, 2005.



under the fundamental rights.<sup>350</sup> However, environment is provided for under Chapter 5 of the Swaziland's *Constitution* in which section 60(11) thereof provides that:

the State shall endeavour to preserve and protect places of historical interest and artefact and the environment.<sup>351</sup>

Section 210(2) of the *Constitution* states:

in the interest of the present and future generations, the State shall protect and make rational use of its land, mineral and water resources as well as its fauna and flora, and shall take appropriate measures to conserve and improve environment.<sup>352</sup>

Section 216 of the *Constitution* specifically addresses the environment. This section provides that:

216 (1) Every person shall promote the protection of the environment for the present and future generations,

(2) Urbanisation or industrialisation shall be undertaken with due respect for the environment,

(3) The Government shall ensure a holistic and comprehensive approach to environmental preservation and shall put in place an appropriate environmental regulatory framework.

The *Constitution* reinforces the protection of environment on the aforementioned sections. The above sections can be reduced to being a direct principle geared towards the state to ensure environmental protection, except for section 216(1) placing an obligation on every person to protect environment. In light of section 216(2), it is evident that during developments, the environment should be taken into account. From the reading of the aforementioned sections, it does not appear that the sections are enforceable hence the need for legislation to ensure enforceability. The section necessitates the promulgation of environmental framework legislation. In view of the fact that the Swaziland's *Constitution* provides for the undertaking of measures to

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350 The same position has been observed in Lesotho's *Constitution* which does not provide for the protection of environment or right to safe and healthy environment as a fundamental right. See para 3.3 above.

351 Section 60(11) of the *Swaziland's Constitution*. The section does however does not disclose how the government shall undertake its endeavours to protect the environment. See also para 2.3 for the definition of environment.

352 Section 210(2) of the *Swaziland's Constitution*. Taking into account the definition of environment in chapter 2 above, it becomes apparent that this section reinforces the commitment of the state of protecting the environment for the present and future generations by employing appropriate measures.

ensure environmental protection, it can safely be deduced therefore that an EIA as a tool for environmental management is important to achieve what the Swaziland's *Constitution* has provided for. In 2005 when the Swaziland's *Constitution* was promulgated, there was already environmental legislation in place which will be discussed below.<sup>353</sup>

#### **4.4 Environment Management Act 5 of 2002 (EMA)**

As stated before,<sup>354</sup> EMA was promulgated to replace *Swaziland Environment Authority Act*<sup>355</sup> and it became the current environmental framework legislation.<sup>356</sup> The objectives of the EMA are to institute a framework environmental protection act and to integrate management of natural resources on a sustainable basis and to transform the SEA into a body corporate.<sup>357</sup> The Act makes provisions for promotion, protection and conservation of the environment.<sup>358</sup>

Part II of the EMA provides for general sustainable environmental management principles that shall be adhered to in order to achieve the purpose of EMA.<sup>359</sup> The Act provides that:

adverse effects should be prevented and minimised through long term integrated planning and the co-ordination, integration and co-operation of efforts, which consider the entire environment as a whole entity.<sup>360</sup>

This provision corresponds with the procedural principles in chapter 2 in that it provides for the prevention of adverse environmental impacts. The EMA further establishes the Authority. The Authority is a "body corporate with perpetual succession to the Swaziland Environmental Authority" which was established under the 1992 *Swaziland Environment Authority Act*.<sup>361</sup> The Authority is mandated to establish measure for the

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353 See para 4.4 below.

354 See para 4.2 above.

355 *Swaziland Environment Authority Act* 15 of 1992.

356 Bray 2006 *XXXIX CILSA* 537.

357 *Environment Management Act* 5 of 2002. See also para 4.4 above.

358 Section 4 of the EMA.

359 Section 5 of the EMA.

360 Section 5 of the EMA. This principle encapsulates the phenomenon of an EIA process. Thus an EIA in Swaziland is also undertaken in pursuance of this principle. See also Bray 2006 *XXXIX CILSA* 537.

361 *Swaziland Environment Authority Act* 15 of 1992. See also Bray 2006 *XXXIX CILSA* 53-536 for detailed discussion on the history of the Authority and the law reform it fostered.

implementation of the EMA either alone or in co-operation with other bodies.<sup>362</sup> The Authority has a duty to administer the licences which have been issued pursuant to the provisions of the EMA.<sup>363</sup> The Authority is further mandated to review EIA reports and SEAs.<sup>364</sup> Thus the Authority also acts as an authorisation body in certain instances.<sup>365</sup> As regard access to information by the public, the function of the Authority is:

to disseminate and facilitate public access to information on the environment including creating and maintaining an environmental information registry in accordance with section 50.<sup>366</sup>

The Authority has as its function, a duty to facilitate public involvement in the decision-making relating to environment and forming the procedures to facilitate the submission of comments on the application for licences.<sup>367</sup>

As regards environmental assessment, the EMA prohibits any person to undertake any project<sup>368</sup> that may have significant impact on the environment without authorisation by the authority.<sup>369</sup> In the event that there is an undertaking of such a project without required authorisation, such conduct will constitute an offence which upon conviction, the person responsible may be liable to a fine.<sup>370</sup> No any other organ of state or any other body may grant an authorisation unless authorisation has first been granted by the Authority.<sup>371</sup> The EMA also provides for integrated environmental management.<sup>372</sup>

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362 Section 9 of the EMA.

363 Section 9 of the EMA.

364 Section 9 of the EMA.

365 Section 33(1) of the EMA.

366 Section 9 of the EMA.

367 Section 9 of the EMA.

368 Project has been defined in Section 1 to mean "an enterprise, undertaking or activity, or a proposal or plan for a new enterprise, undertaking or activity or to significantly change an enterprise, undertaking or activity, and includes a plan, operation, undertaking, construction, development, change in land use, or alteration that may not be implemented without a permit, licence, consent or approval issued by or on behalf of a Minister, Public Officer, an organ of Government or a Public Body."

369 Section 32(1) of the EMA. Bray 2006 *XXXIX CILSA* 541.

370 Section 32(2) of the EMA.

371 Section 32(3) of the NEMA.

372 See Bray 2006 *XXXIX CILSA* 540 for detailed discussion on this regard.

## **4.5 Environmental Audit, Assessment and Review Regulations, 2000**

The EAARR have been formulated pursuant to section 18 of the *Swaziland Environment Authority Act*.<sup>373</sup> The regulations set out the steps and the procedures that must be followed in conducting an EA. The said steps are outlined hereunder. The steps followed in an EIA will be discussed below in line with the generally accepted EIA steps and principles of EIA.<sup>374</sup>

## **4.6 Steps of an EIA in Swaziland**

### **4.6.1 Screening**

The EMA makes it mandatory that before undertaking any project, the applicant must submit a project brief to the Authority which shall contain enough information to enable the authority to identify the potential impacts of the proposed project on the environment and to classify which category the proposed project should be ascribed to.<sup>375</sup> Upon receipt of the project brief, the appropriate authorising agency must review the project brief and if there is sufficient information, the project may be categorised.<sup>376</sup> The EAARR makes provision for the existing undertakings and states that the Authority shall identify and maintain a list of existing projects which are likely to have adverse impact on the environment and publish same.<sup>377</sup> The Authority shall thereafter require the person in charge of the project to submit the EA report and the CMP.<sup>378</sup> Thus, Swaziland considers the projects that were in existence prior commencement of legislation and those that were commenced without ECC. The First Schedule in the

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373 *Swaziland Environment Authority Act* 15 of 1992.

374 See para 2.5 and 2.6 above.

375 Section 32(4) of the EMA. The EAARR defines a project brief has been defined as "a document which incorporates a brief plan and/or outlines a proposal for project which contains sufficient information to enable the Authority or authorising agency to determine to which category the proposed project should be assigned. See also regulation 5(1) of the EAARR. See also Walmsley and Patel *Handbook on Environmental Assessment* 385.

376 Regulation 6(1) of the EAARR. However, in the event that the authorising agency is of the view that the information contained in the project brief is not sufficient, they may require sufficient information. See also section 32(5) of the EMA.

377 Regulation 4 of the EAARR.

378 Regulation 4 of the EAARR. Following the submission of the EA report and the CMP, the processes that outlined in para 4.6 shall follow.

EAARR sets out the types of projects that may be assigned to each category.<sup>379</sup> The applicant must identify whether the proposed activity is listed or not. This is not the position in Lesotho as the Act provides for the long list of activities that may not commence without a license. The proposed project may be categorised into one of the following categories:

- (a) Category 1-The proposed project falls under this category if it is unlikely to have any significant adverse impacts on the environment.<sup>380</sup> After classification of the category 1 projects, the Authority or an authorisation agency must issue an environmental compliance certificate.<sup>381</sup> An Environmental compliance certificate (ECC) is a certificate issued by the Authority which verifies that the Authority has agreed to a proposed project proceeding subject to the applicant adhering to the terms and conditions set by authorisation authority and the approved comprehensive mitigation plan.<sup>382</sup>
- (b) Category 2- The proposed project falls under this category if it is likely to have some significant adverse impact on the environment but those impacts are fairly well-known and are easily predicted and the measures which can be taken to avert or mitigate these impacts are well-known.<sup>383</sup> When the project has been classified as category 2 projects, the applicant shall prepare an initial environmental evaluation (IEE) and a comprehensive mitigation plan (CMP).<sup>384</sup> The IEE is defined as "an environmental analysis of a proposed project whose environmental impacts may be easily determined and for which there are appropriate, well known and tested mitigation measures"<sup>385</sup> while a CMP has been defined to mean "a document containing a description of the mitigation measures to be implemented that would prevent, reduce or otherwise manage the

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379 Swaziland has simplified the screening process as opposed to Lesotho in that when one intends to undertake the project, the proponent can identify which category his project falls under and therefore be able to predict the procedures he must follow.

