The Legal Framework for Renewable Energy in South Africa

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1. Introduction

Chapter 4 of the White Paper on the Renewable Energy Policy of the Republic of South Africa, [1] identifies the following varied forms of renewable energy in South Africa :

- Solar. South Africa experiences some of the highest levels of solar radiation in the world and although tourist brochures refer to "sunny South Africa", solar energy currently provides only about 10% of the country's primary energy needs; but solar power has tremendous potential and is the fundamental component of the country's rural energy programme where millions of people do not have access to the national grid;

- Biomass (in the form of firewood, wood waste, dung, charcoal and bagasse). It similarly accounts for about 10% of net national energy use and for 60% of household energy consumption;

- Hydro power. Again both small scale and large hydro generators have potential in SA but currently less than 1% of electricity generated in South Africa comes from hydro-electric power;

- Biogas and landfill gas, address thermal energy needs;

- Wind energy. Finally a number of experimental wind farms have been built and is also suited to both small-scale battery charging systems as well as large scale win-farms

At time of writing there is no one umbrella statute which provides an overarching legal framework for renewable energy in South Africa; rather legal provisions dealing with renewable energy are found in a disparate set of laws which are outlined in 4 below.

It must be pointed out at the outset however that important policy initiatives are underway, in particular the publication of the general White Paper on Energy Policy of the Republic of South Africa,[2] the specific White Paper on the Renewable Energy Policy of the Republic of South Africa,[3] and the National Energy Bill all of which are described in 3 and 5 below. These initiatives are likely to culminate in a National Energy Act which will be a comprehensive umbrella law which will amongst others things, provide an integrated set of legal principles, targets and related provisions dealing with renewable energy.

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[1] Department of Minerals and Energy, N513/2004, *Government Gazette* 26169 of 14 May 2004 at 29 to 42.

[2] Department of Minerals and Energy, N3007/1998, *Government Gazette19606* of 17 Dec 2004

[3] Fn 1.

The above varied forms of renewable energy are recognised in the Draft National Energy Bill published for public comment in November 2004, elaborated on in 5 below and which defines "renewable energy", as:

> energy generated from natural resources that is regenerated over a short time scale including solar energy, wind energy, biomass energy, biological waste energy, hydro energy, landfill gas energy, ocean and tidal energy, or any combination thereof.

This Bill has at time of writing, October 2005, not been tabled in Parliament.

2 The Constitutional setting

The relatively new South African democratic Constitution is relevant from two points of view. Firstly the environmental right contained in chapter 2 of the Constitution puts environmental issues firmly on the political and legal agenda. It provides:

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;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[4]

Part (b) has provided the impetus for the enactment of a number of environmental statutes as well as putting environmental issues firmly into the executive and judicial agenda, including the initiation of a number of energy law related initiatives outlined below. The embracing of the concept of sustainable development in the judicial sphere was well articulated in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004(5) SA124 WLD, where the applicant, BP Southern Africa ('BP'), sought an order on review setting aside the decision of the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (the 'Department'). The Department had refused to authorise an environmental assessment application under section 22 of the Environment Conservation Act, 73 of 1998, dealt with below, regarding the development of a new filling station on one of its properties. In handing down judgment, the Court made the following pertinent comments on the notion of sustainable development and the environmental right:

> The concept of 'sustainable development' is the fundamental building block around which environmental legal norms have been fashioned, both in South Africa, and is reflected in s 24(b)(iii) of the Constitution. …Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia,* socio-economic concerns and principles (at page 144 B-D).

Secondly the Constitution determines the respective roles of the three spheres of government, national, provincial and local, in South Africa, which enjoys a quasi-

[4] S 24 of the Constitution of the Republic of South Africa 108 of 1996.

federal system of government. Each of these must "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere…".[5] Furthermore chapter 3 of the Constitution, titled Co-operative Government, sets out a set of eight "Principles of co-operative government and intergovernmental relations".[6]

In addition the Constitution sets out the legislative and executive functions of the three spheres of government in general terms.[7] Schedule 4 lists "Functional Areas of Concurrent National and Provincial Legislative Competence" while Schedule 5 lists "Functional Areas of Exclusive Provincial Legislative Competence". Both schedules are also divided into Part A and B to deal with local authority competencies. While each of these schedules includes a number of items relevant to environmental management, the only reference to energy is the item "electricity and gas reticulation" in Part B of Schedule 4. The implication of this is that energy matters generally and renewable energy in particular are by default national matters administered by the national Department of Mineral Affairs and Energy ('DME').

