

*FUEL RETAILERS, SUSTAINABLE
DEVELOPMENT & INTEGRATION:
A RESPONSE TO FERIS*

*Dire Tladi**

1 Introduction

Fuel Retailers is, without question, a most interesting and significant decision: (1) Interesting because the decision tackles head on the difficult task of balancing apparently conflicting interests – the right to a healthy environment and economic imperatives of development; (2) Significant because, as the first decision in which the Constitutional Court gives content to section 24 of the Constitution, one expects the decision to play a major role in the development of environmental law and sustainable development.

Loretta Feris' comment¹ provides a fairly detailed (and accurate) overview of *Fuel Retailers*.² The exploration of the nuances of sustainable development in Professor Feris' contribution, rooted as it is in pragmatism, makes the contribution particularly useful to practitioners – especially those who evaluate applications for approval for activities with a potential impact on the environment.

As someone concerned more with the theoretical and normative aspects of sustainable development, I thought the paper important for engaging the complexity of the process of integration in sustainable development discourse – a complexity that is often

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¹ L Feris 'Sustainable development in practice: Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province' (2008) 1 *Constitutional Court Review* 235.

² *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).

missed because of our collective reverence for the concept of sustainable development.³ Feris and I are in accord over a large range of issues, in particular the view that Sachs J's dissent provides the most 'conceptually sound analysis of sustainable development'.⁴ Our common ground established, I would now like to offer my slightly different take on what the *Fuel Retailers* Court misses.

2 The Court's treatment of sustainable development

Feris states upfront that she will avoid a 'comprehensive analysis of the historical development of the concept or the normative content' of sustainable development.⁵ For me, the historical development of the concept is critical for understanding the normative content, which, in turn, influences its practical application. Ngcobo J's majority judgment does, in fact, survey the historical evolution of sustainable development – he traces it back to the 1972 Stockholm Conference on the Human Environment.⁶ The historical exposition of sustainable development by the Court suffers from the same ailment as many similar expositions. First, the Court erroneously states that the term sustainable development was 'coined' by the Brundtland Commission in 1987.⁷ Second, the Court does not explain how this evolution influences the conceptualisation that follows in the rest of the judgement. The Court offers, so to speak, a recollection of history for history's sake. While time and space do not allow for a discussion of how the historical evolution of sustainable development ought to influence its conceptualisation, the Court's history is notably flawed in this regard.⁸

The problem with the Court's analysis, in my view, begins when the Court, in connection with section 24 of the Constitution, makes reference to the 'explicit recognition of the obligation to promote justifiable "economic and social development"' and links this notion with the 'well-being of human beings' and 'socio-economic rights'.⁹ Precisely what that link is, the Court never explains or explores. But the result of this linkage is that, throughout the judgement, the terms

³ Someone, I cannot recall who or in what context, once remarked that sustainable development, like human rights, is a concept that is not to be questioned in polite company.

⁴ Feris (n 1 above) 236.

⁵ Feris (n 1 above) 236.

⁶ *Fuel Retailers* (n 2 above) para 46.

⁷ *Fuel Retailers* (n 2 above) para 47. Already in 1980, the IUCN World Conservation Strategy contained several references to sustainable development.

⁸ For my views, see D Tladi *Sustainable development and international law: An analysis of key enviro-economic instruments* (2007) 34 *et seq.*

⁹ *Fuel Retailers* (n 2 above) para 44.

‘socio-economic rights’, ‘development’ and ‘economic development’ are used interchangeably as the values that most often oppose the right to a clean and a healthy environment.¹⁰ At one point the Court, for example, refers to the integration of environmental protection and economic development.¹¹ Elsewhere, the Court states that as a result of sustainable development ‘environmental considerations will now increasingly be a feature of economic and development policy’.¹² Further on, the Court states that ‘economic development, social development and the protection of the environment’ are considered to be the three pillars of sustainable development.¹³ Finally, the Court asserts that sustainable development ‘provides a framework for reconciling socio-economic development and environmental protection’.¹⁴

By lumping these concepts together the Court misses an opportunity to develop a sound understanding of sustainable development. The result of treating these concepts as interchangeable is that the Court never stops to ask whether the factors that the Fuel Retailers Association requested that the environmental authorities consider are socio-economic or purely economic. To use language from the common definition of sustainable development, the Court does not ask whether these factors are social or economic. The Court’s judgment implies – incorrectly – that economic considerations are the same as social considerations.

A similar conflation of these concepts is evident in Feris’ analysis. After applying the model of three variations of sustainable development that I have proposed, she asks whether *Fuel Retailers* would ‘fall within the economic growth or human-centred (or a combination of both) variation’ of sustainable development because of the failure of the authorities to consider ‘socio-economic considerations’.¹⁵ Although Feris answers the question in the negative, it is the manner in which she treats economic growth centred variation and human well-being centred variation as similar that is of some concern.

One can readily understand the intuitive lumping together of these two variations of sustainable development (and the values they represent). After all, at the centre of both of these variations are human-related concerns, namely economic concerns and social concerns. However, in my view these variations (and their values) tend to pull in different directions. Factors relevant for economic

¹⁰ *Fuel Retailers* (n 2 above) paras 51, 52, 53 & 55.

¹¹ *Fuel Retailers* (n 2 above) para 51.

¹² *Fuel Retailers* (n 2 above) para 52.

¹³ *Fuel Retailers* (n 2 above) para 53.

¹⁴ *Fuel Retailers* (n 2 above) para 55.

¹⁵ Feris (n 1 above) 249.

growth variation are, for example, trade related concerns. Access to clean drinking water and food reflect a human well-being variation of sustainable development. They are not the same.¹⁶ The approach of the Court in this instance – and reflected in some of Feris’ comments – takes us back in time to the old definition of sustainable development. On this *outré* account, sustainable development balanced environmental needs and development needs – the latter notion represented both social and economic concerns.

Sustainable development – and this is where a proper historical sketch is important – was born out of a realisation that the existing paradigm (in which economic concerns trumped all other concerns (social and environment) – could not continue. By blurring the distinction between social and economic concerns, our jurisprudence flirts with the undesirable outcome of preserving the *status quo*: namely, paying lip service to sustainable development and integration. The failure to distinguish more carefully between these values facilitates the instrumentalisation of sustainable development for economic ends. *Fuel Retailers* is a case in point.

3 Concluding remarks

The treatment of sustainable development by the Constitutional Court was long overdue. For that reason alone *Fuel Retailers* is a welcome addition to South African jurisprudence. Given the shortcomings of the judgment delineated in Professor Feris’ comment and my reply, we can only hope that the Court will, over time, develop a more nuanced approach to sustainable development that does justice to its history, makes subtle but important distinctions between economic concerns and social concerns, and does not allow this concept to be captured by those parties with purely pecuniary motives.

¹⁶ For an in-depth discussion of how these variations and their factors, see Tladi (n 8 above) 81-90.