380 Regulation 6(1)(a) of the EAARR.

381 Regulation 7(1) of the EAARR.

382 Regulation 3 of the EAARR.

383 Regulation 6(2)(b) of the EAARR.

384 Regulation 8(1) of the EAARR.

385 Regulation 3 of the EAARR.

environmental impacts of a project and done according to the reporting requirements."<sup>386</sup>

The project impacts are usually limited to "a small number of significant negative impacts, where the nature of impacts is well understood and the size and nature of those impacts mean that the relevant mitigation actions are well known."<sup>387</sup> Although not the same level of detail is expected as in a full EIA, expert opinion is, however, still required to verify the impacts anticipated.<sup>388</sup> It has been further suggested that "without relevant experience and technical knowledge, appropriate professional consultancy advice will be needed by a project proponent to carry out an IEE to the standards required by the Swaziland Environment Authority."<sup>389</sup>

Upon receipt of the two documents, the Authority shall review the said documents and decide whether they comply with the law.<sup>390</sup> In the event that they are in conformity with the law, the authority will issue notice of acceptance.<sup>391</sup> If the documents do not comply with the legal requirements, the applicant will be required to prepare and submit the amended documents.<sup>392</sup> When the Authority has accepted the amended documents, it shall issue the notice of acceptance.<sup>393</sup> The Authority shall then review the IEE and the CMP and if it is of the view that further studies are required, it may require the applicant to undertake a full EIA.<sup>394</sup> Where the Authority has issued the notice of acceptance, a public participation process will follow.<sup>395</sup>

- (c) Category 3- The proposed project that falls under this category is likely to have significant adverse environmental impacts and a more detailed study is required to determine the scale, extent and the significance of the impacts and to identify

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386 Regulation 3 of the EAARR.

387 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>.

388 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>. The regulations nor the EMA do not make a provision for an expert or environmental practitioner.

389 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>.

390 Regulation 8(1)(b) of the EAARR.

391 Regulation 8(1)(b)(i) of the EAARR. See also section 32(5) of the EMA.

392 Regulation 8(1)(b)(ii) of the EAARR. See also section 32(5) of the EMA.

393 Regulation 8(1)(c) of the EAARR. See also section 32(5) of the EMA.

394 Regulation 8(1)(d) of the EAARR. See also section 32(5) of the EMA.

395 See para 4.6.2 below for further discussion on public participation.

appropriate measures.<sup>396</sup> The projects categorised under category 3 require full EIA. An applicant whose project has been categorised under this category must before undertaking an EIA effect a consultation process to involve all the I&APs and people to determine the scope and effect of the project.<sup>397</sup>

#### *4.6.2 Scoping and preparation of ToR*

If the project has been assigned to category 3, the next step to follow is scoping. An applicant must submit to the Authority a ToR which entails the results of the consultation with the I&APs.<sup>398</sup> The ToR provides a framework which shall be used to guide the EIA study and is usually prepared by an expert or consultant employed by the applicant although the legislation does not make express requirement for the expert.<sup>399</sup> An EIA may only be undertaken when the Authority has approved the ToR.<sup>400</sup> The applicant must then undertake an EIA studies and prepare an EIA report and the CMP.<sup>401</sup>

#### *4.6.3 EIA report and the CMP*

When the ToR has been approved, the applicant must prepare an EIA report and CMP in line with the requirements set out in law.<sup>402</sup> The EIA report is meant to provide the Authority with the adequate information relating to the impending impacts of the proposed project on the environment which shall assist in deciding whether or not to grant the ECC.<sup>403</sup> Further, the EIA report is meant to record all the processes by which

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396 Regulation 6(2)(c) of the EAARR.

397 Regulation 9(1) of the EAARR.

398 Regulation 9(2) of the EAARR.

399 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>. The ToR are prepared to ensure that an EIA "focuses on the key issues and that the relevant interested and affected people are consulted and participate in the decision making process." The regulations do not however describe who are the consultants or the expert.

400 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>. This will assist in judging the EIA report that shall be filed at a later stage.

401 Regulation 4(a) of the EAARR.

402 SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>.

403 *EIA Guideline 4* in SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>. The information contained in the EIA report heavily relies on the ToR. The form and content is stated in Second Schedule of the EAARR.

the studies and the consultation processes were conducted when gathering and assessing the information.<sup>404</sup> The EIA report shall be accompanied by the CMP.<sup>405</sup> In the event that an EIA report and the CMP comply with the requirements of the law, the Authority shall issue a notice of acceptance.<sup>406</sup> In the event that the EIA report or CMP or both do not conform, the Authority shall order the applicant to prepare and amend the EIA and CMP.<sup>407</sup>

The Authority shall issue a notice of acceptance to the applicant if in the opinion of the Authority the applicant has complied with all the legal requirements.<sup>408</sup> The purpose of this notice of acceptance is to confirm that the documents to which the notice refers to are acceptable for the purposes of deciding whether to grant the licence or not.<sup>409</sup> Thereafter there must be subjected review.

#### *4.6.4 Review of the reports*

When the Authority has issued the notice of acceptance, and has received copies of either the IEE or an EIA report and CMP, the Authority shall concurrently distribute such copies, place the copies at the public places and advertise the opportunity for public review.<sup>410</sup> The public must be informed of the places where the documents shall be available for inspection, invite objections, comments and representations.<sup>411</sup> The legislation is to some extent detailed in this regard as opposed to Lesotho. After receipt of the objections, comments or submissions, the Authority shall acknowledge receipt thereof and forward a copy of the objections, comments or submissions to the applicant

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404 *EIA Guideline* 4 in SEA 2015 <http://www.sea.org.sz/pages.asp?pid=14>.

405 See para 4.6.1 above.

406 Regulation (9)(4)(b)(i) of the EAARR.

407 Regulation 9(4)(ii) of the EAARR.

408 Regulation 10(1) of the EAARR.

409 Regulation 10(2) of the EAARR. The Authority may at any point in time before or after the notice of acceptance issued require further information.

410 Regulation 11 of the EAARR. The copies are distributed to the affected ministries, local authorities, parastatals, non-governmental organisations and other persons who may be affected. The public review is advertised in the *Government Gazette* by the Swaziland Broadcasting Services and in a newspaper circulating in Swaziland. The advertisement must invite objections, comments, or submission from all I&APs. See also section 52(1) of the EMA. The copies must be distributed to the Ministry, the Authority and to the Ministries who may have interest section

411 Section 52(1) of the EMA.



and the authorising agency.<sup>412</sup> The Authority shall then review the objections, comments or submissions that were made and decide whether public hearing should be held or not.<sup>413</sup>

If the Authority is of the opinion that the proposed project is of a significant nature that warrants that the public hearing should be held or that the public concern towards the project is great, the Authority may hold a public hearing.<sup>414</sup> The Authority shall publish notice to this effect in a newspaper circulating in Swaziland and the said notice shall indicate the place where the public hearing shall be held.<sup>415</sup> The Authority shall also avail all reports, documents; written comments and objections during and after public review for inspection and shall call any person who has an interest in the outcome of the public hearing to attend.<sup>416</sup> It would appear that the difference between public review and public hearing is that public review is meant for the I&APs while public hearing it is a form of public review but that extends to the public at large.

The chairperson of the public hearing shall compile and deliver a report to the Authority for it to make its determination which in turn shall avail the report for public inspection.<sup>417</sup> After public review or the public hearing, the Authority will consider the IEE, the EIA report and the CMP for the proposed project and all the comments, submissions and objections made by I&APs and then make a decision.<sup>418</sup> In Swaziland, as opposed to Lesotho, the Authority takes charge of the public participation.

#### *4.6.5 Decision-making*

When the Authority has reviewed the documents submitted, it may decide to issue the environmental compliance certificate (ECC). It shall do so subject to terms and conditions it may deem fit to ensure that adverse impacts of the project on the

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412 Regulation 11(5) of the EAARR.

413 Regulation 11(6) of the EAARR. See also section 53 (1) of the EMA

414 Regulation 12(1) of the EAARR. The number of written and substantiated objections must have exceeded 10. A tribunal shall be appointed by the Authority to conduct the public hearing which shall consist of not less than 3 and more than 5 people and shall be led by a chairperson. See also Regulation 13 of the EAARR.

415 Regulation 12(2) of the EAARR.

416 Regulation 12(2) of the EAARR.

417 Regulation 14 of the EAARR.

418 Regulation 15(1) of the EAARR.

environment are mitigated properly.<sup>419</sup> However, the Authority may refuse to grant the ECC under two circumstances. The Authority may refuse to issue ECC if the Authority is of the view that the continued operation of an existing project is causing or is likely to cause adverse impact on the environment or the public, and the CMP does not provide adequate measures for mitigating the adverse impacts.<sup>420</sup> The Authority may also refuse to issue the ECC in the event that the proposed project which is yet to be undertaken will have unacceptable adverse impact on the environment and the CMP does not provide adequate measures for mitigating the adverse impacts on the environment.<sup>421</sup>

The Authority must communicate its decision as regards the issuance of the ECC or the refusal thereof in writing with full reasons of the decision to the authorising agency and must be published for public inspection and the copy of the decision must be send to any person who had submitted a comment and lodged an objection to the Authority.<sup>422</sup> It becomes evident that it is mandatory that the public should still have access to information even after the decision is made which is not the case in Lesotho. The duty to inform the public is upon the Authority.

#### *4.6.6 Appeals*

Any person who has been aggrieved by or has an interest in the decision made by the Authority may lodge an appeal with the Minister for Tourism, Environment and Communications.<sup>423</sup> The Minister must take into account the objectives of the EMA, environmental policies, the guidelines and the practice of the Authority. The decision of the Minister shall be in writing and set out the reasons for the decision.<sup>424</sup> The Regulations do not state what the position will be in the event that a party is not satisfied with the decision of the Minister, that is, whether that will be the end of the matter or if the applicant may proceed to the courts of law. When the decision is made, the project must be implemented.