Significantly recent legislation enacted by the DME wholeheartedly embraces the notion of sustainable development referred to in section 24(b) (iii) of the environmental right quoted above. Thus for example the Minerals and Petroleum Resources Development Act, 28 of 2002 gives prominence for the first time in South African mining legislation to "sustainable development" which is defined in the Act as meaning: ". . . the integration of social, economic, and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations".[8]

3. Policy Documents

3.1 White Paper on Energy Policy of the Republic of South Africa[9]

The White Paper on Energy Policy is an overarching document which sets out the government's official policy on the supply and consumption of energy for the next decade. In a general sense it represents for the first time a comprehensive and holistic perspective of South Africa's official overall energy needs and options. Its position on renewable energy is based on the integrated resource planning principle of "ensuring that an equitable level of national resources is invested in renewable technologies, given their potential and compared to investments in other energy supply options" (Energy White Paper at p XX). It has subsequently been elaborated by the White Paper on Renewable Energy discussed below.

One of the main goals of the White Paper is to create energy security by diversifying the energy supply and energy carriers. Currently, much of South Africa's energy is derived from expensive imported fuels and coal-powered energy generation, which could be threatened by climate change response measures of developed countries. In response the Government has initiated certain activities in this regard. For example,

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[5] Sect. 41(1)(g)

[6] Section 41(1). See generally B. de Villiers, "Intergovernmental Relations in South Africa" (1997) 12 *SA Public Law* 197.

[7] Chapters 5 and 6 respectively.

[8] S 1

[9] Department of Minerals and Energy, N3007/1998, *Government Gazette* 19606 dated 17 December 1998.

the Integrated Electrification Plan which aims to provide solar power to rural areas. The White Paper on renewable energy is now elaborated on.

3.2 White Paper on the Renewable Energy Policy of the Republic of South Africa[10]

The White Paper on Renewable Energy ("Renewable Energy White Paper") complements the White Paper on Energy Policy, by pledging "Government support for the development, demonstration and implementation of renewable energy sources for both small and large-scale applications".[11] Its sets out the policy principles, goals and objectives to achieve:

> An energy economy in which modern renewable energy increases its share of energy consumed and provides affordable access to energy throughout South Africa, thus contributing to sustainable development and environmental conservation.[12]

South Africa currently relies heavily on coal to meet its energy needs.[13] It is a relatively low-cost means of supplying electricity to many residential, commercial and institutional consumers. However, conscious of the concerns around the use of fossil fuels and global warming, the need to utilise renewable energy resources more has been recognised. The Department of Minerals and Energy has thus embarked on an Integrated Energy Plan (IEP) to develop the renewable energy resources, while taking safety, health and the environment into consideration.

The government has set the target of:

> 10 000 GWh (0.8 Mtoe) renewable energy contribution to final energy consumption by 2013, to be produced mainly from biomass, wind, solar and small-scale hydro. The renewable energy is to be utilised for power generation and non-electric technologies such as solar water eating and bio-fuels.[14]

Because the renewable energy industry is still relatively underdeveloped and demands significant capital outlay, a phased and innovative approach is required if it is to become a sustainable alternative to fossil fuels and attract investors.

The White paper identifies four strategic areas that need to be addressed, to create the appropriate enabling environment for the promotion of renewable energy. These include: financial instruments, legal instruments, technology development, and awareness raising, capacity building and education. Goals and objectives have been set out for each of these.[15] A Strategy on Renewable Energy has been developed to provide a practical plan for achieving the policy's goals and objectives and is outlined in 3.3 below.[16] Progress of the policy will be evaluated after five years to see if it is on track in meeting its aims and to determine if the policy direction is still appropriate.