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419 Regulation 15(2) of the EAARR. The terms and conditions shall be stipulated in the ECC. See also Regulation 15(5) of the EAARR.

420 Regulation 15(3)(a) of the EAARR.

421 Regulation 15(3)(b) of the EAARR.

422 Regulation 15(6) of the EAARR.

423 Regulation 19(1) of the

424 Regulation 19(5) of the EAARR.

#### 4.6.7 Implementation and follow up

Any holder of an ECC shall be responsible for adhering to and implementing the CMP which shall form part of the ECC and for monitoring the impacts of the project on the environment.<sup>425</sup> Moreover, the holder of the ECC shall submit a periodic project compliance report which shall be composed of information relating to the implementation of the CMP.<sup>426</sup> The Authority may inspect the approved projects in order to make sure that their undertaking is in compliance with the CMP.<sup>427</sup>

### 4.7 Conclusion

In this chapter, a brief historical background of EIA legislation has been provided relying on the *Constitution* of Swaziland, the EMA and the EAARR. The EIA legislation of Swaziland was discussed in line with the EIA principles and the generally accepted steps and it has been observed that it corresponds to a greater extent with the generally accepted steps and principles of EIA. The EIA process is uniform as shall be seen hereunder, the legislation is easy to follow and there are few gaps in the legislation as opposed to Lesotho. Swaziland's EIA legislation follows the following step:

#### (a) Screening

The applicant who intends to undertake an activity that requires licensing must submit a project brief to assist the Authority in decision-making. This is in line with the objectives and principles of EIA in that it must aid in decision-making. The competent authority must use the project brief to categorise the activities based on the nature of its impact. The EAARR uses thresholds to categorise the activities. In this regard, the competent authority does not have discretionary powers as opposed to Lesotho in that the legislation provides for a list of activities falling under different categories. It may be argued that in both Lesotho and Swaziland, the developer must submit a project brief for the competent authority to determine which EIA procedure to follow. However, this

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425 Regulation 16(1) of the EAARR.

426 Regulation 16(3) of the EAARR. In the event that any person monitoring the implementation of the CMP discovers that the terms and conditions of the ECC are being breached or "unforeseen damage to environment is occurring," that information must be reported to the Authority. See Regulation 16(6) of the EAARR.

427 Walmsley and Patel *Handbook on Environmental Assessment* 394.

argument can be refuted by indicating, that in the case of Swaziland, the applicant knows which procedure he is going to follow even before submission of the project brief by identifying which category the proposed activity fall within. This leads to uniformity in the EIA process. The EIA legislation of Swaziland provides for the already existing projects.

The challenge with Swaziland's legislation is that it does not contain a requirement that an applicant should invoke the services of an expert or consultant. Thus the legislation does not adhere to the principle that an EIA process must be interdisciplinary. The EIA process includes the identification of mitigation measures in the CMP and they are included in both the IEE and the EAI report.

(b) Scoping and preparation of ToR

In light of discussion in chapter 2,<sup>428</sup> it becomes evident that Swaziland does not have a scoping process as it is replaced by a screening process as the ToR are formulated on the basis of the project brief completed during the screening process for the activities that require full EIA. The preparation of the ToR ensures that the EIA focuses only on the relevant issues and that I&APs are involved. This corresponds to the principles of EIA in chapter 2 in that the EIA process ensures public participation.

(c) EIA report and the CMP

The applicant whose proposed activity falls in category 3 must prepare an EIA report which contains the comments of the I&APs and the CMP. The reports must contain sufficient information that will assist in decision-making. What is peculiar in Swaziland is that when the competent authority approves submitted documents, it issues notice of acceptance.

(d) Review of the reports

Swaziland's EIA legislation provides for the review of the IEE, EIA report and the CMP and the competent authority has the responsibility to ensure public participation is

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428 See para 4.6.1 above

conducted as opposed to Lesotho where the applicant or developer is left to take charge of the public participation. The legislation is clear and precise on how public participation should be held and provides for timeframes. Thus, the legislation promotes the principle that dictate that EIA process must be participative.

(e) Decision-making

Following the review of the reports, the legislation provides for the decision-making step where the competent authority must decide whether to issue the licence or not. What is peculiar in Swaziland is that the decision is made available to the general public to view it and it is also sent to any person who filed objection by the Authority.

(f) Appeals

As part of the decision making process, any party aggrieved by the decision may file an appeal with the Minister to challenge the decision. This is different with the position in Lesotho where the applicant appeals to the same body (DoE) that made the decision. However, it is not clear as to the steps that must be followed if one is not satisfied with the decision of the Minister.

(g) Implementation and follow up

The applicant is responsible for implementing the CMP and filing the periodic project compliance reports.

*4.7.1 Learning points for Lesotho*

The learning points for Lesotho can briefly be summarised as follows:

- (a) Swaziland's EIA legislation is uniform;
- (b) The screening process is easier to follow due to the manner in which the activities have been listed;
- (c) The Authority is in charge of the public participation and the legislation is clear on the procedures followed in public participation. The legislation is to a greater extent comprehensive and detailed on the public participation process;

(d) The legislation provides for access to information in a detailed manner and extends access to information beyond the decision-making phase by ensuring that I&APs are informed of the decision.

(e) The appeal is made to the different body.

On the basis of the foregoing, the legislation of Swaziland to a greater extent provides for an EIA process that may be regarded as in line with the EIA principles as set out in chapter 2. Despite Swaziland's legislation having some shortcomings, it does provide learning points for Lesotho.

## Chapter 5 South Africa

### 5.1 Introduction

South Africa has been described as

a mega diverse country, considered one of the most biologically diverse countries in the world, largely due to the species diversity and endemism of the vegetation. The major natural systems of the country have been classified in terms of the biome concept, based on dominant plant life forms, correlated with climatic variations.<sup>429</sup>

South Africa has enacted EIA legislation which has undergone a rigorous evolution over the years.<sup>430</sup> However, the focus of the discussion in this chapter will be on the current position with some reference to the previous position. In South Africa, an EIA is considered to play a central role because it is one of the primary measures targeting the environmental sustainability of development and providing for the public participation for people who stand to be affected by the development.<sup>431</sup>

NEMA prohibits the undertaking of listed activities without conducting a basic assessment or S&EIR and has set out the procedures to be followed in doing same.<sup>432</sup> This chapter discusses the EIA legislation of South Africa. This shall be done by discussing the historical background of South African EIA legislation, then the legislation that provides for an EIA in South Africa, to wit; the South African *Constitution*,<sup>433</sup> NEMA and *NEMA EIA Authorisation Regulations*.<sup>434</sup> The said discussion will assist in drawing lessons for Lesotho in the subsequent chapter. The historical background shall be discussed first.

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429 Du Plessis and Du Plessis "Striking Sustainability Balance in South Africa" 415. See also *South Africa's National Biodiversity Strategy and Action Plan*, 2005.

430 See Retief 2010 *Journal of Environmental Assessment Policy and Management* 375 for detailed discussion of the evolution of South African EIA legislation. The focus will be on the current position for the due to the scope of this study.

431 Kidd and Retief "Environmental Assessment" 973.

432 Sections 24 and 24F of NEMA. See also para 2.3 for the definition of an EIA and "activity" in South Africa.

433 *Constitution of the Republic of South Africa*, 1996 (South African Constitution).

434 *NEMA EIA Authorisation Regulations* in GN R982-985 in GG 38282 of 4 December 2014.

## **5.2 Historical background**

South Africa's EIA historical background dates as far back as 1970s.<sup>435</sup> Since its inception in the 1970s, "EA has evolved from its humble beginnings as an *ad hoc*, voluntary tool, to the formalised EA system" that exists in South Africa in the present day.<sup>436</sup> In due course, it was observed that an EIA on its own was too limited and separate from the planning process thus there was a next evolutionary stage which marked the birth of IEM<sup>437</sup> that served as a holistic environmental management philosophy underlying the idea of an EIA.<sup>438</sup> Some writers have argued that South Africa has been slow to develop EIA procedures which were relevant to its circumstances.<sup>439</sup>

In 1980, the *White Paper on a National Policy Regarding Environmental Conservation*<sup>440</sup> aiming at formulating a national policy on environmental conservation was published and that led to the promulgation of the *Environment Conservation Act 100 of 1982*<sup>441</sup> This Act established a Council for the Environment which initiated the first thinking on EIA.<sup>442</sup> In 1989, South Africa promulgated the *Environmental Conservation Act 73 of 1989 (ECA)*.<sup>443</sup> The ECA provided for the promulgation of environmental policy.<sup>444</sup> The policy did not make direct provision for an EIA but provided for the environmental management system which the results thereof are similar to those of an EIA.<sup>445</sup> Amongst its provisions, the ECA also provided for an EIA.<sup>446</sup> It contained provisions which were aimed at regulating activities which may have significant adverse impacts on the environment.<sup>447</sup> Section 21 provided that the then Minister of Environmental Affairs and Tourism had to identify activities which in his opinion may have significant

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435 Kidd and Retief "Environmental Assessment" 973. See also Mafune et al "The early years of EA in South Africa."

436 Kidd and Retief "Environmental Assessment" 973.

437 See para 2.3 above for discussions on IEM.

438 Kidd and Retief "Environmental Assessment" 976. See also para 2.3 for the discussion on the IEM.

439 Sowman, Fuggle and Preston 1995 *Environmental Impact Assessment Review* 46.

440 *White Paper on a National Policy Regarding Environmental Conservation*, 1980.

441 *Environment Conservation Act 100 of 1982*.

442 Van Wyk *Planning Law* 422.

443 *Environmental Conservation Act 73 of 1989*. The ECA partially repealed by NEMA and other specific environmental management acts.