3.3 Energy Efficiency Strategy[17]

The Energy Efficiency Strategy (the Strategy) aims to assist in providing energy for all residents of South Africa, by reducing energy consumption through efficient practices and sustainable energy development. This will also assist in reducing the effects of energy usage on human health and the environment.

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[10] Department of Minerals and Energy, N513/2004, *Government Gazette* 26169 dated 14 May 2004.
[11] White Paper on the Energy Policy of the Republic of South Africa (Department of Minerals and Energy, 1998).
[12] Vision. S1.1.
[13] In 1999, 91% of the electricity generated was derived from coal as was 75% of the fossil fuel based energy. (S2).
[14] S5. This is about 4% of the estimated electricity demand for 2013.
[15] S8.
[16] S11.
[17] Energy Efficiency Strategy of the Republic of South Africa. Department of Minerals and Energy, Mrch 2005.

A target to improve national energy efficiency by 12 % by 2014 has been set. To achieve this enabling instruments and interventions must be established. These include: financial and legal instruments, efficiency labels and performance standards, energy management activities and energy audits.
The Strategy involves all energy-using sectors and will be implemented through Sectoral Implementation Plans

4. Legislation
Currently the legislation pertinent to renewable energy is found in a disparate set of statutes outlined below. For convenience they are divided into those statutes which deal with energy matters and those which deal with environmental issues in particular environmental assessment.

4.1 Energy related statutes
4.1.1 Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA)

The MPRDA is relevant here because it encapsulates not only "minerals", the primary sources of energy but also "petroleum", having a specific chapter dedicated to "Petroleum exploration and production".[18] The term "petroleum" includes hydrocarbons and gases being defined as meaning:

any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation of gas arising from a marsh or other surface deposit.[19]

However it appears that this definition does not include gas in a renewable sense as used in this paper. The MPRDA is accordingly not elaborated on here. specifically states that many of the provisions in the "mineral and environmental However the environmental regulation sections of chapter 4 of the MPRDA, specifically those sections dealing with environmental management principles, environmental management programmes, plans, remediation and closure are made applicable to "petroleum" and could provide a model for the equivalent requirement for renewable gas.[20]

4.1.2 Electricity Act, 41 of 1987

The objective of the Electricity Act, 41 of 1987, is to provide for the continued existence of the National Electricity Regulator and the control of the generation and supply of electricity and related matters.[21] As such it takes over the functions of the previous Electricity Control Board and has as its objects, "…to exercise control over the electricity supply industry so as to ensure order in the generation and sufficient supply of electricity…".[22]

The functions of the Regulator include the issuing of licenses, determination of process, settling disputes, collecting information and related matters.[23]

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[18] Chapter 6 SS 69 to 90.

[19] S 1 Definitions.

[20] S 69 (2). These environmental provisions have been dealt with in 15.5 above.

[21] Long title.

[22] S. 3

[23] S 4(1).

The Act does not pay particular heed to sustainable development or environmental considerations except for one section, which deals with the impact of electricity generation on public streams.[24] It provides:

> Notwithstanding anything to the contrary contained in the Water Act 1956 (Act No. 54 of 1956), an undertaker, whether or not he is a riparian owner as defined in that Act, may apply to a water court established by Chapter IV of that Act for permission –
>
> (a) to use a defined quantity of the normal flow of a public stream; or
>
> (b) to abstract or to impound or to store a definite quantity of the surplus water or a public stream within or outside the channel of the stream,
>
> for the generation of steam or electricity or any other form of energy, condensing, cooling or incidental purposes, in any catchment area.

In so far as this section refers to the repealed Water Act, 54 of 1956, it is outdated and needs revision.[25]

The principal electricity generator in South Africa, Eskom, states that ". . . it is continually striving towards sound environmental performance and socio-economic improvement.[26] It has adopted an environmental policy, implemented environmental management systems in accordance with SABS/ISO14001.[27] It has also introduced Environmental Key Performance Indicators (KPIs) into its environmental management system.