444 Kidd and Retief "Environmental Assessment" 976. See also section 2 of ECA. See also GN R51 in GG 15428 of 28 June 1989.

445 GN R51 in GG 15428 of 28 June 1989.

446 Sections 21, 22 and 26 of ECA. See also Kidd and Retief "Environmental Assessment" 976.

447 Sowman, Fuggle and Preston 1995 *Environmental Impact Assessment Review* 46.



impact on the environment.<sup>448</sup> ECA further prohibited the undertaking of the "identified activity" without an authorisation (record of the decision as was then referred to) from the relevant competent authority.<sup>449</sup> The environmental authorisation was granted after the competent authority had considered the reports in relation to the impacts of the proposed activity on the environment.<sup>450</sup> The Minister was entrusted with the power to promulgate regulations regarding environmental impacts reports which included the scope and content of the said reports and the procedures to be followed.<sup>451</sup> The South African EIA legislation has been subjected to an on-going law reform process to address key weaknesses in its EIA system.

In the same year, the Council for the Environment, which was an advisory committee to the Minister of Environment Affairs, released the *Council for the Environment Report on the IEM*.<sup>452</sup> The report outlined the environmental evaluation procedures in South Africa which were referred to as IEM.<sup>453</sup> It became apparent from the IEM procedures that IEM was not only concerned with environmental assessment but also with the implementation of the impact report and the monitoring of the impacts.<sup>454</sup> The aim of IEM was to "ensure the environmental consequences of development proposals are understood and adequately considered."<sup>455</sup>

The EIA regulations were introduced only in 1997.<sup>456</sup> According to Retief<sup>457</sup>, since the publication of these regulations, the Minister promulgated a list of "identified activities" and general regulations which outlined the procedures to be followed in applying for

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448 Section 21 of the ECA.

449 Section 22(1) of the ECA.

450 Section 22(20) of ECA. See also Kidd and Retief "Environmental Assessment" 986.

451 Section 26 of ECA.

452 Kidd and Retief "Environmental Assessment" 973. The Council was formerly known as South African Committee on Environmental Conservation and was established in 1972 to advise the cabinet committee concerned with the environmental conservation.

453 The IEM was aimed at ensuring that the environmental impacts and implications of proposals were investigated and adequately considered in the planning and decision-making process.

454 Kidd and Retief "Environmental Assessment" 973.

455 Kidd and Retief "Environmental Assessment" 978. Nel and Du Plessis critiqued the interpretation of IEM as it seems that IEM was regarded as a concept similar to EIA. See in this regard Nel and Du Plessis 2004 *SAPR* 182.

456 Kidd and Retief "Environmental Assessment" 978.

457 Retief 2010 *Journal of Environmental Assessment Policy and Management* 385.

environmental authorisation.<sup>458</sup> NEMA was subsequently promulgated and came into effect in January 1999. Chapter 5 of NEMA is headed IEM.<sup>459</sup> NEMA repealed most of the ECA provisions including sections 21, 22 and 26 and the EIA regulations although the repeal was to take effect after publication of regulations under NEMA.<sup>460</sup> The *NEMA EIA Regulations* were only promulgated in April 2006.<sup>461</sup> The Regulations dealt with the process to be followed and lists of identified activities and the identification of the competent authorities.<sup>462</sup> In 2010, new EIA regulations were published<sup>463</sup> which were replaced in 2014.<sup>464</sup> It has been suggested that they were amended as a result of the comments made by the stakeholders, the need to accommodate mining activities and to align the NEMA Amendments Acts and specific environmental management Acts (SEMAs).<sup>465</sup> Against this historical background, it is important to discuss the current legislation regulating EIA and the Constitution shall be discussed first.

### **5.3 Constitution of South Africa, 1996**

Section 24 of the South African *Constitution* provides for the protection of environment by placing a positive obligation on everyone not to create an environment that is harmful to another's health and well-being and by placing a positive obligation on all spheres of government to protect the environment. Section 24 reads:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
  - (i) prevent pollution and ecological degradation;

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458 Kidd and Retief "Environmental Assessment" 986. The regulations were published in GN R1182, GN R1183, GN R 1184 in GG 18261 of 5 September 1997.

459 Section 23 of NEMA. See also Kidd and Retief "Environmental Assessment" 991. See para 5.4 below for full discussions.

460 Kidd and Retief "Environmental Assessment" 978.

461 The regulations were published in GN R615 in GG 28938 of 23 June 2006 which repealed by GN R1182 and R1184 and GN R616 in GG 28938 of 23 June 2006. See also Kidd and Retief "Environmental Assessment" 991.

462 Kidd *Environmental Law* 248.

463 The regulations were published in GN R543 in GG 33306 of 18 June 2010. See also Kidd *Environmental Law* 250. The thrust of the procedures remained the same with procedures in the 2006 regulations.

464 The regulations are published in GN R982-985 in GG 38282 of 4 December 2014

465 Walmsley and Patel *Handbook on Environmental Assessment* 326.

- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

NEMA can be regarded as one of the measures employed to give effect to section 24.<sup>466</sup> The need to protect the environment for present and future generations highlights the need to invoke such an instrument or "other measures" as an EIA to fulfil the aims of the *Constitution*. Thus, it can be argued that an EIA is important to achieve the environmental protection aimed at by the *Constitution*. It is prudent to discuss NEMA as the environmental legal framework of South Africa.

#### **5.4 National Environmental Management Act 107 of 1998**

NEMA was given birth through a comprehensive public participation process which was known as Consultative National Environmental Policy Process (CONNEPP).<sup>467</sup> The CONNEPP process resulted in the *White Paper on Environmental Management Policy for South Africa*, 1998 which formed the basis of the NEMA.<sup>468</sup> Goal 6 of the *White Paper* provided for IEM. NEMA encompassed the recommendations of the *White Paper* and provided an underlying framework for general environmental law reform.<sup>469</sup> The objective of NEMA is "to fashion an environmental management system on organs of state rather than impose a set of regulatory commands on private sector."<sup>470</sup> NEMA provides for environmental management principles in section 2 and initially established some institutions to foster co-operative governance.<sup>471</sup> The environmental management principles are in line with the EIA principles in that they seek to ensure that any

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466 Preamble of NEMA. It can also be regarded as remedial legislation that is to ensure that the pre-1994 challenges are addressed. The EIA is a tool to address potential environmental impacts created by new developments.

467 Kidd *Environmental Law* 35. See also Glazewski *Environmental Law in South Africa* 162.

468 Kidd *Environmental Law* 36.

469 Glazewski *Environmental Law in South Africa* 166.

470 Glazewski *Environmental Law in South Africa* 167. The *NEMA* also provides for co-operative environmental governance thereby establishing principles for decision-making on the matters that relates to environment and the institutions that will foster co-operative governance.

471 Glazewski *Environmental Law in South Africa* 167. The institutions created by NEMA include the National Environmental Advisory Forum in section 3 of NEMA and Committee for Environmental Co-ordination. This section is now repealed and replaced by section 3A that provides that the Minister may establish any forum or advisory committee, determine its composition and functions. See also Du Plessis 2008 *SAPL* 94. Some sections in NEMA and the EIA Authorisation Regulations still provide for co-operative governance, for instance, section 24L of NEMA which provides for co-operative environmental authorisations.

significant impact on environment is avoided or mitigated and that public participation is promoted, amongst others.

Chapter 5 of NEMA provides for IEM.<sup>472</sup> The chapter is aimed at promoting the environmental management tools in order to ensure IEM of the activities.<sup>473</sup> Section 23 sets out the general objectives of IEM in a very detailed manner. The general objectives of an IEM include "promoting the integration of principles of environmental management in the decisions that may have significant effect" on the environment.<sup>474</sup> The other objectives of IEM relates to assessing the impacts of the proposed activity on environment and minimising negative impacts while maximising benefits and promoting compliance with principles of section 2 of NEMA.<sup>475</sup> Section 24(1) provides for requirement of environmental authorisations for undertaking listed activities.

Any applicant seeking an environmental authorisation must comply with the requirements of section 24.<sup>476</sup> NEMA further gives the Minister responsible for environmental matters the powers to identify the activities that may not commence without an environmental authorisation.<sup>477</sup> Pursuant to section 24(5) of NEMA, EIA regulations were published and are briefly discussed hereunder. The focus will be on the 2014 regulations.

### ***5.5 NEMA EIA Authorisations Regulations, 2014***

The purpose of GN R982<sup>478</sup> is "to regulate the procedure and criteria as contemplated in Chapter 5" of NEMA in relation to the preparation, evaluation, submission, processing and consideration of and decision on application for authorisation.<sup>479</sup> The said authorisation in terms of section 24 of NEMA is issued for the activities subjected to a

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472 Section 23 of NEMA. See also Van Wyk *Planning Law* 42.

473 Section 23(1) of NEMA.

474 Van Wyk *Planning Law* 42.

475 Section 23(2) (b) of NEMA. It appears that the section does not only apply to the organs of state but the developers are mandated to comply with the NEMA principles in section 2.

476 Section 24(1A) of NEMA.

477 Section 24(2) of NEMA. See also section 24F of NEMA that prohibits the commencement of listed activities without the environmental authorisation granted by the competent authority. NEMA also imposes sanction in section 49A for contravening section 24F and other prescribed measures and the penalties in section 49B.

478 GN R982-985 in GG 38282 of 4 December 2014.

479 Regulation 2 of the GN R982 in GG 38282 of 4 December 2014.

basic assessment or a Scoping and EIA report (S&EIR) with the aim to mitigate significant adverse impacts on the environment and to optimise positive environmental impact.<sup>480</sup> The regulations are accompanied by listing notices which contain lists of activities and the identification of competent authorities. Listing notice 1 lists the activities that would require a basic assessment. Listing notice 2 lists activities that require S&EIR. Listing notice 3 lists activities that requires environmental authorisation when a project is undertaken in specified geographical areas.

The listing of activities therefore ensures that the projects with potential lesser impacts on the environment will only need a basic assessment while those with potentially a larger impact will need an EIA. There are other tools such as SEAs listed in NEMA but they shall, however, not be discussed due to the scope of the research but that may be considered as not all projects require an EIA. There are currently no regulations for SEAs.

It is now important to discuss the steps followed in conducting an EIA in South Africa as provided for in the legislation.

## ***5.6 Steps of an EIA in South Africa***

In South Africa, the definition of an EIA includes the process of basic assessment and S&EIR.<sup>481</sup> Thus, in discussing the steps to be followed in an EIA process, the two shall be discussed separately although some processes and procedures appear in both processes. The first step to be discussed is screening and shall be discussed below.

### ***5.6.1 Screening***

The applicant must appoint the environmental assessment practitioner (EAP) at his cost who shall manage the application process.<sup>482</sup> An EAP must be independent, possess

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480 Regulation 2 of the GN R982 in GG 38282 of 4 December 2014.

481 Regulation 1 of the GN R982 in GG 38282 of 4 December 2014.

482 Regulation 12 of the GN R982 in GG 38282 of 4 December 2014. EAP is defined in section 1 of NEMA as a person who is responsible for "planning, management, coordination or review of environmental impact assessment, strategic environmental assessment, environmental management programmes or any other appropriate environmental instruments introduced through regulations. See also Walmsley and Patel *Handbook on Environmental Assessment* 322.

expertise in conducting an EIA and ensure compliance with the regulations.<sup>483</sup> An EAP must identify whether a basic assessment<sup>484</sup> or S&EIR must be conducted by making use of the listed activities.<sup>485</sup> Further the EAP must identify the competent authority to which an application for an EIA must be submitted.<sup>486</sup> The EAP must submit an application form to the competent authority.<sup>487</sup> Thus, an EIA in South Africa focuses on the activities that may have significant impact on the environment.

The competent authority may be the national or provincial department or the Minister of Mineral Resources depending on the circumstances.<sup>488</sup> The competent authority may advise the applicant on the nature and extent of any of the processes that may or must be followed or any tool that may support the decision-making process.<sup>489</sup> The competent authority must also determine the format of the application form that must be used.<sup>490</sup>

The competent authority or EAP must consult other organs of state that administers any law relating to matter affecting environment relevant to the application for environmental authorisation.<sup>491</sup> When the application for an environmental authorisation has been filed with the competent authority, the competent authority must manage the process.<sup>492</sup> This is similar to the position in Lesotho wherein the applicant must consult with the competent authority and the organs of state that may be affected by the

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483 Regulation 13 of the Regulation 2 of the GN R982 in GG 38282 of 4 December 2014. The EAP must disclose all the material information in his possession to the applicant, the interested and affected parties.

484 GN R982-985 in GG 38282 of 4 December 2014. See also regulation 15(1) of the GN R982 in GG 38282 of 4 December 2014.

485 Regulation 15(1) of the GN R982 in GG 38282 of 4 December 2014.

486 Regulation 6 of the GN R982 in GG 38282 of 4 December 2014. In the event that the Minister is the competent authority, the application must be submitted to the Department while in the event where the MEC is the competent authority; the application must be submitted to the provincial department responsible for environmental affairs.

487 Regulation 6 of the GN R982 in GG 38282 of 4 December 2014.

488 GN R982-985 in GG 38282 of 4 December 2014

489 Regulation 8 of the GN R982 in GG 38282 of 4 December 2014. The advice may be provided upon payment of a prescribed fee. The advice may also relate to matters that that may prejudice the success of an application.

490 Regulation 9 of GN R982 in GG 38282 of 4 December 2014. The application must be made on the official application form from the competent authority. See also regulation 16(1) of GN R982 in GG 38282 of 4 December 2014.

491 Regulation 7(2) of the GN R982 in GG 38282 of 4 December 2014.

492 Regulation 7(3) of the GN R982 in GG 38282 of 4 December 2014.

activity. When the screening process has been done, the step that will be followed is either a basic assessment or scoping.

### 5.6.2 Basic assessment

When the activity that the applicant intends to undertake is listed in Listing Notice 1 of the GN R983, the applicant or EAP, whatever the case may be, should undertake the basic assessment.<sup>493</sup> A basic assessment is a tool which is aimed at determining the legislation applicable; identify the alternatives considered, the nature, significance and extent of the impacts of the activity.<sup>494</sup> It is less complicated than the S&EIR process and is supposed to be a quick procedure. This is in line with the project briefs in the other jurisdictions.

When the applicant has submitted the application, he must notify the potential I&APs of the application. The potential I&AP is "any person, group of persons, or organisation interested in or affected by an activity, and any organ of state that may have jurisdiction over any aspect of the activity."<sup>495</sup> The regulations provide the pointers as to who may be I&APs and other stakeholders that may be interested in the decision as opposed to Lesotho where it is not clear who the I&APs may be.<sup>496</sup> In South Africa, the I&APs must be registered as opposed to Lesotho. The applicant must open and maintain a register of I&APs.

The applicant must prepare and submit a basic assessment report which must include specialist reports,<sup>497</sup> an EMPr<sup>498</sup> and where applicable closure plan which have been

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493 Regulations 19 and 20 of GN R982 in GG 38282 of 4 December 2014.

494 Regulation 43 of GN R982 in GG 38282 of 4 December 2014.

495 Para 3.4 of the DEA (2010), *Companion to the EIA Regulations 2010, Integrated Environmental Management Guideline Series 5* published in GN R805 in GG 35769 of 10 October 2012. The I&AP can be a resident in close proximity, a member of public and a worker of the nearby business premises but to name a few.

496 Para 4.5 in the GN R807 in GG 35769 of 10 October 2012.

497 A Specialist report is a report prepared by a specialist who is defined as a "person generally recognised within the scientific community as having the capability of undertaking," studies or preparing specialist reports in conformity with generally accepted scientific principles. See also regulation 1 of the GN R982 in GG 38282 of 4 December 2014 in this regard. See also section 24I of NEMA.

498 Sections 24N (1A) and (1A) of NEMA. See section 24N (2) for the contents of EMPr.

subjected to public participation process<sup>499</sup> and must reflect consideration of the public comments as well as comments from the competent authority and other organs of state where applicable.<sup>500</sup>

The basic assessment report must contain, amongst other things, all the information necessary for the competent authority to consider and make a decision.<sup>501</sup> In the event that the basic assessment relates to mining operations, the report must address the financial provision for rehabilitation and closure as well as post closure and mitigation means for other mining operations.<sup>502</sup> South Africa takes mining operations into account as opposed to other jurisdictions.<sup>503</sup>

The EMPr must contain amongst others, the details of the EAP, a description of the impact management objectives, the proposed impact management actions, and the method of monitoring the implementation of the impacts management actions.<sup>504</sup> The EMPr must be in accordance with section 24N of NEMA and Appendix 4 of the GN R982.<sup>505</sup> The other jurisdictions are vague when it comes to this issue in that they do not detail out the contents of EMPs as is the position in South Africa. A closure plan is required for the application for authorisation for decommission of a facility.<sup>506</sup> The closure plan also contains the details of the EAP, closure objectives and proposed mechanisms for monitoring compliance with closure plan.<sup>507</sup> The closure plan must also disclose the measures to rehabilitate the environment, mitigation measures and details

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499 See para 5.6.9 below for detailed discussion on public participation. See regulation 40 which requires that the interested and affected parties must submit their comments on basic assessment and the EMPr and if applicable the closure plan.

500 Regulation 19(1)(a) of the GN R982 in GG 38282 of 4 December 2014. In the event that there has been significant changes to the basic assessment or its accompanying documents or there is or there is new information that was not included in the reports consulted on, an applicant must submit a notification to the competent authority that the basic assessment shall be submitted with 140 days after receipt of the application by the competent authority.

501 The content of basic assessment is reflected in Appendix 1 to the regulations.

502 Regulation 19(3) of the GN R982 in GG 38282 of 4 December 2014.

503 Lesotho can consider this a learning point since its mining industry is growing. South Africa went through rigorous amendments of its legislation to include, among other things mining operations, thus Lesotho can do the same.

504 Regulation 19(4) of GN R982 in GG 38282 of 4 December 2014. See also Appendix 4 to GN R982.

505 Section 24N of NEMA which provides that the competent authority may require submission of the EMPr before considering the environmental authorisation application. Section 24N (2) sets out the contents of the EMPr.

506 Regulation 5 of GN R982 in GG 38282 of 4 December 2014.

507 Appendix 5 to GN R982 in GG 38282 of 4 December 2014.



of public participation processes conducted.<sup>508</sup> The legislation of other jurisdictions does not provide for closure plans. The applicant must then submit the basic assessment report to the competent authority for review and decision-making.<sup>509</sup> In the event that the applicant must conduct the S&EIR, the said procedure will follow after filing an application. The process is discussed below.<sup>510</sup>

### *5.6.3 S & EIR*

When the activity that is intended to be undertaken is in Listing notice 2 or where the activity is listed in Listing notice 1 but the competent authority has directed that a full EIA be undertaken, the applicant will must undertake S&EIR.<sup>511</sup> The first process will be to undertake scoping.

### *5.6.4 Scoping report*

In the event that the applicant must conduct a full EIA, he must, after acceptance of an application prepare and submit scoping report which has been subjected to public participation process<sup>512</sup> and must reflect consideration of the public comments and comments from the competent authority.<sup>513</sup> The procedures followed in undertaking the scoping process; inclusive of public participation process is similar to that of basic assessment. The information contained in the scoping report is necessary for the competent authority to make a decision.<sup>514</sup> This information is to a greater extent similar to the information contained in the basic assessment.