4.1.3 Gas Act, 48 of 2001

The long title of Gas Act, 48 of 2001, states its objectives as being "to promote the orderly development of the piped gas industry; to establish a national regulatory framework; to establish a National Gas Regulator as the custodian and enforcer of the national gas regulatory framework; and for matters in connection therewith".

The Act defines "gas" to mean:

> "…all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas, or any combinations thereof…".[28]

Again it is evident that this is not directly applicable as it applies appears that renewable gases are not included in this definition. Nevertheless in developing legislation applicable to the renewable sector the objectives and principles contained in the Gas Act could be considered:

More specifically the objects of the Act are stipulated to be:

(a) Promote the efficient, effective, sustainable and orderly development and operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities and the provision of efficient, effective and sustainable gas transmission, storage, distribution, liquefaction and re-gasification and trading services;

(b) Facilitate investment in the gas industry;

(c) Insure the safe, efficient, economic and environmentally responsible transmission, distribution, storage, liquefaction and re-gasification of gas;

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[24] S 18.

[25] See chapter X on the new Water Law

[26] Environmental Report 1998, Eskom. At 4.

[27] See ch 8 par 8.5.4.

[28] Sect 1 Defintions

(d) Promote companies in the gas industry that are owned or controlled by historically disadvantaged South Africans by means of licence conditions so as to enable them to become competitive;
(e) Ensure that gas transmission, storage, distribution….are provided on an equitable basis…;
(f) Promote skills among employees in the gas industry;
(g) Promote employment equity in the gas industry;
(h) Promote the development of competitive markets for gas and gas services;
(i) Facilitate gas trade…;
(j) Promote access to gas in an affordable and safe manner.[29]

The Act establishes a National Gas Regulator;[30] and set out its functions to include: matters such as the issuing of licences, gathering of information, consultation with other government departments, undertaking investigations and enquiries, as well as related mattes.[31] Curiously no mention is made of environmental considerations and these could be included in the renewables section of the Energy Bill discussed below. A further section lays down various details and conditions which an application for a gas licence must comply with but once again no reference is made to environmental considerations.[32]

4.1.4 Gas Regulator Levies Act, 75 of 2002

The Gas Regulator Levies Act 75 of 2002, complements the Gas Act by empowering the National Gas Regulator, to impose levies to meet its administrative and functional costs.[33]

4.1.5 National Energy Regulator Act 40 of 2004

The National Energy Regulator Act aims to consolidate and regulate the electricity, piped gas and petroleum pipeline industries under a single regulator, the National Energy Regulator (NER). Again it is not applicable to renewable energy but its provisions could be adapted in the Energy Bill.

4.2 Environmental statutes

4.2.1 Environment Conservation Act, 73 of 1989 (ECA)

Central to any form of energy generation whether renewable or not is the environmental assessment (EA) process. The legal basis for environmental assessment in South Africa is currently the ECA; regulations made under this Act lay down the trigger as to when EA is required and the processes to be followed.[34] This regime is however about to be replaced by a recent set of amendments to the National Environmental Management Act, 107 of 1998, (NEMA) and draft regulations published under it as elaborated on it paragraph X below.

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[29] S2(a) – (j).

[30] S 4

[31] S 4.

32 S 16

[33] S 2.

[34] R1197 discussed in X below

The current EA regime is dictated by Part V of the 1989 Act entitled, "Control of Activities which may have a Detrimental Effect on the Environment",[35] as well as Part VI which provides for regulations to be made in this regard.[36] Part V provides that the Minister [of Environment] may declare activities which require EA and then an environmental authorisation in the form of ". . . reports concerning the impacts of activities on the environment".[37] A series of comprehensive regulations comprsing of three sets of seprte regulations was promulgated under section 21 in 1997. [38]

The first set of the regulations comprises of two schedules, the first of which identifies activities under section 21 of the Environment Conservation Act. The very first item is pertinent here in that it provides that EA must be carried out in respect of:

1. The construction or upgrading of –
   (a) facilities for commercial electricity generation and supply;

The second set, headed "Regulations regarding activities identified under section 21(1)", provides the substantive set of rules regarding these listed activities.[39] The third set of regulations is an administrative measure which provides that the competent authority to implement the regulations is the province concerned.[40]

4.2.2 National Environmental Management Act 107 of 1998 (NEMA)

The NEMA includes a definition of sustainable development referred to in 2 above as: "the integration of social, economic and environmental factors into planning, implementation, and decision-making so as to ensure that development serves present and future generations".[41] It goes on to flesh out what is meant by the notion by stipulating a number of provisions the following being relevant to renewable energy:

> [s]ustainable development requires the consideration of all relevant factors including the following:
> (i) – (v)
> (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
> (vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
> (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
> (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied. (sect 4(a)).

4.2.3 National Water Act 36 of 1998

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[35] Ss 21–23.

[36] XXXXX

[37] S 22(2).

[38] R1182 The Identification under s 21 of Activities which may have a Substantial Detrimental Effect on the Environment; R1183 Regulations Regarding Activities Identified under s 21(1); R1184 Designation of the Competent Authority who may issue Authorisation of the Undertaking of Identified Activities in *Government Gazette* No. 18261 dated 5 September 1997.

[39] R1183.

[40] R1184.

[41] Sect 1(1)(xxix).

Although hydro-electric power is not harnessed in South Africa in any significant way it is pertinent to refer to the National Water Act in this regard which was enacted by the new government and hailed as a very progressive form of water law internationally.

At the heart of the new water law is the fact that virtually all water use (there are some exceptions) falls under a uniform legal regime and is subject to the principle that the national government is the public trustee of all the nation's water.[42] Since the Act abolishes the common law historical distinction between public and private water, persons cannot in general own water and all water use is now subject to a system of licensing in common with many other countries.

Central to the new regime is the control of "use of water" provided for in Chapter 4 of the Act. All water use is subject to a license regime and the the phrase "water use" is widely defined to include a broad range of activities which includes the following:

> For the purpose of the Act water use includes –
> (a) taking water from a water resource;
> (b) storing water;
> (c) impeding or diverting the flow of water in a watercourse;
> (d) – (k).[43]

From the above it is evident that a hydro-electric power plant would be regarded as a "water use" and the requisite licence would hve to obtained from the relevant authority.

From the above brief survey it is evident that the law relating to renewable energy is contained in a wide variety of statues and more importantly has not been written with renewable energy in mind. The position will now doubt change if the draft energy Bill now turned to is enacted into law.

5 National Energy Bill, 2004

5.1 Introduction

At time of writing a draft National Energy Bill has been published for comment.[44] If enacted it will be the central legislation regulating the energy sector in South Africa and will dramatically change and consolidate the energy legislative landscape. The Bill is administered by the Department of Minerals and Energy and gives legislative effect to the Energy White Paper discussed above. It must also be seen as giving effect to the White Paper on Renewable Energy approved by cabinet during 2004.

The Bill provides a framework for a number of existing energy statutes including the Electricity Act 41 of 1987, Nuclear Energy Act 46 of 1999, National Nuclear Regulator Act 47 of 1999, Gas Act 48 of 2001, Gas Regulator Levies Act 75 of 2002 and others dealt with above. It gives effect to the White Paper on Energy Policy and the White Paper on Renewable Energy discussed above.

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[42] S 3(1).

[43] S 21. The use of water for recreational purposes (s 21(k)) was in issue in *Butgereit and another v Transvaal Canoe Union and another* 1988 (1) SA 759 (A) and in *Transvaal Canoe Union and other v Butgereit and another* 1986 (4) 207 (T).