Upon receipt of the scoping report, the competent authority must review the scoping report and may accept the scoping report with or without conditions and advice the applicant to proceed to the EIA.<sup>515</sup> The South African legislation does not provide for a

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508 Appendix 5 to GN R982 in GG 38282 of 4 December 2014.

509 See para 5.6.6 below.

510 See Regulation 20 to 24 of GN R982 in GG 38282 of 4 December 2014

511 If more than one activity is triggered or one project triggers activities in both Listing Notices 1 and 2, a joint S&EIR must be undertaken for all activities. See section 24L of NEMA and regulation 25(3) of the GN R982 in GG 38282 of 4 December 2014.

512 Regulation 21(1) of the GN R982 in GG 38282 of 4 December 2014.

513 See para 5.6.6 above.

514 Appendix 2 to the GN R982 in GG 38282 of 4 December 2014.

515 Regulation 22 of the GN R982 in GG 38282 of 4 December 2014.

ToR as opposed to other jurisdictions. On the other hand, the competent authority may refuse the environmental authorisation if the activity does not comply with the legislation or the scoping report does not comply with Appendix 2 to the NEMA regulations.<sup>516</sup> In the event that the scoping report is rejected, the applicant may amend the scoping report and submit it to the competent authority.<sup>517</sup> The applicant must then undertake EIA studies and the findings thereof must be contained in the EIA report.<sup>518</sup>

#### *5.6.5 EIA report and the EMPr*

When the competent authority has reviewed the scoping report and has accepted same, applicant must prepare and submit the EIA report (otherwise referred to as EIR in the regulations) which must include an EMPr and specialist reports to be subjected to public participation process.<sup>519</sup> The EIA report must outline the environmental impacts, mitigation and closure outcomes and residual risks of the proposed activity.<sup>520</sup> It must also include an assessment of all the alternatives identified, description of all environmental issues, and significance thereof.<sup>521</sup> In the event that the authorisation relates to mining operations, the EIA report must address the requirements relating to the provisions of rehabilitation, closure as well as post closure and operations in terms the of NEMA.<sup>522</sup> An EMPr must include information as contained in an EMPr submitted for a basic assessment.<sup>523</sup> Public participation is also conducted during the conduct of an EIA which should result in the comments of the I&APs and other organs of state being included in the reports and being responded thereto.<sup>524</sup> The applicant must submit draft

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516 Regulation 22(b) of the GN R982 in GG 38282 of 4 December 2014.

517 Para 7 in the in GN R805 in GG 35769 of 10 October 2012.

518 Para 7 in the in GN R805 in GG 35769 of 10 October 2012.

519 Regulation 23(1)(a) of the GN R982 in GG 38282 of 4 December 2014. See also para 7 in GN R805 in GG 35769 of 10 October 2012.

520 Appendix 3 to the GN R982 in GG 38282 of 4 December 2014. Appendix 3 also sets out the objective of the EIA process and the scope of the reports.

521 Para 7 in GN R805 in GG 35769 of 10 October 2012.

522 Regulation 23(3) of GN R982 in GG 38282 of 4 December 2014.

523 See para 5.6.4 (a) above.

524 Regulation 23(1)(a) of GN R982 in GG 38282 of 4 December 2014. The process of submitting the EIA is to the large extent similar to the process of submitting the basic assessment report.

reports to the competent authority which the I&APs must comment upon prior to submitting the final reports. This position is different from Lesotho and Swaziland.<sup>525</sup>

#### *5.6.6 Review of the reports*

In the case of the basic assessment, the competent authority must review the basic assessment report and the accompanying documents.<sup>526</sup> When the competent authority has accepted the reports, it must consider the application, basic assessment report and other reports and make its decision.<sup>527</sup> The competent authority may reject the basic assessment report, in which case the applicant may have to amend the report and subject it again to a public participation process. The competent authority will then reconsider the amended reports and make a decision.<sup>528</sup>

As regards the EIR, the I&APs must be given an opportunity to comment again on all the final reports before they are submitted to the competent authority<sup>529</sup> and must provide a copy of their comments to the applicant.<sup>530</sup> The EAP must acknowledge the receipt of the comments from the I&APs and must indicate how he will respond to the comments.<sup>531</sup> South Africa does not provide for public hearing like in Lesotho and Swaziland. The competent authority must thereafter make a decision based on the reports and the comments submitted. The legislation provides for public participation in an extensive manner and it is easy to follow.

#### *5.6.7 Decision-making*

Upon receipt of the reports with comments, the competent authority must review the reports and the comments and then make a decision in writing whether to grant or

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525 Para 7.3 in GN R807 in GG 35769 of 10 October 2012. The draft reports include basic assessment reports (and the amended basic assessments), scoping reports (amended and resubmitted scoping reports), specialist reports, EIA reports and the EMPs. The EAP must record comments of the interested and affected parties on the draft reports.

526 Regulation 20 of the GN R982 in GG 38282 of 4 December 2014.

527 Regulation 20 of the GN R982 in GG 38282 of 4 December 2014.

528 Para 7 in the GN R805 in GG 35769 of 10 October 2012.

529 Regulation 43 (1) of the GN R982 in GG 38282 of 4 December 2014. See also para 7.2 in the GN R807 in GG 35769 of 10 October 2012.

530 Para 7.3 in the GN R807 in GG 35769 of 10 October 2012.

531 Para 7.4 in the GN R807 in GG 35769 of 10 October 2012. The comments and responses must be recorded and in the comments and responses report and submitted with the basic assessment or S&EIR reports. See also regulation 44 of the GN R982 in GG 38282 of 4 December 2014.

refuse the environmental authorisation.<sup>532</sup> The competent authority must provide the applicant with the reasons for the decision, and where applicable notify the applicant of the fact that he may lodge an appeal against the decision.<sup>533</sup> The applicant must notify all the registered I&APs of the decision and grant them access to the environmental authorisation and ensure that they are made aware that an appeal may be lodged against the decision of the competent authority.<sup>534</sup> When the competent authority has decided to grant the applicant the environmental authorisation, its contents must be in line with regulation 26.<sup>535</sup> An option of appeal is open to the applicant and the I&APs.

### *5.6.8 Appeal*

Any person who is adversely affected by the decision of the competent authority may appeal to the Minister against a decision made by any person in exercising a power conferred by the Minister under NEMA or the SEMAs.<sup>536</sup> The appeal may be lodged to a Member of Executive Committee (MEC) against a decision in exercise of the power delegated by the said MEC.<sup>537</sup> The 2014 *National Appeal Regulations*<sup>538</sup> prescribes the procedures to be followed in filing an appeal. However, there is no appeal available against the decision taken by the Minister or an MEC himself in the capacity as the competent authority.<sup>539</sup> This is based on the premise that he is *functus officio*. The Minister or an MEC may decide on the matter or appoint an appeal panel.<sup>540</sup>

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532 Regulation 24(1) of the GN R982 in GG 38282 of 4 December 2014.

533 Regulation 4(1) of the GN R982 in GG 38282 of 4 December 2014. See also para 7.6 in the GN R807 in GG 35769 of 10 October 2012.

534 Regulation 4(2) and 24(3) of the GN R982 in GG 38282 of 4 December 2014. See also para 7.6 in the GN R807 in GG 35769 of 10 October 2012.

535 Regulation 26 of the GN R982 in GG 38282 of 4 December 2014.

536 Section 43(1) of NEMA. Any person may also appeal against the decision made pursuant to NEMA or a specific environmental management Act by the Minister responsible for mineral resources. See also section 43(1A) of NEMA.

537 Section 43(2) of NEMA. The Minister and an MEC are also referred to in GN R993 in GG 38303 of 8 December 2014 as the appeal authority. See in this regard regulation 1 of GN R993 in GG 38303 of 8 December 2014.

538 Regulation 4 in GN R993 in GG 38303 of 8 December 2014.

539 Regulation 3(2) in GN R993 in GG 38303 of 8 December 2014.

540 Section 43(5) of NEMA.

The appeal panel may consist of the number of independent experts who after considering the appeal must provide advice to the appeal administrator.<sup>541</sup> The appeal administrator must make recommendations to the appeal authority which must then make the decision.<sup>542</sup> The appeal authority may confirm, set aside or vary the decision or make any other appropriate decision.<sup>543</sup> The appeal authority must notify the appellant, applicant and I&APs of the decision which must contain reasons for the decision.<sup>544</sup> It can be inferred from the foregoing that the appeal procedure of South Africa is more elaborate than that of Lesotho and Swaziland. When the decision has been made regarding the environmental authorisation, there must be implementation of the EMPr which is the next step that follows.

### *5.6.9 Implementation and follow up*

The holder of environmental authorisation must manage the environmental impacts in accordance with the EMPr.<sup>545</sup> The holder of environmental authorisation must also undertake monitoring and auditing.<sup>546</sup> The holder must ensure that an environmental audit report is compiled and submitted to the competent authority in the interval provided for in the environmental authorisation.<sup>547</sup> The environmental audit report which is prepared by an independent person with relevant experience and it must indicate the capability of the EMPr and where applicable, closure plan to adequately provide for avoidance, management and mitigation of the impacts.<sup>548</sup> Following from the above, it becomes apparent that the duty to monitor, audit and prepare the audit report is upon the developer. In the event that the report reveals insufficient mitigation measures and

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541 Regulation 6 in the GN R993 in GG 38303 of 8 December 2014. Appeal administrator is "a holder of an office in the Department or Provincial Department responsible for environmental who administers the appeal on behalf of the appeal authority. See in this regard regulation 1 in the GN R993 in GG 38303 of 8 December 2014.

542 Regulation 7 in the GN R993 in GG 38303 of 8 December 2014. The recommendations are made by the appeal administrator whether the appeal panel was constituted or not.

543 Section 43(6) of NEMA.

544 Regulation 7(3) and 7(4) in the GN R993 in GG38303 of 8 December 2014.

545 Section 24N (7) (c) of NEMA.

546 Section 24N (7) (d) of NEMA. See also regulation 34(1) of GN R993 in GG38303 of 8 December 2014. See also regulation 34(2). Regulation 4 of GN R993 in GG38303 of 8 December 2014. See also section 24Q.

547 Regulation 34(1) of GN R993 in GG 38303 of 8 December 2014.

548 Regulation 34(3) (a) of GN R993 in GG 38303 of 8 December 2014. See also section 34(2) for the contents of the audit report.

non-compliance to the EMPr, the holder of the authorisation must also submit a recommendation to amend the EMPr and where applicable, closure plan to rectify the shortcomings when submitting an environmental audit report to the competent authority.<sup>549</sup>

The said amendments shall be subjected to public participation.<sup>550</sup> The competent authority must also make the audit report available to the public for inspection.<sup>551</sup> Thus, public participation and access to information extend to the implementation and auditing stage.

Section 31B makes provision for the appointment of environmental management inspectors (EMIs). The Ministers responsible for environmental affairs, water affairs, mineral resources and an MEC may designate as EMI any member of staff from their respective departments and organs of state.<sup>552</sup> The environmental management inspectors are mandated to monitor and enforce compliance with the environmental legislation which they have been designated in terms of.<sup>553</sup> They are also mandated to investigate any conduct in respect of which there is a reasonable suspicion that it might constitute an offence, contravention of law or breach of term and conditions of the environmental authorisation.<sup>554</sup> Therefore, this implies that monitoring is not only entrusted upon the developers, but the state is mandated to carry out the monitoring, that is, both the developer and the state have a duty to carry out monitoring. In summary of the foregoing discussion relating to the South African EIA legislation, the figure below illustrates the EIA process in South Africa. <sup>555</sup>

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549 Regulation 34(4) of GN R993 in GG 38303 of 8 December 2014. The regulations provide for the procedures to be followed in the event that that the applicant seeks to amend the EMPr and other relevant documents like closure plans

550 Regulation 34(6) in the GN R993 in GG 38303 of 8 December 2014.

551 Regulation 34(7) in the GN R993 in GG 38303 of 8 December 2014.

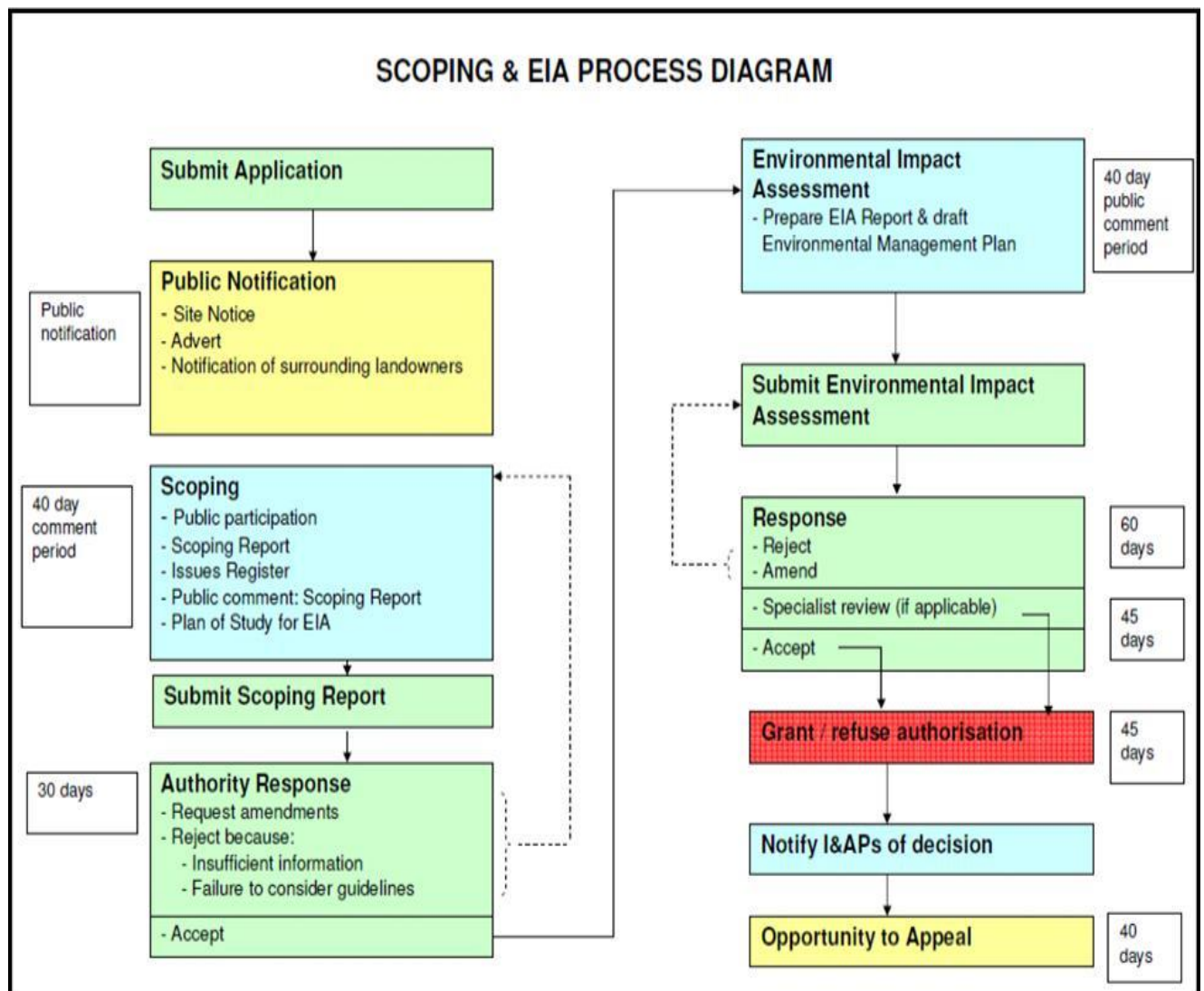
552 Sections 31B, 31BA, 31BB and 31C of NEMA.

553 Section 31G910(a) of NEMA.

554 Section 31G92) of NEMA.

555 ERM 2015 <http://www.erm.com/en/public-information-sites/VenetiaMineEIA>.

**Figure 5-1: EIA process in South Africa**



### 5.7 Conclusion

In this chapter, a brief history of the EIA legislation of South Africa was provided and the evolution thereof. The chapter placed reliance on the South African *Constitution*, NEMA and the *NEMA EIA Authorisation Regulations*. It has been highlighted that EIA legislation has undergone a rigorous evolution to fill the gaps that were observed. The South African legislation further provides for mining operations, and this is not the case with other jurisdictions. It has been observed that the South African EIA legislation incorporates the objectives, basic and procedural principles of EIA in its environmental

framework legislation, for instance, it provides for a participative and interdisciplinary<sup>556</sup> EIA process and the legislation is purposive in that it informs the decision-making.<sup>557</sup> The EIA legislation is also focused on activities that may have a significant impact. It has also been observed that the South African legislation is detailed in certain aspects as opposed to Lesotho and Swaziland, for instance, with regard to the contents of the EMPr, public participation process and appeal procedures. The EIA process in South Africa is integrative in that it does not only focus on the environment but also addresses socio-economic factors as is the case in Lesotho as espoused in the South African definitions of EIA and "environment"<sup>558</sup> and the case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Other*.<sup>559</sup> The public participation processes extend to the implementation and follow up stage where the environmental audit reports are subjected to public review. South Africa also provides for the issuing of the integrated environmental authorisation which is not the case in Lesotho and Swaziland.

South Africa follows the steps discussed in chapter 2,<sup>560</sup> Lesotho<sup>561</sup> and Swaziland<sup>562</sup> to a greater extent as shall be shown below although there are differences in certain aspects. The steps followed in South Africa *vis-a-vis* a, generally accepted EIA steps are as follows:

(a) Screening

Although it may be argued that South Africa does not provide for screening, when reference is made to description of screening process in chapter 2<sup>563</sup> it is safely inferred that there is a screening process in South Africa.<sup>564</sup> The screening process is similar to

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<sup>556</sup> There is a requirement for expert reports.

<sup>557</sup> See para 5.4 above.

<sup>558</sup> See para 2.2 above.

<sup>559</sup> *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 6 SA 4 (CC).

<sup>560</sup> See para 2.6 above.

<sup>561</sup> See para 3.7 above.

<sup>562</sup> See para 4.6 above.

<sup>563</sup> See para 2.6.1 above.

<sup>564</sup> See para 5.6.1 above.



that of Lesotho and Swaziland in that the applicant or the EIA consultant<sup>565</sup> determines whether the proposed activity requires an environmental authorisation. It has been shown that the South African screening process is easier as the threshold used enables the applicant to know whether they are going to need a basic assessment or a S&EIR. It is also similar to Lesotho in that the applicant or the EAP may consult the competent authority at this stage. Furthermore, other relevant authorities that administer environmental matters are consulted just as in Lesotho.

(b) Basic assessment

It has been highlighted that South Africa provides for the basic assessment procedure for activities listed in Listing Notice 1. Although, this does not appear in general step in chapter 2,<sup>566</sup> it can be inferred from the nature of this process that plays a role of project brief in Lesotho while in Swaziland, is referred to an IEE similar to that one in chapter 2.<sup>567</sup> The contents thereof are similar to those of a project brief thus it could be regarded as scoping process for activities in Listing Notice 1.

(c) S&EIR

(i) Scoping report

South African legislation provides for scoping report for the activities that require a full EIA (EIR). This is in line with the steps in chapter 2. However, at this stage, South Africa does not require ToR.