[44] N 2151/2004 in Government Gazette no 26848 dated 8 October 2004

5.2 Objectives[45]

The Bill laudably aims to optimise energy supply and utilisation. The stated objectives of the Bill are to:

a) provide for appropriate and sustainable development and use of energy resources for the benefit of all South Africans;
b) provide for the supply, transformation, transportation, storage and demand of energy that is planned and implemented with consideration for security of supply, economics, consumer protection and a sustainable environment;
c) provide for the sustainable utilisation of energy resources;
d) provide for an equitable supply of energy;
e) provide for access to appropriate forms of energy for all South Africans;
f) provide for the establishment and maintenance of an energy database and information system;
g) provide for energy efficient measures;
h) provide for development and introduction of renewable energy;
i) provide for safety, health and environment matters pertaining to energy, not contemplated in other legislation;
j) comply with international agreements;
k) through research, development and technology transfer provide for:
    (i) cost effective and efficient energy supply, transportation, use and decision-support technologies;
    (ii) energy technology innovation;
    (iii) sustainable utilisation of energy resources;
    (iv) improvement of quality of life;
    (v) development of human and other capacity in the energy sector;
    (vi) the establishment and expansion of industries in the field of energy and its products;
    (vii) commercialisation of energy technologies.

5.3 Definitions

The Bill includes a number of pertinent definitions:

"Integrated energy planning" which is:

> the planning of the energy sector and energy resources as an integrated process used to support evidence-based decision-making.

"Renewable energy" which is:

> energy generated from natural resources that is regenerated over a short time scale including solar energy, wind energy, biomass energy, biological waste energy, hydro energy, landfill gas energy, ocean and tidal energy, or any combination thereof.

"Sustainable" which means:

> use of natural resources for current needs that does not compromise the ability of future generations to meet their needs.

"Sustainable development" which is:

> development that satisfies current needs without endangering those of future generations".[46]

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[45] S2.
[46] S1: Definitions.

5.4 Institutions created under the Bill

The Bill establishes a National Energy Advisory Committee[47] which is to advise the Minister on energy policy matters (by means of an annual report) and any other energy-related matter referred to it by the Minister.[48] The National Energy Advisory Committee must comprise up to ten members (including the chairperson), appointed by the Minister.[49] Members must –

a) have adequate legal, business, economic, technical, environmental, social, or other experience relevant to energy matters;
b) collectively represent South African society;
c) be committed and available to serve on the Committee;
d) be impartial and objective.[50]

5.5 National Energy Data Base and Information System

The Bill also provides for the establishment of a national energy data base and information system.[51] This will allow for the mandatory collection of energy data, rather than on a voluntary basis as it has been until now.[52] Failure to provide such data or information, or if false information or data is supplied, is an offence and a fine of up to R10 000 per month for each month that false information was provided may be imposed.[53]

The main purpose of the data base and information system is to:

a) record information to develop, implement and monitor the national energy policy;
b) provide information for energy planning purposes;
c) enable monitoring of national and international energy matters;
d) provide information to integrate energy policy with marcro-economic, environmental and fiscal policy and to coordinate energy development with related activities;
e) serve and promote energy development and related matters;
f) collect and analyse data in respect of energy development;
g) comply with national, regional and international obligations;
h) to make energy data and information available to the public.[54]

Access to energy data and information may be restricted, if other legislation prohibits or regulates its disclosure, or if its dissemination is restricted or prohibited because it is from a restricted state source, or because there are pre-existing conditions that the information would not be accessible to such persons or category of persons, or if the disclosure of such information would prejudice a source.[55] Provision of information

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47 S3.
48 S4.
49 S5(1) and (2).
50 S5.
51 S 11.
52 S13(1).
53 S14.
54 S12.
55 S15(1) and (2).

may be conditional upon a payment determined by the Director-General and based on the cost of providing the information requested.[56]

5.6 Integrated Energy Planning

The draft Bill provides for the establishment of an Integrated Energy Planning capability to inform energy policy and policy implementation.[57] It stipulates that a national integrated energy plan shall be produced at least every five years.[58] The Bill sets out a number of principles that integrated energy planning must use. These are:

a) Sustainable development;
b) Optimal use of indigenous and regional resources;
c) Balance between supply and demand, and their characteristics;
d) Economic viability;
e) Environment, health and safety impacts; and
f) Developmental impacts in the Southern African region.[59]