(ii) EIA report and the EMPr

South Africa also requires the submission of the EIA report and the EMPr (EMP) in line with the generally accepted steps and the other two jurisdictions.

(d) Review of the report

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565 EIA consultant in the case of South Africa is EAP.

566 See para 2.6.1 above.

567 See para 2.6.1 above.

Similar to the generally accepted steps, South Africa requires the review of the reports that are submitted to the competent authority and the comments made therein by the I&APs, the relevant organs of state and the competent authority. What is peculiar in South Africa is that the registered I&APs must comment on both the draft reports and the final reports.

(e) Decision-making

The South African EIA legislation also provides that the competent authority should make the decision on the application for environmental authorisation. What is peculiar in South Africa is that the competent authority may issue integrated environmental authorisation and that the applicant has a duty to inform the registered I&APs of the decision as well as their option to appeal.

(f) Appeal

South African legislation makes provision for appeal option and the legislation is detailed as regards the appeal procedure. Similar to Swaziland, the aggrieved party does appeal to the competent authority that made the decision as is the case in Lesotho.

(g) Implementation and follow up

South African legislation in a similar manner to the generally accepted EIA step and steps followed in other jurisdictions, it has the implementation and the follow up step where there is monitoring, mitigation and auditing by various parties.

*5.7.1 Learning points for Lesotho*

Following the above discussions, the following lessons can be drawn by for Lesotho:

- (a) Environmental protection must be included in the *Constitution* as a justiciable right;
- (b) The law should be amended to meet evolving needs and must be uniform, that is, it must provide for such other activities as mining in the same manner;

- (c) The legislation must be detailed in relation to the steps that must be followed;
- (d) The legislation must clearly determine who an I&AP may be and provide that they be registered;
- (e) The legislation must provide for detailed public participation procedures and amended reports should also be subjected to a public participation process;
- (f) The legislation must ensure that access to information is possible throughout the whole EIA process and ensure that all reports are made available to I&APs for review;
- (g) Integrated environmental authorisations should be considered to avoid a multiplicity of applications;
- (h) The listing of activities to curtail long EIA processes should be considered;
- (i) Appeal must be filed with a different body to save time and costs;
- (j) Extend public participation to the implementation and follow up phase to improve public involvement in the process.
- (k) The contents of the EMPr must be detailed to ensure better results of the EIA process.

## Chapter 6 Conclusion and recommendations

### 6.1 Conclusion

Lesotho, Swaziland and South Africa all have the *Constitutions*, environmental framework legislation other pieces of legislation that provide for an EIA process. Lesotho and Swaziland have state policies while South Africa's right to environment is justiciable right. The South African *Constitution* lays a foundation for an EIA in that it provides that the state must protect the environment through the legislative and other measures. All the three States enacted environmental framework legislation providing for EIAs. An EIA for the purpose of this study was defined as:

systematic identification, prediction, and evaluation of the significant adverse socio-economic, cultural and environmental impacts of the proposed project or activity with public involvement, formulation of mitigation measures and alternatives to the proposed project or activity, monitoring and the reporting thereof to assist the authorities in the decision-making.<sup>568</sup>

An EIA in Lesotho has been defined as "systematic examination of a project or activity conducted to determine whether or not that project or activity may have adverse impact on the environment."<sup>569</sup> In Swaziland, an EIA is defined as "process of predicting and evaluating the likely environmental impacts of a proposed project where the scale, extent and significance of the environmental impact cannot be determined." South Africa defines an EIA as "systematic process of identifying, assessing and reporting environmental impacts associated with the activity and includes basic assessment and S&EIR."<sup>570</sup> Compared with the theoretical definition, the definitions are very brief and do not include certain elements. For instance, they do not provide for public involvement and do not provide for mitigation measures and alternatives. Although the definitions seem to focus on the impacts of the activities on the environment, the definitions of "environment" in all three countries indicate that environment is not only limited to physical environment but it includes socio-economic and cultural issues.

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568 See para 2.3 above.

569 Section 2 of the 2008 *Environment Act*. According to the *Guidelines*, EIA is both a process and a tool for a project planning and decision-making.

570 The Regulations do not define basic assessment but instead defines basic assessment report as a report contemplated in regulation 9. S&EIR means scoping and environmental impact reporting process as contemplated in regulations 21 to regulations 24.

The aim of the study was to discuss the EIA legislation of Lesotho, Swaziland and South Africa and to draw lessons for Lesotho.

The basic EIA principles include that an EIA process must be purposive, rigorous, practical, relevant, cost-effective, efficient, focused, adaptive, participative, interdisciplinary, credible, integrated, transparent and systematic.<sup>571</sup> The EIA processes of the three countries are purposive in that they aid in decision-making, are relevant, focus on significant impacts and are participative although in Lesotho there are serious shortcoming in this regard as were highlighted.<sup>572</sup> The three countries' EIA legislation integrates various aspects such as socio-economic and cultural aspects. Lesotho's legislation is not fully adhering to such principles as cost effectiveness and efficiency because it does not provide time-frames. It is also not fully participative in that there are discrepancies and shortcoming in regard to public participation.

Chapter 2 discussed the historical background, the objectives, principles of EIAs and the generally accepted steps of EIA procedures. Chapter 3 discussed the EIA legislation of Lesotho and measured it against the generally accepted procedures of EIA. The chapter shall further discuss the shortcomings of the Lesotho EIA legislation. The shortcomings of Lesotho were that the *Constitution* does not provide for environmental protection as a justiciable right, that the legislation does not include time frames, that it is not clear who are I&APs are, the EIA legislation is not comprehensive and extensive as regard the public participation process and the legislation is inconsistent and not up to date. The manner in which activities are listed leaves wide discretionary powers on the Director to determine which EIA procedure to follow and access to information is limited.

Chapter 4 discussed the EIA legislation of Swaziland measuring it against the principles of EIA and generally accepted procedures of EIA and determine the possible learning points for Lesotho. There are learning points that were formulated. There is uniformity in legislation. The screening process is easier to follow due to the manner in which the activities have been listed. The Authority is in charge of the public participation process

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571 IAIA 2015 <http://www.iaia.org>.

572 See para 3.9 above.

and the legislation is clear on the procedures followed during this process. The Authority ensures access to information. Lastly, the appeal is made to a different body other than the initial decision-maker.

Chapter 5 discussed the EIA legislation of South Africa comparing it with the EIA legislation of Lesotho and Swaziland in order to determine the possible learning points for Lesotho. The figure below summarises the legislation of the three countries, showing the similarities, differences and the shortcomings of Lesotho.

**Table 6-1: EIA legislation in Lesotho, Swaziland and South Africa**

Principles	Lesotho	Swaziland	South Africa
Purposive	✓	✓	✓
Rigorous	✓	✓	✓
Practical	✓	✓	✓
Relevant	✓	✓	✓
Cost effective	X	✓	✓
Efficient	X	✓	✓
Focused	✓	✓	✓
Participative	x	✓	✓
Interdisciplinary	✓	X	✓
Credible	✓	✓	✓
Integrated	✓	✓	✓
Transparent	X	✓	✓
Accepted steps of EIA			

Screening	√	√	√
Scoping	√	√	Scoping and basic assessment
Preparation of ToR	√	√	X
EIA studies	√	√	√
Mitigation and EMP	√	√	√
EIA report and EMP	√	√	√
Review of EIA report	√	√	√
Decision-making	√	√	√
Implementation and follow up	√	√	√

The above table shows that South Africa and Swaziland adhere to almost all the principles of EIA while Lesotho adheres to some principles save for the following; cost effective, efficient, participative and transparency principles. As regards the EIA steps, the three countries follow the same procedures although in some instances, different legislation uses different terminology which refers to the same step or process. On the basis of the foregoing, it is now imperative to make recommendation for Lesotho.

## **6.2 Recommendations**

It is recommended that Lesotho should improve the following areas of its EIA legislation;

- (a) It is recommended that Lesotho should include environmental protection in its *Constitution* as a justiciable right.

- (b) Lesotho should amend its EIA definition to include all EIA principles.
- (c) Lesotho should formalise the Regulation which fills the gaps found in the current applicable legislation. The gaps include amongst others, time frames for conducting an EIA process and making it mandatory that public participation process be held at certain stages.
- (d) The legislation must be amended to bring consistency between the 2008 *Environment Act* and the *Guidelines* and to ensure they correspond to each other.
- (e) The legislation should be amended to cover other sectors of development that results in significant impact on the environment, like mining. Lesotho's mining industry is growing thus it would be of paramount importance to include mining activities in EIA legislation. The South African legislation frequently makes reference to mining activities.
- (f) The legislation should define who I&APs and provide for the keeping of the register of I&APs.
- (g) The legislation must provide for the EIA principles in the legislation just as South Africa in section 2 of NEMA.
- (h) Lesotho should improve the nature of its listed activities by identifying which activities only require a project brief and those that require a full EIA so as to curtail the EIA process.
- (i) In order to improve the implementation and follow up stage, the legislation must provide in details what the EMP must contain.
- (j) In order to avoid multiplicity of application for licences, the legislation must provide for integrated environmental licences.
- (k) The legislation must be comprehensive and extensive as regards public participation process to enhance uniformity in the process and to ensure that there is meaningful public participation.



- (l) The legislation must be comprehensive and extensive as regards enhancing access to information to ensure transparency. Access to information must be extended to the implementation and follow up stages where not only the DoE will have access to the audit report but the public as well.
- (m) The legislation must provide for extensive and comprehensive appeal procedures. The legislation should be amended to provide for filing of an appeal to a different entity as opposed to the DoE which is the *functus officio*.

The foregoing recommendations will assist as the learning points for Lesotho and may be implemented to remedy the shortcomings highlighted from the table.

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