5.7 Energy

The draft Bill provides for the establishment of a Renewable Energy Programme.[60] Its purpose is to promote renewable energy and to optimise its contribution to the national energy supply, and ultimately to sustainable development.[61] The following principles are stated:

The Minister must establish a national programme to promote renewable energy and

a) must establish and maintain a renewable energy capability within the Department;
b) may publish targets for the use of renewable energy after consulting the National Energy Advisory Committee;
c) may prescribe minimum contributions to the national energy supply from renewable energy sources, and may in regard thereto specify renewable energy technologies and sources;
d) may prescribe the manner in which institutions, agencies and regulators responsible for energy matters must comply with subsection (3)©;
e) may prescribe standards for renewable energy technologies; and
f) may prescribe certifications necessary for the application of renewable energy technologies.[62]

The reference to minimum contributions to the national energy supply in (c) above is particularly important as this essentially provides for renewable energy targets. This section is followed up in section 23(3)(a) which enables the Minister to make regulations in this regard.

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56 S15(3).
57 S16(1).
58 S16(4).
59 S16(3).
60 S17.
61 S17(1) and (2).
62 S17(3).

5.8 Other provisions

The draft Bill also makes provision for the establishment of a national energy efficiency programme. The aims to increase energy efficiency throughout the economy, increase the Gross Domestic Product per unit of energy consumed, as well as to extend the lifetime of non-renewable resources.[63]

In addition, a programme to minimize the negative safety, health and environmental impacts of energy carriers not contemplated in other legislation must be established.[64] The Minister may prescribe standards relating to: the composition, colour and form, transportation, storage and packaging of energy carriers, as well as standards for low-smoke fuels, the sale and combustion of polluting fuels in specified areas, electrical and electronic products and fuel-burning appliances.[65]

The Minister must also establish a programme to address the access of appropriate energy to households.[66] This must take into account the: safety, health and suitability of such energy, resources available, existing and required infrastructure, provision of information and training regarding energy and its utilization, energy provision sustainability and governance procedures for government sponsored programmes.[67]

The Bill also provides for the establishment of a Designated National Authority to approve projects in line with the Clean Development mechanism requirements. The Minister must also ensure that international commitments and obligations to energy matters are fulfilled within the availability of resources.[68]

General provisions are also given whereby the Minister may make regulations regarding: procedures to be followed by the National Energy Advisory Committee, energy data, renewable energy, energy efficiency and safety, health and environment and practices.[69]

6. The international law dimension

South Africa acceded to the UN Framework Convention on Climate Change in August 1997 and the Kyoto Protocol in February 2004

7 Conclusions

Positive elements of South Africa's current legal and policy framework

- the notion of sustainable development included in the environmental right in the Bill of Rights chapter of South Africa's Constitution is firmly embedded in the natural resource use and policy arena and has provided impetus for the inclusion of the notion in sectoral legislation including that of the DME;

- sustainable development and environmental considerations underpin the National Energy Bill which is expected to come before Parliament shorty;

- the current statutory regime in South Africa is uncoordinated as regards renewable energy in that relevant provisions are contained in a number of diffuse statutes;

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[63] S18(2).
[64] S19(1).
[65] S19(2).
[66] S20(1).
[67] S20(2).
[68] S21.
[69] S23.

- the White Papers Energy and Renewable Energy respectively provide a solid basis for an umbrella Energy Act as exemplified in the National Energy Bill.

Challenges which still remain outstanding regarding South Africa's legal and policy framework on renewable energy

- the regulatory institutional framework for varied forms of renewable energy described in the introduction needs to be accommodated under one institutional roof;

- although provision is made for the setting of renewable energy targets as described in 5.8 above it is not clear what the sanction will be if such targets are not met. Moreover it is not clear whether an incentive based or a "stick" approach will be taken in this regard;

- legislation needs to be investor friendly;

- consideration needs to be given to financial incentives to accommodate small-scale renewable energy enterprises in the context of the stranglehold which the big power utilities currently enjoy.

But in conclusion the DME deserves to be congratulated on providing a practical environmentally sensitive legal framework for renewable energy in South Africa.

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